THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr. Circuit Court Judge

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S.C. Supreme Court

CA No. 05-CP-10-3113

STATE OF SOUTH CAROLINA . . . . *Petitioner,*

v.

WESLEY MAX MYERS . . . . *Respondent.*

RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION.

Respondent, Wesley Max Myers (hereinafter Myers), files this Return to the Petition for Writ of Certiorari. For the reasons which will be set forth in detail below, the Post-Conviction Relief Court (hereinafter "PCR Court") correctly determined, following the post-conviction relief hearing (hereinafter "PCR Hearing"), that Myers is entitled to a new trial. First, the writ should be denied because there is ample probative evidence in the record supporting the PCR Court's decision that Myers' constitutional right to be present at all critical stages of trial and to the effective assistance of counsel was violated. *See Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625-26 (1989) (determining that the "appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings"). Second, the writ should be denied because, as the PCR Court again correctly found, there exists newly discovered evidence of Myers' innocence. Finally, there are additional sustaining grounds, including ineffective assistance of trial counsel for failing to: a) obtain a forensic pathologist; b) obtain and call a mental health expert; and, c) impeach a key prosecution witness, which independently warrant the denial of certiorari.

II. STATEMENT OF THE CASE.

A. Factual Background.[1]

In the early morning hours of March 13, 1997, a police officer spotted a fire at the Mill Inn, a local bar in North Charleston, South Carolina. App. 1099-110. He alerted the fire department (App. 1100); firefighters responded and extinguished the fire. App. 1109. Firefighters also discovered the body of Teresa Haught, the owner and manager of the Mill Inn, lying in the burned

[1] Because the State's recitation of the facts is materially incomplete, and in some instances simply wrong, undersigned counsel's statement of facts will be more detailed than is typical in a Return.

rubble in the front of the bar. App. 1113-1114. Haught had received several injuries to her head which, according to the pathologist who conducted the autopsy, caused her death. App. 2263-2264. Physical evidence found at the scene included a hair found in Haught's hand and a stained dollar bill in her back pocket. App. 1268; 2246-47. Crime scene technicians were able to recover little other physical evidence because of fire and water damage, and because of disruption caused by the firefighters and investigators who tramped through the bar before the victim's body was discovered. App. 1263, 1339.

Myers was immediately a person of interest because he was Haught's boyfriend at the time of her death. App. 1490. After being interrogated both at the crime scene and at the police station for a combined total of fifteen to twenty hours over a three day period, Myers confessed to Haught's murder and the arson of the Mill Inn.[2] App. 2363-65. Myers only made an incriminating statement, however, after police interrogators told him falsely that SLED had determined that the hair found in Haught's hand was a "match" to a hair sample he voluntarily provided. App. 1739. The interrogating officers admitted at trial that they had lied to Myers about the hair found in the Haught's hand as a ruse to obtain a confession. App. 1853. Myers was charged with both murder and arson.

B. Trial Proceedings.

Myers' jury trial began on February 26, 2001. He was represented by retained counsel, Timothy Kulp. The State's case rested almost entirely on Myers' confession, as there was almost no other evidence connecting him to the crime. Indeed, one of the state's witnesses, a crime scene

[2] The State asserts that Myers' confession to the police "included details of the murder which were either known only to police or unknown to police." Petition for Writ of Certiorari at 4,9. First, any information provided by Myers – true or false – would fall in this category (i.e., known or unknown by the police) and second, the State is also incorrect because Myers' statement did not contain any information verifiably known only to the police.

investigator, testified that DNA swabs taken from glass and the tile floor at the crime scene did not come from Myers. App. 1383. Although a SLED forensic examiner testified that the hair found in the victim's hand was microscopically similar to Myers' hair,[3] the FBI's analysis of the same hair did not find any microscopic comparisons between the hair found in the victim's hand and Myers' hair. App. 1384. Consequently, the FBI excluded Myers as the source of the hair. App. 1382-83. In addition to the confession, the State called several witnesses who testified that Haught and Myers had a tumultuous, sometimes violent, relationship. App. 1134-37, 1178, 1669.

The State also called a surprise witness the last day of the trial, Laurie Villalobos, who had been contacted by the solicitor's investigator for the first time that morning. App. 2224. Villalobos testified that she went to the Mill Inn on the night of Haught's murder to collect the remaining funds from a check that she had cashed at the bar days earlier, and that Myers was present with the victim. App. 2213-14. According to Villalobos, she had not previously come forward, even when there was an open investigation before Myers' arrest, because she did not think that the police would believe her. App. 2221. Villalobos also stated that she had just learned from another witness that there was no evidence that Myers was in the bar with Haught the night of the murder. App. 2223. Villalobos was the only witness that placed Myers at the bar at the night of the incident. App. 2232. No other Mill Inn employee or customer testified to having seen Myers at the Mill Inn on the evening in question.[4] As such, she was the only witness that rebutted Myer's alibi evidence showing that he was at home with his parents at the time Haught was killed. App. 2232. As will

[3] This analysis was performed after the interrogating officers lied to Myers about the hair analysis.

[4] A witness did see Dana Chaples, a frequent patron, at the Mill Inn on the night of the fire trying to enter the bar after it had closed. Chaples was intoxicated, and when the witness left, Chaples was still outside the bar. App. 1183. Chaples lied to the police about being present at the Mill Inn the night in question. App. 2662. He also had changed his appearance from the evening before by shaving his mustache. App. 1168. He also appeared "nervous" when questioned by the police. App. 1245. For reasons which are unclear, law enforcement never developed a DNA profile from a vial they obtained of Chaples' blood.

be discussed in more detail below, even though Villalobos was a surprise witness, Myers' counsel did not request more time to prepare to cross-examine her.

The defense strategy was that Myers' confession was false and was the product of coercive police interrogation methods. In support of the false confession theory, Myers' mother, Rose Marie Myers, testified that Myers never left the house on the night of the fire at the Mill Inn. App. 1207. Counsel also pointed out unexplained inconsistencies in Myers' confession and the known facts as well as the lack of forensic evidence linking Myers to the crime. App. 1067, 1087-89. The defense called Dr. Saul Kassin, a false confession expert, who testified that the police used interrogation techniques that are likely to induce a false confession. App. 2391-92.[5] The defense also called Dr. Terry Melton, an expert in mitochondrial DNA analysis, to testify that she did not think that the hair found in the victim's hand belonged to Myers. App. 2626-27. Another defense witness, an expert in DNA analysis, testified that the DNA profile of the dollar bill found in Haught's pocket was not a match to Myers' DNA profile. App. 1976. Villalobos' ex-boyfriend testified that Villalobos never told him that she went to the Mill Inn on March 12, 1997, or that she saw Myers inside the inn with the victim on that date. App. 2287.

After five hours of deliberation, the jury found Myers guilty of murder and arson in the third degree. The trial judge sentenced Myers to thirty years for murder and ten years for arson, to be served concurrently.

C. Appellate and Post-Conviction Proceedings.

Myers appealed to this Court. He was represented by Robert M. Dudek. This Court affirmed, *State v. Myers*, 359 S.C. 40, 596 S.E. 2d 488 (2004), and, on November 8, 2004, the

[5] At trial, Dr. Kassin was not allowed to testify about specific internalized false confession case studies. App. 2310-11. On appeal, this Court determined that the exclusion of the evidence was error, but harmless. *State v. Myers*, 359 S.C. 40, 50, 596 S.E.2d 488, 493-94 (2004).

