

STATE OF SOUTH CAROLINA
In The Supreme Court

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Sep 05 2025

On Petition for Writ of Certiorari to Richland County
Honorable Robert E. Hood, Trial Judge
Honorable Maité Murphy, Post-conviction Relief Judge

S.C. SUPREME COURT

Appellate Case No. 2024-001123

Mimi J. Marshall, #231397,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUES ON PETITION FOR CERTIORARI

- I. Did the PCR court err in finding a break in the chain of custody, caused by the state and concerning a non-fungible piece of evidence, justified the destruction of such evidence and excused trial counsel's failure to investigate or properly address such evidence at trial?
- II. Did the post-conviction relief court err in determining that the state's destruction of physical evidence before examination by either the state's experts or the petitioner's expert before trial negated a finding of prejudice since the impact of such evidence was "speculative"?

COUNTERSTATEMENT OF ISSUES ON PETITION FOR CERTIORARI

- I. Whether the post-conviction relief court correctly determined Petitioner failed to meet his burden of establishing trial counsel were constitutionally ineffective regarding the investigation into and handling of a t-shirt that was purportedly worn by Petitioner during the fatal shooting of his wife because Petitioner failed to establish that any beneficial evidence or successful arguments could have been gleaned from the t-shirt, and, accordingly, counsel could not have been deficient nor could there have been a reasonable probability that the result of Petitioner's trial would have been different but for counsel's handling of this shirt?

STATEMENT OF THE CASE

Petitioner, Mimi J. Marshall, was indicted at the December 2015 term of the Richland County Grand Jury for murder (2015–GS–40–06133) and possession of a firearm by felon (2015–GS–40–06134). Petitioner was represented by Fifth Circuit Assistant Public Defenders Alicia Goode, Stephen F. Krzyston, and Lucas Hawks, Esquires (collectively trial counsel). Fifth Circuit Assistant Solicitors April Sampson, Sandra Moser, and Samuel McGlothin, Esquires, prosecuted the case. Petitioner proceeded to a jury trial from October 30 to November 2, 2017, before the Honorable Robert E. Hood. The jury convicted Petitioner as indicted. Judge Hood sentenced Petitioner to life without parole for murder and five (5) years' imprisonment for possession of a weapon by a felon.

Petitioner filed a timely Notice of Appeal. Stephen F. Krzyston, Esquire, and Chief Appellate Defender Robert M. Dudek, Esquire, perfected Petitioner's appeal by raising the following issues:

- I. Whether the trial court erred in refusing to charge the jury on the law of involuntary manslaughter where there was evidence tending to mitigate the offense of murder?
- II. Whether the trial court erred in admitting the testimony of Timothy Lee, a crime scene investigator, on crucial blood evidence where he was not qualified as an expert in blood spatter evidence or crime scene reconstruction, and where the evidence failed to satisfy three of the four factors proffered in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and was thus not reliable?
- III. Whether the trial court erred in admitting the testimony of Stan Richards, an expert in blood spatter, on crucial blood evidence where the evidence did not satisfy three of the four factors proffered in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), and where the evidence was unreliable?

The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Marshall, Op. No. 2020–UP–241 (S.C. Ct. App. filed August 12, 2020). On August 25, 2020, Petitioner petitioned the South Carolina Court of Appeals for a

rehearing. Petition for rehearing was denied by Order filed October 28, 2020. On December 14, 2020, Petitioner filed a Petition for Writ of Certiorari. Petitioner's Petition for Writ of Certiorari was denied by Order filed August 6, 2021. The Remittitur was returned to the circuit court on August 6, 2021.

On April 28, 2022, Petitioner filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on January 11, 2024, at the Richland County Courthouse before the Honorable Maité Murphy. Petitioner was present at the hearing and represented by Timothy L. Griffith, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, of the South Carolina Attorney General's Office, represented the State. (App. p. 766). On June 21, 2024, Judge Murphy denied Petitioner's post-conviction relief application with prejudice. (App. pp. 805–834).

On August 7, 2024, Petitioner timely filed a Notice of Appeal. On November 12, 2024, Petitioner filed his Petition for Writ of Certiorari and Appendix.