United States Supreme Court denied Myers' Petition for Writ of Certiorari. *Myers v. South Carolina,* 125 S.Ct. 485 (2004).

Myers' current counsel, John H. Blume, then filed a timely Application for Post-Conviction Relief. On January 12-13, 2012, a PCR Hearing was held in the Charleston County Court of Common Pleas and was presided over by Judge R. Markley Dennis, Jr. On February 10, 2012, additional testimony was taken by agreement via deposition and made part of the record. Judge Dennis granted post-conviction relief on September 18, 2012, finding violations of Myer's constitutional right to be present as well as the right to effective assistance of trial and appellate counsel. Judge Dennis also concluded that there was newly discovered evidence of Myers' innocence which justified a new trial. The State then filed a motion to alter or amend the judgment pursuant to SCRCP 59(e), which the PCR court denied on November 16, 2012. The State then filed a notice of appeal and ultimately a Petition for Writ of Certiorari.

III. REASONS THE WRIT SHOULD BE DENIED.

A. Applicant was Denied his Constitutional Right to be Present During Critical Stages of his Criminal Trial.

1. *Relevant Facts.*

The evidence presented at the PCR Hearing established that the trial judge held numerous off-the-record conferences and hearings in Myers' absence without obtaining a waiver of the right to be present. First, conferences involving the prosecution, defense counsel, and the trial judge concerning the admissibility of DNA analysis of the hair found in Haught's hand occurred off-the-record. The follow exchange makes the point: "THE COURT: Now the two of you all go in my chambers right now and you figure out how you want to straighten this thing out." App. 1315. The next day, the first words on the record by the trial judge were: "You want to publish them?" App. 1322. It does not become apparent until later that "them" refers to letters from the Federal

Bureau of Investigations, which conducted the DNA analysis, indicating that the DNA profile found in the hair in Haught's hand is not consistent with Myers' DNA profile. App. 1327. This initial statement, coupled with the trial judge's directive for the attorneys to go to his chambers, reveals an off-the record hearing and ruling regarding the admissibility of the DNA evidence at which Myers was not present. The record also contains no waiver of Myers' right to be present.

Second, the testimony at the PCR Hearing established that two jurors, Jawana Stephens and Sarah Doctor, were excused during conferences with the trial judge held outside of the defendant's presence. Ms. Stephens, the first juror to be excused, had been selected as the second juror at Myers' trial. App. 601-02. Then, inexplicably, Ms. Stephens was no longer on the jury. After jury selection, the judge took a short recess, and when the jury returned, the judge selected the first alternate as a juror. App. 620. The only explanation the judge gave was: "[t]hat poor young lady, she almost had a heart attack, I think." App. 620-21. The record lacks any reference to what happened at the hearing which resulted in Stephens' dismissal. At the PCR Hearing, Ms. Stephens testified that she had not been comfortable serving as a juror and she asked to speak with the judge. App. 3217. She testified that neither Myers nor his attorney were present during this meeting. App. 3218. After hearing Ms. Stephen's concerns, the trial judge excused her from the petit jury. App. 3218.

Ms. Doctor, the second juror excused, was dismissed at the end of Myers' trial after all the evidence was heard and immediately before the jury was charged. After returning to the bench from a short break, the trial judge stated "We had to send Miss Doctor home. She, as you know, forgot her medicine." App. 2755. As was the case with Ms. Stephens, there is no record of the meeting between the judge and Ms. Doctor. Ms. Doctor testified at the PCR Hearing that she had forgotten her heart medication that day and spoke with the trial judge about the situation in the

courtroom. App. 3214. She was not sure if defense counsel was present during this conference, but she testified unequivocally that Myers was not present. App. 3215. Ms. Doctor further testified that there was no discussion of attempts to send someone to her house to get her medicine. App. 3215. Had such an offer been made, she would have willingly completed her jury service. App. 3214.

Third, another juror, Patricia White, twice reported to the judge during the trial that she knew Myers, but there is no record of these conferences. Ms. White testified during the post-conviction proceedings that after she was seated as a juror, she suspected that she knew Myers and wrote a note to the judge. App. 3386: 12-20. The judge then called her into his chambers to discuss the matter. App. 3386: 24-25. The next day, Mrs. White became certain that she knew Myers, and she wrote another note to the judge. App. 3387: 14. Another conference was conducted in the judge's chambers. App. 3387: 16. At this conference, which was not transcribed, the judge and the attorneys discussed Mrs. White's ability to decide the case based solely on the evidence presented at trial. App. 3388:5-7. Myers was not present during either off-the-record conference concerning Ms. White's impartiality. App. 3387:10-11, 3388:11. Mrs. White was allowed to remain on the jury. App. 3388: 5-8.

Finally, during jury deliberations, the foreperson, Elizabeth Babcock, wrote a note indicating that the jury could not reach a verdict.[6] Trial Court's Exh. 2 App. 3321. Ms. Babcock testified at the PCR Hearing, that, as a result of the note, the judge called her into his chambers, where another off-the-record conference occurred. App. 3321. The trial judge instructed her to tell the other jurors that they had not deliberated long enough for him to declare a mistrial, and that

[6] The notes that the jurors sent to the judge are contained in the Charleston County Clerk of Court's file as part of the trial and post-conviction record. The note states, "Your Honor, we feel we cannot agree upon a decision" and was signed by Ms. Babcock. A second note hints at another off-the-record conference between the judge and Ms. Babcock. That note states "I need to see the judge please" and is also signed by Ms. Babcock.

the jury should continue deliberating. App. 3322. She conveyed the trial judge's admonition to her fellow jurors. App. 3323. The trial transcript, however, lacks any reference to the jury's note, the fact that the jury appeared to be hung, or the discussion between Ms. Babcock and the judge. Ms. Babcock testified unequivocally at the PCR Hearing that Myers was not present during this conference.[7] App. 3321-22. Mr. Kulp testified at the PCR hearing that he did not inform Myers of his right to be present at any of these five conferences with the jurors and the record contains no waiver of the right to be present. App. 3338.

2. *Argument.*

A defendant has the right to be present at any critical stage of a criminal proceeding if the defendant's presence "would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667 (1987). This right is rooted in the Confrontation Clause of the United States Constitution and corresponding sections of the South Carolina Constitution. U.S. Const. Amend. VI.; S.C. Const. Art. I, Sec. 14. The right to be present is also protected by the Due Process Clause. *Snyder v. Massachusetts*, 291 U.S. 97, 54 S. Ct. 330 (1934). The Due Process Clause expands the right to be present to situations that do not necessarily involve confronting witnesses or evidence against the defendant. *Id.* at 105-08.

A critical stage of a proceeding is one where there is at "least a reasonable probability of prejudice to the defendant." *State v. Williams*, 263 S.C. 290, 294-95, 210 S.E.2d 298, 300-01 (1974). Therefore, a defendant has a right to be present where a defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" and

[7] Another note, from juror Sandra Burnett, states "I have a "a non-refundable round trip air line ticket for Thursday and need to know how to handle this situation." There almost certainly was another juror conference in connection with this note at which Myers was not present, but undersigned counsel was unable to locate and interview juror Burnett.

where a fair and just hearing would be prevented by the defendant's absence. *See Snyder*, 291 U.S. at 105-108; *see also State v. Bradley*, 324 S.C. 387, 388 (1996). Similarly, the South Carolina Supreme Court has held that the right to be present exists at any critical stage where the defendant's presence contributes to the fairness of the proceeding. *Starnes v. State*, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991).

There are a number of stages of a criminal proceeding that courts have specifically ruled are critical. For example, jury selection is a critical stage of a proceeding. *See United States v. Rolle*, 204 F. 3d 133 (4th Cir. 2000). Additional voir dire of a juror to ensure continued impartiality is also a critical stage. *See State v. Rivers*, 294 S.C. 123, 363 S.E.2d 105 (1987). Specifically, the South Carolina Supreme Court has stated that "nothing can be done by the court in a trial for felony, after the jury is sworn and impaneled, unless the defendant is personally present," especially if a juror's potential bias is being explored. *See Rivers*, 294 S.C. at 125, 363 S.E 2d. at 106; *see also State v. James*, 116 S.C. 243, 107 S.E. 907, 908 (1921). Furthermore, a conversation between a judge and a jury foreperson while the jury is out is a critical stage. *See State v. Ashley*, 121 S.C. 15, 113S.E. 305 (1922). Another critical stage occurs when a judge gives a modified or supplemental charge to a jury in response to a jury's note. *See Norris v. South Carolina*, 2001 WL 34085161(D.S.C. 2001)(order vacated on other grounds, *Norris v. South Carolina*, 18 Fed. Appx. 171 (4th Cir. 2001)); *see also James*, 116 S.C. at 243, 107 S.E. at 907.

Depriving a defendant of his or her right to be present during critical stages of criminal proceedings mandates reversal. *See Rivers,* 294 S.C. at 125, 363 S.E. 2d at 106 (determining that the defendant's absence during the continued voir dire of a juror to ensure impartiality was a deprivation of his right to be present and reversing the conviction); *see also James*, 116 S.C. at 246-47, 107 S.E. at 908 (holding that defendant's absence from further oral instruction from the

judge to the jury after the jury sent a note violated the defendant's right to be present and reversing the conviction).

A defendant may waive the right to be present during a criminal proceeding only in limited circumstances. *See State v. Wright*, 304 S.C. 529, 405 S.E. 2d 825 (1991). For such a waiver to be valid, the defendant must knowingly, voluntarily, and intelligently waive his or her right to be present, *see* S.C. R. Crim. P. 16, and defense counsel's presence at a critical stage of a proceeding does not waive the defendant's right to be personally present. *See James*, 116 S.C. at 247, 107 S.E. at 908; *see also State v. Ritch*, 292 S.C. 75, 76, 354 S.E.2d 909, 909 (1987). To be valid, a finding of a waiver must be made on the record. *See Ritch*, 292 S.C. at 76, S.E. 2d at 909.

The PCR Court correctly determined that numerous off-the-record conferences and hearings held in Myers' absence during his trial violated Myers' right to be present. First, Myers had a right to be present at the conferences concerning the DNA analysis of the hair found in the victim's hand because those conferences were critical stages of his trial. The hair was the only piece of physical evidence that the State had supposedly connecting Myers to the crime. Due to its importance, conferences where both attorneys and the judge discussed the admissibility of substantive information concerning the hair evidence were a stage in Myers' trial where there was a reasonable probability of prejudice against Myers. *See In Interest of Dwayne M.*, 287 S.C. 413, 415, 339 S.E. 2d 130, 131 (1986) (holding that defendant was denied his right to be present during his trial when he was excluded from the courtroom while critical testimony was given against him); *cf. Stincer*, 482 U.S. at 746 (holding that the defendant was not denied his right to be present at a hearing because the witnesses' substantive testimony was not discussed at the hearing). Myers' presence could have contributed to the fairness of the conference because he would have been able to discuss his counsel's plans to agree to stipulate to the chain of custody of the hair. *Cf.*

Starnes v. State, 307 S.C. 247, 250, 414 S.E. 2d 582, 583 (1991) (holding that the defendant's presence at a hearing would not have contributed to the fairness of the defendant's trial because the purpose of the hearing was only to decide how certain testimony would be admitted, so defendant's presence could not have affected whether the witness testified).

Second, Myers undeniably had a right to be present at the conferences that the trial judge had with Ms. Stephens and Ms. Doctor. Jury selection is a critical stage. *See U.S. v. Rolle*, 204 F. 3d 133, 137 (4th Cir. 2000) (holding that a defendant has a right to be present at the voir dire of prospective jurors); *see also U.S. v. Camacho*, 955 F.2d 950, 956 (4th Cir. 1992) (holding that it is " 'of the utmost importance that the defendant be present when the jury is being selected' "). Although the dismissal of these two jurors occurred after jury selection, the conferences were critical stages because, by dismissing the jurors, the judge privately made decisions about the composition of the jury in Myers' absence. *See Rolle*, 204 F. 3d. at 137-38 (noting that defendant had a right to be present at during voir dire of prospective jurors in the judge's chambers because a "defendant's presence at voir dire is of utmost importance" to determining the ultimate make-up of the jury). Had Myers been present there is a reasonable probability that the outcome of these two conferences and ultimately, the composition of the jury, would have been different.

Third, Myers also had a right to be present at the two conferences that the trial judge held concerning the impartiality of Ms. White. Additional voir dire to ensure continued impartiality of a juror is a critical stage. *See Rivers*, 294 S.C. at 124-25, 363 S.E.2d at 106. The denial of Myers' right to be present at these conferences was especially damaging because the trial judge was exploring any possible bias Ms. White might have had due to her prior knowledge of Myers. *See id.* (holding that because the defendant was not present during a voir dire of a juror concerning that juror's impartiality the defendant was deprived "of the means to challenge the sufficiency of the

trial judge's inquiry before the determination of impartiality"). Even though Ms. White knew Myers, she was allowed to remain on the jury and thus these two conferences were stages of the proceeding where a decision was made that prejudiced Myers. *See Rolle*, 204 F.3d at 137 (noting that a defendant's presence at voir dire of the jury is critical because the defendant might "identify prospective jurors that he knows"); *see also Williams*, 263 S.C. at 294-95, 210 S.E.2d at 300-01. Myers' absence at these conferences prevented him from having a fair and just trial because without his input a possibly partial juror remained on the jury. *See Snyder*, 291 U.S at 105-108 (holding that a defendant's due process right to be present is violated to the "extent that a fair and just hearing would be thwarted by his absence").

Fourth, Myers was denied his right to be present at the two off-the-record conferences between the trial judge and the foreperson, Ms. Babcock. The Supreme Court of South Carolina has previously held that a conversation between a judge and a foreperson while the jury is deliberating is a critical stage. *See State v. Ashley*, 121 S.C. 15, 21-23; 113 S.E. 305, 307 (1922). Furthermore, during the conferences with Ms. Babcock, the judge gave what was for all practical purposes a jury charge in response to a jury note, which is another stage of a trial that courts have determined to be critical. *Norris*, 2001 WL 34085161(D.S.C. 2001). The conferences with Ms. Babcock concerned the possibility of a mistrial, and thus were stages of Myers' trial where there was a reasonable probability of prejudice to Myers. *See Williams*, 263 S.C. at 294-95, 210 S.E.2d at 300-01.