This Return to Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Doris Marshall (victim) clocked out of her dining facility attendant shift at Fort Jackson at 10:15 PM on August 14, 2015. (App'x p. 133, ll. 9–13; p. 137, ll. 10–33). Early the next morning, her nephew was awakened by Petitioner knocking at his father's door. (App'x p. 115, ll. 22–25). Petitioner had come over to tell them he had "messed up" while he was arguing with Auntie Doris, and she tried to grab the gun, and it went off. (App'x p. 116, ll. 5–8). Petitioner had already left his brother a voicemail indicating the same. (App'x p. 342, ll. 1–9; p. 348, ll. 4–22). Petitioner had driven a gray van to their home. (App'x p. 116, l. 22). Petitioner showed his nephew the double-barreled shotgun. (App'x p. 117, l. 23–p. 118, l. 7). Then Petitioner left, and the family members called 911 and their extended family to fill them in. (App'x p. 144, ll. 14–24).

As the family heard what happened, Petitioner's daughter-in-law, Amanda, went to Petitioner's home. (App'x p. 385, l. 18–p. 386, l. 14). Amanda checked the front door, but it was locked, and the other door was locked as well. She pushed in an A/C unit in the window until she caught sight of the victim in the living room. (App'x p. 386, l. 19–p. 388, l. 2). Amanda saw Doris sitting "like in the middle of the couch" and leaning to one side. (App'x p. 388, ll. 4–9). Amanda ran to the neighbor to ask for help breaking open the front door. (App'x p. 388, ll. 12–21). When they gained access, it was apparent that the victim was deceased. (App'x p. 389, ll. 22–23). The victim "had been sitting on a sofa with her lunch bag beside her foot and had been shot in the face at close range with a shotgun. That's where she was killed instantly." (App'x p. 531, ll. 7–10).

The Richland County Sheriff's Department and EMS arrived on the scene, and EMS noted the following about its arrival:

EMS was able to visualize the patient from the front door of the home without entering. Noted brain matter on the floor. The patient was sitting on a couch to the

right of the front door, leaning to her right with her head down. Noted injury to the head inconsistent with life, skull fragment on the back of the couch, noted brain matter. Blood splatter around the patient. The patient had no respiratory effort, no signs of life, noted coagulation of blood on and around the patient, lividity and notified dispatch of D.O.A.

(App'x p. 124, ll. 6–23).

Law enforcement issued a BOLO for Petitioner and a gray Chrysler Pacifica minivan. (App'x p. 148, ll. 4–6). The night before, neighbors witnessed Petitioner banging on the window of a running vehicle as if he were trying to break in. (App'x p. 128, ll. 10–20; p. 319, l. 17–p. 320, l. 9). That same night, one neighbor helped Petitioner, who had locked himself out of his and the victim's home, by crawling in one of Petitioner's back windows and opening the side door so Petitioner could get back in. That neighbor said that it "reeked" when he got inside the house, but that he did not see the victim. (App'x p. 303, l. 23–p. 315, l. 25). That neighbor also recalled seeing a flash coming from the direction of Petitioner's home that night. (App'x p. 312, l. 17–p. 313, l. 18).

A short time after the BOLO was issued, Petitioner surrendered to law enforcement at Tony's Lounge, a spot near Eastover about ten miles away from his home. (App'x p. 148, l. 8–p. 149, l. 7). Somebody at the Lounge who had heard Petitioner was suspected of murder noticed him there and called 911. (App'x p. 307, l. 3–p. 308, l. 19). At the time of arrest, Petitioner had noticeable reddish–brown spatters on his pants, socks, and shoes. (APP'X p. 332, ll. 15–17). The Chrysler Pacifica was parked at the Lounge, and law enforcement located a double–barreled shotgun inside the van. (App'x p. 151, ll. 10–21). The van's back window was broken. (App'x p. 380, ll. 5–8).

At the Sheriff's Department, Petitioner gave a signed question–and–answer type statement to Sergeant Joe Clark about what happened to his wife:

When she came home from work last night, I had my gun in the front room. I did this because the trailer park is an unstable place. She came at me. She grabbed the gun. It went up and it went off. I grabbed her. I had her head in my hands and I let her down on the chair. I knew she was dead then. I should have handled it a different way, the way I did not handle it, I should have killed myself.

(App'x p. 540, ll. 11–21).