Furthermore, Myers' presence would have contributed meaningfully to the outcome of the conferences or meetings previously discussed.[8] First, the off-the-record conferences about the

[8] Myers does not concede that he has to demonstrate any prejudice on the facts of this case, and especially given the repeated denial of his right to be present. The South Carolina Supreme Court has stated clearly that nothing should

admissibility of the DNA analysis of the hair concerned key evidence in the case that tended to show Myers' innocence. At these conferences, the attorneys agreed to a stipulation about the chain of custody of the hair found in the victim's hair, but Myers was absent while this important decision was made. Myers' presence could also have contributed meaningfully to the conferences where the judge excused Ms. Stephens and Ms. Doctor because these conferences concerned who would be serving on the jury. The denial of Myers' right to be present was particularly egregious in terms of the conferences with Ms. White because Ms. White claimed that she actually knew Myers. Myers' presence at the conferences to determine whether Ms. White could remain on the jury would have been valuable to his attorney. Furthermore, the off-the-record discussions between Ms. Babcock and the judge concerned the verdict of Myers' trial and the possibility of a mistrial and Myers' presence could have impacted the decisions made during those discussions.

Finally, Myers did not waive his right to be present at any of the critical conferences and hearings that occurred during his trial. Myers was unaware that he had a right to be present because neither his attorney nor the trial judge informed Myers of this right and thus he could not have knowingly, voluntarily, and intelligently waived this right. *Cf. State v. Ravenell*, 387 S.C. 449, 457, 692 S.E.2d 554, 558 (2010) (holding that the defendant knowingly, voluntarily, and intelligently waived his right to be present because he was aware of his right to be present and was absent from his trial). Defense counsel's presence at the numerous conferences from which Myers

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be done in the absence of the defendant without a valid waiver of the right to be present. *State v. James, supra.* The State relies on *State v. Smart*, 278 S.C. 515, 299 S.E.2d 686 (1982) for the proposition that an affirmative showing of prejudice is required. But Smart is clearly distinguishable on its face. Unlike the case here (or in *James*), the events which occurred outside of the defendant's presence were transcribed and part of the record. 278 S.C. at 524, 299 S.E. 2d at 691. Second, the defendant in *Smart* was not present because he had escaped and taken hostages (which he threatened to kill) before being recaptured. 278 S.C. at 525, 299 S.E. 2d at 692. Given those facts, the Court noted that it is "not surprising that securing defendant's presence was not a burning concern to the court" and because of those factual differences and the defendant's misconduct, it was proper to "require some evidence of prejudice." *Id.* In any event, the debate is largely academic as Myers has demonstrated that the denial of his right to be present was prejudicial.

was excluded is neither a waiver nor sufficient to protect Myers' right to personally be present at all critical stages. *See James*, 116 S.C. at 247, 107 S.E. at 908. The record does not contain a finding by the judge that Myers received notice of his right and a warning that the trial would continue in his absence, which further shows that Myers did not waive his right to be present. *See State v. Fleming*, 287 S.C. 268, 269, 335 S.E. 2d 814, 814 (1985) (holding that the trial judge did not make a finding that defendant was aware of his right to be present and thus this right was not waived); *cf. Ravenell*, 387 S.C. at 456, 692 S.E.2d at 558.

3. ***Failure to Advise Applicant of his Right to be Present Violated Applicant's Right to the Effective Assistance of Counsel.***

The PCR Court determined that Myers was denied the right to be present at critical stages of the proceedings against him and granted him relief on that basis. Multiple hearings and conferences took place during Myers' trial in Myers' absence. The PCR Court noted that Myers' trial counsel testified unequivocally that he did not advise Myers of the right to be present or ask that the trial judge advise Myers of this right. Thus, in this respect, trial counsel's performance was both deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354 (2008). Myers' counsel's performance "fell below an objective standard of reasonableness," because he did not advise Myers of a basic right. *See Strickland,* 466 U.S. at 688; *see also Price v. State*, 172 P.3d 1236, 1237 (MN 2007). Counsel did not have a strategic reason for failing to inform Myers of his right to be present. *See Legare v. State,* 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998). Furthermore, if Myers had been aware of his right to be present, there is a reasonable probability that the result

of Myers' trial would have been different. *See Brown v. State*, 340 S.C. 590, 593, 533 S.E.2d 308, 309 (2000).

B. Newly Discovered Evidence of Respondent's Innocence.

1. *Facts Related to this Claim.*

At the PCR Hearing, new evidence was also presented tending to establish Myers' actual innocence. Dr. Keri Colabroy, an expert in chemical biology who holds a M.S. and a Ph. D. in Chemical Biology from Cornell University, and is a Professor of Organic Chemistry and Biochemistry at Muhlenberg College in Allentown, Pennsylvania was retained by undersigned counsel. App. 33361-62. Dr. Colabroy first reviewed the DNA evidence presented at Myer's trial. App. 3365. After doing so, Dr. Colabroy concluded that further DNA testing should be conducted using technology that did not exist at the time of Myers' trial. App. 3366. Specifically, Dr. Colabroy recommended that additional DNA testing should be done on the stained dollar bill that investigators had found on Haught's body. App. 3366. Prior to Myers' trial, the defense had tested the DNA on the dollar bill. An expert testified at trial there was a mixture of male and female DNA on the dollar bill. App. 1975-76. The State minimized the significance of this key exculpatory piece of evidence by arguing that there was: a) no proof that the substance on the dollar bill was blood; and, b) that the male DNA could have been deposited on the dollar bill through casual contact.[9] App. 2744. Dr. Colabroy believed that due to advances in DNA science since Myers' trial, additional testing could produce more probative results. App. 3366. Orchid CellMark Lab, a lab that specializes in DNA forensic analyses, performed the additional tests on the dollar bill. App. 3367. At the PCR Hearing, Dr. Colabroy testified that the results of the tests established that the substance on the dollar bill was in fact blood, which was new evidence that confirmed a proposition that the State hotly contested at Myers' trial. App. 3368. Furthermore, Dr. Colabory testified that two DNA profiles were present on the dollar bill; one female that

[9] The example that the prosecutor used before the jury was that the male DNA could have resulted from a bar patron licking their fingers before touching the money. App. 2744.

matched the victim and one male. App. 3368-3369. Orchid CellMark Lab performed a Y-STR test, which did not exist at the time of Myers' trial, that looks solely for male DNA. App. 3369. The lab obtained a clear, strong DNA profile of the male contributor and further analysis determined that Myers was definitely excluded as the male contributor. App. 3370. Moreover, Dr. Colabroy testified that the new testing established that the blood stain on the dollar bill was the source of the male DNA profile, and that the State's contention at trial that the DNA could have been placed on the dollar bill through casual contact was scientifically unsound. App. 3371.

Dr. Colabroy also analyzed the DNA results obtained from the hair that investigators found in Haught's hand. App. 3372-73. Investigators concluded that the murderer and Haught were in close contact before her death, making the hair a critical piece of evidence. *See* App. 2246; 2257. This strand of hair was the only physical evidence that the State produced at trial. SLED hair examiners testified that the hair was "a match" when compared microscopically to Myers' hair. App. 1416. At trial, the defense presented an expert who suspected, but could not conclusively testify, that the hair was not Myers' hair. App. 2623. Dr. Colabroy reviewed the data from the DNA results, and using the standards for DNA exclusions now generally accepted in the scientific community, testified at the PCR hearing that the DNA profile collected from the hair found at the scene was not consistent with Myers' DNA profile and that the hair definitely did not come from his head. App. 3373. Thus, the combination of a hair found in the victim's hand from a male that was not Myers and the bloody dollar bill found on the victim with male DNA, also not belonging to Myers, is significant newly discovered evidence that Myers is likely innocent of the offense.[10] After hearing Dr. Colabroy's testimony, the PCR judge agreed, and concluded that the newly discovered evidence alone entitled Myers to a new trial. App. 3405.

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[10] At the PCR Hearing, Myers also called two witnesses who saw a man, not Myers, near the Mill Inn shortly after the fire who was blistered and covered in soot.

2. *Argument.*

To succeed on a claim that newly discovered evidence entitles a party to a new trial, that party has the burden of meeting a five-part test. *State v. South*, 310 S.C. 504, 507, 427 S.E.2d 666, 668-669 (1993). First, the party must show that the newly discovered evidence would probably change the outcome of a new trial. *Id.* Second, the party has to demonstrate that the evidence was discovered after the party's original trial. *Id.* Third, the party must prove that such evidence could not reasonably have been discovered before that trial. *Id.* Fourth, the party has to show that the newly discovered evidence is material to the accused's guilt or innocence. *Id.* Fifth, the party needs prove that the evidence is "not merely cumulative or impeaching." *Id.* The judge to whom the party offers the newly discovered evidence makes the determination as to whether the party has proved the credibility of the newly discovered evidence and met the five-part test. *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (2011); *State v. Morrison*, 246 S.C. 575, 579-580, 145 S.E.2d 15, 16-17 (1965). The judge's determination about the credibility of the newly discovered evidence and grant of a new trial cannot be disturbed unless there is a showing of abuse of discretion or error of law. *See Harris*, 391 S.C. at 545, 706 S.E.2d at 529.

Here, the newly discovered evidence consisted of the determination that the hair found in the victim's hand came from a male other than Myers and that the bloody dollar bill found on the victim contained male DNA, which also was not consistent with Myers' DNA, i.e., the hair was not his. The PCR Court correctly determined that this newly discovered evidence satisfied the five-part test laid out above. *See Harris*, 391 S.C. at 545, 706 S.E.2d at 529. First, the result of a new trial would be different if the newly discovered evidence is presented. If a jury learns that the piece of hair and the blood on the dollar bill definitively do not to belong to Myers, but to another male, the chances of an acquittal go up exponentially. *See Southeastern Housing Foundation v.*

Smith, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (2008) (determining that the newly discovered evidence that the plaintiff presented would have affected the outcome of a new trial because the evidence would have led the court not to grant summary judgment on all of the causes of action); *see also State v. Tripp* 133 S.C. 294, 130 S.E. 888, (1925); *cf. Hayden v. State*, 278 S.C. 610, 612, 299 S.E.2d 854, 855-56 (1983) (holding that defendant's newly discovered evidence would not have caused a new trial to result in a different outcome because the evidence was hearsay and would have been testified to by an insignificant witness). This evidence, especially coming from a well-trained and credible expert such as Dr. Colabroy, suggests not only that there were other possible suspects that the police did not investigate, but also that Myers is not the perpetrator. *Cf. State v. Morrison*, 246 S.C. 575, 579, 145 S.E.2d 15,16-17 (1965) (holding that the defendant was not entitled to a new trial because the newly discovered evidence that the defendant offered lacked probative value and consequently was not credible). Therefore, if these two key pieces of information were presented at a new trial, the result of a new trial almost certainly be different.

Second, Dr. Colabroy discovered the new evidence in preparation for Myers' PCR hearing after reviewing the DNA evidence presented at Myers' trial following the conclusion of that trial and used testing methods and exclusion standards which did not exist at the time of trial. *See State v. South*, 310 S.C. 504, 506, 427 S.E.2d 666, 668 (1993) (noting that defendant's brain tumor or cyst was discovered after the defendant was convicted of murder). App. 3373. The evidence concerning the dollar bill and the hair that Dr. Colabroy provided was not known prior to Myers' trial.

Third, the lab that performed the additional DNA analysis after Myers' trial relied on new DNA testing methods that were unavailable prior to the trial. *See Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 634, 637, 670 S.E.2d 680, 687-89 (2008) (holding that because

the newly discovered evidence, which was a custodial resolution, could not have been filed before summary judgment was granted, the evidence was previously unavailable); *cf. State v. Allen*, 276 S.C. 412, 413-14, 279 S.E.2d 365, 366-67 (1981) (holding that the evidence of a prior conviction that the defendant claimed was newly discovered could have been discovered through due diligence prior to trial because the evidence was a matter of public record). Therefore, the evidence could not have been discovered before trial.

Fourth, the newly discovered evidence about the hair and the dollar bill is pertinent to demonstrating Myers' innocence because the evidence conclusively proves the DNA of another person was found on two key pieces of evidence found on the victim's person. *Cf. State v. Harreld*, 228 S.C. 311, 313-14, 89 S.E.2d 879, 880 (1995) (stating that the newly discovered evidence that defendant presented was immaterial because the evidence showed that a State's witness was not qualified as a game warden which had no impact on the defendant's culpability). At Myers' trial, SLED hair examiners stated that the hair found on the victim was a microscopic "match" to Myers, which was significant because investigators believed that the hair likely belonged to the murderer. Had the newly discovered evidence about the hair been presented to the jury at Myers' trial, this information would have eliminated the only piece of physical evidence supposedly linking Myers to the crime and thus this new evidence is material to Myer's innocence. At trial, the State further argued that the substance on the dollar bill was not blood and that the substance could have been transferred to the bill through casual contact, and the newly discovered evidence disproved both of these claims. If the newly discovered DNA evidence had been available at trial, the State could not have downplayed the possibility that someone other than Myers committed the murder. *Cf. State v. Caskey*, 273 S.C. 325, 328, 256 S.E.2d 737, 738 (1979) (holding that the newly discovered evidence that the defendant offered was only significant to attacking the credibility of a witness

and not to the defendant's innocence). Thus, the newly discovered evidence is material to Myers' innocence.

Fifth, despite the State's argument to the contrary, the newly discovered evidence is not cumulative to the evidence presented at trial, but rather presents new, additional evidence of Myers' innocence. *See Southeastern Housing Foundation*, 380 S.C. at 638, 670 S.E. 2d at 689; *cf. Caskey*, 273 S.C. at 329-330, 256 S.E.2d at 738-39 (stating that the newly discovered evidence had actually already been presented at a pre-trial conference). At the time of Myer's trial, it was not possible to determine that the source of the male DNA on the dollar bill came from the blood, and the strength of the profile could not be accurately measured. It is those two new discoveries which refute the State's argument at trial that the presence of male DNA on the dollar bill was insignificant. Additionally, the DNA exclusion standards in existence at the time of trial did not allow the defense expert to conclusively exclude Myers as the source of the hair. But, using current standards, Dr. Colabroy did. Furthermore, the evidence is not merely impeaching evidence, as it does not go solely to the credibility of the State's experts, but is substantive evidence that is material to Myers' innocence. *Cf. Caskey*, 273 S.C. at 329-330, 256 S.E.2d at 738-3 (holding that the newly discovered evidence that the defendant presented was useful only to impeach the credibility of a witness who was given immunity in the case).

The PCR judge, to whom Myers presented the newly discovered evidence concerning the hair and the dollar bill, determined that the evidence entitled Myers to a new trial. Therefore, the PCR judge's grant of a new trial based on the newly discovered evidence cannot be disturbed except for abuse of discretion or error of law. *See Harris*, 391 S.C. at 545, 706 S.E. 2d at 529. There was neither. The newly discovered evidence meets all five parts of South Carolina's newly discovered evidence standard and thus Myers has satisfied his burden of demonstrating that he was

entitled to a new trial based on the new evidence. Consequently, the PCR judge did not abuse his discretion or make an error in granting Myers a new trial and the PCR judge's determination should be upheld. There is ample record evidence supporting the PCR court's decision.

IV. ADDITIONAL SUSTAINING GROUNDS.

A. Trial Counsel's Failure to Obtain a Forensic Pathologist Violated Applicant's Right to the Effective Assistance of Counsel.

To establish that counsel provided ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354 (2008). To prove that counsel's performance was deficient, a defendant must show that counsel's performance "fell below an objective standard of reasonableness" based on the totality of the circumstances. *Strickland,* 466 U.S. at 688. A court determines whether counsel's performance fell below an objective standard of reasonableness by evaluating whether counsel's actions were outside the "wide range of professionally competent assistance." *Id.* at 690. If counsel offers a sound strategic reason for failing to call an expert witness, then, under most circumstances, counsel's performance was not deficient. *See Legare v. State,* 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998); *see also Harrington v. Richter,* 1313 S.Ct. 770, 789 (2010).

The South Carolina Supreme Court has held that counsel's performance is constitutionally deficient, however, if counsel fails to secure an expert witness to rebut a material assertion made by a State's expert witness. *See e.g., Ard v. Catoe,* 372 S.C. 318, 642 S.E.2d 590 (1987) (finding trial counsel ineffective for failing to call an independent gunshot residue expert). A defendant establishes that counsel's deficient performance was prejudicial by demonstrating that, but-for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The reasonable probability

standard, which takes into account the totality of the circumstances, *id.* at 695, is satisfied if the court concludes that there is a reasonable probability that had the defense called an expert witness the jury would have reached a not guilty verdict. *See Lorenzen v. State,* 376 S.C. 521, 530, 657 S.E.2d 771, 776 (2008).

Trial counsel's failure to obtain a forensic pathologist to rebut the testimony of the prosecution's pathologist was unreasonable and prejudicial. At the PCR Hearing, Myers presented testimony from Dr. Jonathan Arden, an experienced and well-credentialed forensic pathologist, who challenged several aspects of the State's forensic pathologist's trial testimony. At trial, Dr. Clay Nichols, testified for the State that the wound on the victim's head matched a wine carafe found at the scene of the murder. In fact, he stated that the wound and the carafe were almost a "perfect match." App. 2252. Dr. Nichols identified the alleged murder weapon by "matching" the stab wound on the victim's head with the broken carafe. App. 2252. At the PCR Hearing, however, Dr. Arden testified that Dr. Nichols' comparison and identification of the murder weapon, as well as the methodology that Dr. Nichols used, was flawed and nonscientific. App. 3228-29. Dr. Arden testified that it is well known among forensic pathologists that it is impossible to match a weapon with a stabbing wound. App. 3229.

Dr. Nichols also testified at trial that the victim's alcohol level was less than the legal limit for driving under the influence in South Carolina. App. 2263. At the PCR Hearing, Dr. Arden also challenged this conclusion. Dr. Arden testified that liver alcohol levels, which Dr. Nichols relied on in forming his conclusions, and blood alcohol levels, which are used to assess intoxication, do not correspond, and that this fact is also well known in the scientific community. App. 3232-3233. Dr. Arden further testified that liver alcohol levels are substantially lower than blood alcohol levels, and that people have died from alcohol poisoning when their liver alcohol

level was below the legal limit for intoxication. App. 3232. Moreover, Dr. Arden testified he had never before seen any pathologist attempt to extrapolate a blood alcohol level from a liver alcohol level. App. 3233.

Finally, Dr. Arden testified that Dr. Nichols failed to gather relevant evidence and conduct certain tests during the autopsy of the victim. Specifically, Dr. Arden testified that Dr. Nichols did not take fingernail scrapings or perform a rape protocol examination to determine whether the victim had been sexually assaulted. App. 3234, 3238. At trial, Dr. Nichols testified that the victim had a defensive wound on her finger, App. 2257, and that a hair was removed from the victim's hand. App. 2246. At the PCR Hearing, Dr. Arden testified that these circumstances indicated that victim and the perpetrator had been in direct physical contact, and thus fingernail scrapings should have been obtained during the autopsy. App. 3235-36. Had the scrapings been secured, they could have been examined for biological material which, in turn, could have been submitted for DNA testing in an effort to identify the perpetrator. App. 3235-36. Moreover, the victim in this case was also found with her shirt and bra torn and her pants unbuttoned. App. 3237-38. Dr. Arden testified at the PCR hearing that given the disarray of the victim's clothing, a rape protocol should have been performed to determine if the victim had been sexually assaulted. App. 3238-3239. Again, had Dr. Nichols done so, evidence could have been discovered for forensic testing and analysis.

Trial counsel's failure to retain an independent forensic pathologist resulted in deficient performance that prejudiced Myers. An independent forensic pathologist would have provided testimony at Myers' trial that rebutted the conclusions of Dr. Nichols and counsel's failure to call such an expert was unreasonable. *See Richey v. Bradshaw*, 498 F.3d 344, 362-64 (2007) (stating that defense counsel rendered deficient performance where the testimony of a defense expert

would have undermined the testimony of the State's expert witnesses); *see also McKnight v. State*, 378 S.C. 33, 46-47, 661 S.E.2d 354, 360-61 (2008) (determining that defense counsel's failure to secure an expert to rebut the state's expert's testimony was unreasonable performance). Myers' counsel had no legitimate strategic reason for failing to secure an independent forensic pathologist, and doing so would have bolstered the overall defense strategy that the police and prosecutor prejudged the case and failed to conduct an adequate investigation. *See Richey* 498 F.3d at 362-64 (noting that there was no strategic reason for defense counsel's to failure to consider using an expert witness to rebut the State's experts); *cf. Harrington*, 131 S.Ct. 789-90 (holding that counsel did not provide deficient performance by failing to call an expert because the expert could have actually hurt the defense's case). Therefore, counsel's performance fell outside the range of professionally competent assistance.

Furthermore, counsel's unreasonable performance affected the outcome of Myers' trial. As a result of counsel's failure to secure an independent expert, the defense was unable to challenge several of the flawed and non-scientific conclusions of Dr. Nichols. *See McKnight*, 378 S.C. at 46-47, 661 S.E.d 2d at 360-61 (holding that if defense counsel had secured an expert to rebut the state's expert's adverse and flawed testimony there was a reasonable probability that the jury would have found the defendant not guilty); *see also Usher v. Ercole*, 710 F. Supp. 2d 287, 295, 303-05 (E.D.N.Y 2010) (determining that counsel's performance was deficient because he failed to call an expert witness to challenge the scientific basis and accuracy of the state's expert witness). Specifically, an independent expert would have testified that Dr. Nichols could not have matched a weapon with the stabbing wound on the victim and that Dr. Nichols' reliance on liver alcohol levels to assess intoxication was erroneous. *See Richey*, 498F.3d at 363 (holding that defense counsel's performance prejudiced defendant because if a defense expert testified as to

"evidence debunking the State's scientific conclusions, the trial court might have had a reasonable doubt about [the defendant's] guilt"). Moreover, the defense was unable to inform the jury that important, potentially exculpatory evidence was not obtained during the autopsy of the victim. Had an expert testified, the jury would have learned that Dr. Nichols failed to take fingernail scrapings and perform a rape protocol examination. *See Jackson v. Conway*, 765 F. Supp. 2d 192, 262-63 (W.D.N.Y. 2011) (holding that trial counsel provided ineffective assistance by not consulting or calling an expert physician even though the State's physician failed to do a thorough physical examination); *cf. U.S. v. Davis*, 406 F. 3d 505, 509-510 (8th Cir. 2005) (holding that even though counsel failed to hire a certain type of expert, another expert did provide key evidence undermining the State's expert's testimony and thus counsel's performance was not prejudicial). Given the important rebuttal testimony that an expert would have provided, the possibility of exculpatory evidence that the jury did not hear about, and the lack of physical evidence linking Myers to the murder, there is a reasonable probability that had the defense called an independent forensic pathologist, the jury would have found Myers' not guilty.

B. Trial Counsel's Failure to Obtain a Psychologist to Evaluate Applicant and Testify as to Why Respondent Would Be More Likely than Other Individuals to Falsely Confess to a Crime He Did Not Commit Violated Applicant's Right to the Effective Assistance of Counsel

As previously discussed, for a defendant to show that trial counsel rendered ineffective assistance of counsel, a defendant must prove both prongs of the *Strickland* standard. A defendant has to show that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357

(2008). Counsel's performance is not deficient if counsel had a valid strategic reason for not calling an expert. *See Legare v. State,* 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998); *see also Harrington v. Richter*, 1313 S.Ct. 770, 789 (2010). Also, as previously discussed, the South Carolina Supreme Court has determined that counsel's failure to call an expert witness to rebut a material argument made by the State is deficient performance. *See e.g.*, *Ard v. Catoe,* 372 S.C. 318, 333, 642 S.E.2d 590 (1987). Finally, if a defendant demonstrates that if an expert witness had testified there is a reasonable probability that the result of a proceeding would have been different, then counsel's performance was prejudicial. *See Lorenzen v. State,* 376 S.C. 521, 530, 657 S.E.2d 771, 776-77 (2008).

Myers' trial counsel was ineffective for failing to obtain a mental health expert to evaluate whether Myers was more likely than the "average" person to falsely confess. The State's case for guilt rested almost exclusively on Myers' confession. The defense contended that the confession was false. At trial, the defense called Dr. Saul Kassin who testified that Myers' confession "strikingly resembled" many internalized false confessions and that the interrogation techniques used and the resulting confession were problematic.[11] App. 2391. The State countered on cross examination and during summation that false confessions usually occur in cases involving children or mentally impaired adults.[12] App. 2415-17; 2724-25.

At the PCR Hearing, Myers called Dr. Susan Knight, a forensic psychologist employed by the Medical University of South Carolina. App. 3246. Based upon the results of psychological tests she administered to Myers, Dr. Knight testified that Myers has several psychological

[11] An internalized false confession occurs when an innocent person confesses to a crime that, as a result of suggestive interrogation techniques, he or she believes that he or she committed. App. 2413.

[12] As previously noted, Dr. Kassin was not allowed to testify at trial about specific internalized false confession case studies. App. 2310-11.

characteristics, including high anxiety, poor memory, and low esteem, that predispose him to make unreliable statements to police during a custodial interrogation.[13] App. 3256-58, 3265. Dr. Knight's testing established that Myers is prone to interrogative suggestibility. App. 3256. Interrogative suggestibility renders a person susceptible to accepting suggestions made by those interrogating him or her, such as police officers, and as a result his or her behavior is affected. App. 3251-52, 3257. In other words, a person is susceptible to suggestion during an interrogation and makes a verbal response, such as a confession. App. 3262-64. Myers also tested high in compliance, which is when a person has a disposition to yield to others, such as a suspect confessing to gain approval from law enforcement officials or to escape the stressful situation. App. 3255-56. A compliant person goes along with a suggestion made by others due to the desire to please or avoid conflict. App. 3255. Myers' high levels of interrogative suggestibility and compliance are mixed with his correlating psychological variables of anxiety, low self-esteem, poor memory, and trust in law enforcement. App. 3258. Dr. Knight testified that Myers "has a much higher level of interrogative suggestibility than the general population" during a stressful, psychologically coercive interrogation like the one Myers experienced prior to making an incriminating statement in 1997. App. 3256, 3263-64. In fact, Dr. Knight determined that Myers was "two standard deviations above normal" in terms of his level of interrogative suggestibility. App. 3256-57. According to Dr. Knight, individuals with characteristics like Myers are much more likely to confess falsely to a crime they did not commit than the average person. App. 3263.[14]

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[13] Dr. Knight based her testimony on the background materials of Myers' case, interviews with Myers and his family members, and psychological tests she administered to Myers. These tests included the Gudjonsson Suggestibility Scales, the Personality Assessment Inventory, the Minnesota Multiphasic Personality Inventory, and the Test of Memory Malingering. App. 3253-66.

[14] There have been numerous documented cases of persons confessing to crimes, being convicted at trials where the primary evidence against them was the confession, and then subsequently exonerated through DNA or other evidence of innocence. *See* Appendix A (attached to this Return). One study estimated that there are over 6,000 false confessions every year. Jerome Skolnick and James Frye, *Above the Law: The Police and the Excessive Use of Force,*

Trial counsel's failure to have a mental health professional assess Myers for suggestibility and compliance was unreasonable. The science behind interrogative susceptibility and the Gudjonsson Suggestibility Scales – the methodology used to assess interrogative suggestibility – existed at the time of Myers' trial and was well known in the scientific community. The defense's main argument at trial was that Myers' confession was false. Given that it was essential to persuade the jury that Myers falsely confessed to a crime that he did not commit, trial counsel's failure to secure an expert witness to support the defense theory of the case was unreasonable. *See Ard v. Catoe*, 642 S.C. 318, 334-35, 642 S.E.2d 590, 598 (2007) (holding that defense counsel's performance was unreasonable because counsel failed to call an expert to support the defense's main theory of the case). If a psychologist had testified about Myers' susceptibility to falsely confessing, the State would not have been able to undermine the defense's false confession contention during cross-examination and in its closing argument. *See id.* at 335 (noting that, "had counsel elicited . . . [expert] testimony [concerning the defense's theory] . . . the State would not have been able to attack the defense theory as convincingly as it did").

Moreover, Myers was prejudiced by the failure of his counsel to call such an expert. The State argued that Myers would not confess to something he did not do. During closing argument, the prosecutor stated:

> . . . his contention is that the police brainwashed this man to admit to a crime he did not commit. Well, ladies and gentleman, if those exist at all, they are exceedingly rare and they almost always involve very vulnerable people: children, mentally retarded, the mentally deficient, the very tired, none of which you have in this case. You've got a thirty-seven year old man, twelve years of high school, one year of college, six years in the military, a big strapping guy, that's been home and had a good night's sleep. And there's no way that he is vulnerable when he goes [to the

p. 63 (1987). This is especially problematic because "confession evidence is inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is proven false beyond any reasonable doubt." Steven Drizen and Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev, 891 (2004).

police station] except from what he carries inside and that's why he's vulnerable.
App. 2723-24.

Without a mental health professional to testify about Myers' unique susceptibility to falsely confessing, trial counsel provided little evidence supporting the main defense theory and enabled the State to effectively counter Dr. Kassin's testimony. *See Ard*, 372 S.C. at 335, 642 S.E.2d at 598-99. Given the lack of other evidence implicating Myers, had counsel secured an expert to testify in a manner similar to Dr. Knight's testimony at the PCR Hearing, there is a reasonable probability that the jury would have found Myers not guilty.

C. Trial Counsel's Failure to Thoroughly Examine and Impeach a Key Witness Violated Applicant's Right to the Effective Assistance of Counsel.

As stated above, to prevail on an ineffective assistance of counsel claim a defendant must satisfy both prongs of the *Strickland* standard. A defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced as a result thereof. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008). If counsel strategically chose not to impeach a witness, then a court will determine that counsel's performance was reasonable. *See Ramirez v. Yates*, No. 10-1417, 2012 U.S. Dist. LEXIS 106043, at *23 (E.D. Cal. June 6, 2012). The Court of Appeals of South Carolina has previously determined that trial counsel's failure to impeach a witness who provided key testimony was deficient performance. *See Walker v. State,* 397 S.C. 226, 242-43, 723 S.E.2d 610, 618-19 (2012).

First, Myers' counsel's performance was deficient because counsel failed to thoroughly cross-examine and impeach Laurie Villalobos. Villalobos was the only witness at Myers' trial who claimed to have seen Myers at the Mill Inn the night of the murder and around the time of the murder, but she did not report what she saw until after Myers' trial started, four years after the

events in question. App. 2221-2223. Even though the state called Villalobos as a "surprise" witness, Myers' counsel did not request more time to prepare to cross-examine Villalobos or to investigate the veracity of her testimony.[15] *See Walker*, 397 S.C. at 242-43, 723 S.E. 2d at 618-19. There were reasons to disbelieve Villalobos' testimony on its face. Villalobos never came forward after the event despite the fact that one of her friends had been murdered. App. 2221. Although she testified at trial that she did not come forward because Myers confessed, this is contradicted by the fact that no arrest or confession was made for several days. App. 2221. Thus, Villalobos was purportedly in possession of important information implicating Myers in the murder of her friend that she never shared with anyone. Her purported reason for not coming forward is also contradicted by the fact that she did not tell her boyfriend at the time that she had seen Myers on the night of the incident. App. 2287-88. Had counsel been thoroughly prepared to cross-examine Villalobos, he could have placed further doubt in the minds of the jury as to the truthfulness of her testimony.

Trial counsel also failed to adequately impeach Villalobos. Villalobos had been arrested and convicted for several felonies and misdemeanors involving dishonesty. In 1987, she was convicted of Grand Theft Auto in Martin County Florida. App. 2210. In 1989 she was convicted of forgery, breach of trust with intent to deceive, and grand larceny in Berkeley County, South Carolina. In 1991, she was convicted of financial transaction case theft also in Berkeley County. Myers' counsel did not attempt to impeach Villalobos with her prior convictions despite being provided with her rap sheet. *See Davis v. Alaska*, 415 U.S 308, 316 (1974) (emphasizing the impeaching value of a witness' prior convictions in leading a jury to doubt that witness' credibility). South Carolina Rule of Evidence 609 allows a party to impeach a witness by evidence

[15] The defense did call Laurie Villalobos' boyfriend, Carl Chaplin, who testified that Villalobos never told him that she went to the Mill Inn on March 3, 1997 or that she saw Myers at the bar. App. 2287.

of conviction of a crime if the crime was punishable by death or imprisonment for over a year or if the crime involved dishonesty or false statement. S.C.R. EVID. 609. Evidence of a conviction of a crime that is older than ten years is not admissible unless the court determines that, in the interest of justice, the probative value substantially outweighs the prejudicial effect. *Id.* Although only one of Villalobos' convictions fits within the ten year limit, the rest of the convictions were admissible as the probative value substantially outweighs the prejudicial effect. *See State v. Black*, 400 S.C. 10, 17, 732 S.E.2d 880, 884-85 (2012).[16] The prejudicial effect of admitting Villalobos' convictions was slight, as she was not the defendant in the case and her convictions were not for violent crimes. *Cf. id.* at 23-24 (stating that crimes of violence have limited impeachment value especially compared to crimes related to deception). The probative value of Villalobos' convictions to the defense would have been immense because the convictions were crimes of dishonesty or truthfulness and thus bore directly on Villalobos' credibility. *See id.* at 21-22 (citing *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967): "in common human experience acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity"). Furthermore, Myers' counsel did not have a strategic reason for not impeaching Villalobos. *Cf. Ramirez*, 2012 U.S. Dist. LEXIS 106043 at *23-24. Therefore, given Villalobos' questionable testimony and the missed opportunity to impeach Villalobos' credibility, Myers' counsel actions fell outside the range of professionally competent assistance.

Second, counsel's deficient performance prejudiced Myers. Counsel's failure to request time to prepare to cross-examine Villalobos resulted in a cursory examination of Villalobos that did not demonstrate to the jury the inconsistencies and improbability of her testimony. *See Hash*

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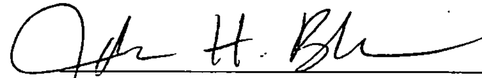
[16] Furthermore, given that Villalobos was a surprise witness, the trial judge would have been more likely to permit trial counsel to use the prior convictions.

v. Johnson, 845 F. Supp 711, 736-741 (W.D. Va. 2012). Furthermore, had the jury known the true extent of her criminal record, the jury would likely have completely discounted her testimony. *See Hoots v. Allsbrook*, 785 F.2d 1214, 1221 (1986) (stating that if one of the State's main witnesses had been impeached by a crime of deceit or fraud the court could have found that the defendant had shown "a reasonable probability that but for the failure to impeach, the outcome of the trial would have been different"); *see also Dillon v. Weber*, 737 N.W. 2d 420, 427, 429-30 (S.D. 2007) (holding that trial counsel was ineffective for failing to impeach the testimony of the mother of two sexual assault victims who claimed that both victims were healthy, with evidence of prior hospital visits). Without Villalobos' testimony, the prosecution did not have any witnesses that placed Myers at the Mill Inn prior to the murder or rebutted Myers' alibi evidence. *See Gonzalez-Soberal v. United States*, 244 F.3d 273, 278 (2001) (noting that defense counsel's failure to impeach two key State witnesses combined with a lack of other corroborating evidence besides the testimony of those two witnesses suggested that the defendant was prejudiced by defense counsel's performance). Considering the lack of physical evidence tying Myers to the crime, if the jury had discounted Villalobos' testimony there is a reasonable probability the jury would have found Myers' not guilty and thus counsel's deficient performance did affect the outcome of Myers' trial. *See Stephens v. Hall*, 294 F.3d 210, 218 (2002); *cf. Harris v. State*, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (holding that even though counsel's performance was deficient because he failed to impeach a witness there was overwhelming evidence of the defendant's guilt and thus the defendant was not prejudiced by counsel's deficient performance).

V. Conclusion

For the reasons stated above, this Court should deny certiorari in this case.

Respectfully submitted,



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September 16, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FOR CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

CA No. 05-CP-10-3113

The State of South Carolina, Petitioner

v.

Wesley Max Myers, Respondent.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Return to Petition for Writ of Certiorari in the above captioned case was mailed by first class United States mail, postage prepaid, this 16th day of September, 2013 upon the following:

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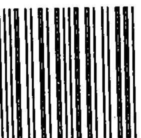

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