The Sergeant asked where the gun was. (App'x p. 540, l. 25–p. 541, l. 1). Petitioner told him it was in a closet, but the Sergeant knew there was no closet in the living room. (App'x p. 541, ll. 1–4). Then Petitioner said he shot her at the front door. (App'x p. 541, l. 5). Moments later in the interview, Petitioner expounded:

I told her when she came in the house that I had just called her job. She was a little late and I was worried about her. I had just had the car's front–end alignment fixed with a new tire for her safety. She comes in with an attitude. I told her I was worried about her. She says, quote, you've got no reason to worry about me, unquote. She said it with an attitude. We were just talking at each other.

...

My gun was laying against the wall the whole time. When I decided to check out around my trailer with my shotgun, Doris was coming in the front door. We are right there at the same time. She comes in the door, that is when I told her I was worried about her. That is when the gun went off. She had touched the gun when it when off. She took the gun and threw it up.

...

She was standing on the side of the couch when the gun went off. I held her by the face and laid her on the couch.

(App'x p. 541, l. 21–p. 544, l. 3).

Petitioner defined "threw [the gun] up" by swiping his hand in front of his face. (App'x p. 543, ll. 4–7). The Sergeant asked, "So the barrel was obviously in her face?" (App'x p. 543, ll. 7–8). Petitioner answered, "she pushed the gun away. And that's when he said it went off." (App'x p. 543, ll. 9–10). Petitioner's statement, however, was unsupported by the forensic evidence presented by the State at trial. (App'x p. 541, ll. 5–10).

Investigator Timothy Lee (Lee), a ten-year veteran of the Richland County crime scene unit, photographed the scene at the Marshalls' home. (App'x p. 162, ll. 14–19; p. 182, ll. 1–10). Lee documented small birdshot pellets and "gelatinized blood" pooled in the center of the living room sofa where the victim was located. (App'x p. 186, ll. 9–20; p. 187, ll. 20–23). He documented the ceiling of the living room, which was also stained with blood. (App'x p. 190, ll. 10–17). "There was a broken pair of glasses that were on the floor near the rug." (App'x p. 193, ll. 17–18). The investigator also noted a piece of shotgun wadding found on the sofa. (App'x p. 192, l. 10). He testified that the location of the wadding indicated "that the shot occurred within the parameter" of where they found the victim. (App'x p. 192, ll. 13–21). Lee testified about photographs depicting differing concentrations of blood at the scene in relation to the victim's location. (App'x p. 205, ll. 5–24; p. 207, ll. 2–11; p. 229, ll. 17–19). Lee photographed biological matter near the sofa, including the documentation of a portion of the brain near the victim's foot and "a chunk of skull and scalp that was up on top of the couch." (App'x p. 244, l. 7–p. 245, l. 13).

David Collins (Collins), the firearm and tool mark examiner from SLED, testified about the 12-gauge double-barreled shotgun located in Petitioner's Chrysler Pacifica. (App'x p. 260, l. 24–p. 261, l. 4). The butt stock on the shotgun had been repaired with electrical tape, but the gun fired, and the safety worked. (App'x p. 263, ll. 1–25). The weapon was manufactured before 1968. (App'x p. 267, ll. 17–22). On the muzzle of the gun, Collins noted not blood, but other biological material. (App'x p. 269, ll. 9–24). Collins did not test the trigger press weight, but did not notice anything mechanically unsound about the trigger pull. (App'x p. 277, ll. 17–23). "It did not appear to be excessively light nor excessively heavy compared to other shotguns of the same make and model[.]" (App'x p. 300, ll. 1–4).

Collins also received for examination three unfired shotgun shells, the wadding located on the victim's sofa, and three sets of birdshot pellets. (App'x p. 264, l. 22–p. 265, l. 2; p. 272, l. 25–p. 273, l. 5). Like the shotgun muzzle, the wadding contained a coating of biological material, which Collins cleaned off as part of his examination. (App'x p. 271, ll. 13–17). "The fired wadding was consistent with the wadding found in one of the fired shotgun shells" in brand, type, and gauge. (App'x p. 272, ll. 19–24). All three unfired shotgun shells "were capable of being fired in that gun." (App'x p. 273, ll. 13–18). Also consistent with the unfired shells received for comparison were the birdshot pellets received for examination, including those extracted from the victim. (App'x p. 274, l. 3–p. 275, l. 23).

"Based on the nature of the injury to the victim in this case and the severity of it, [Collins] did not feel that there was sufficient information present" for him to test the distance from which the victim was shot with any degree of scientific reliability. (App'x p. 278, l. 21–p. 279, l. 6). In addition to a precise diameter of the wound, which was unavailable, Collins needed more of the same ammunition to reliably test–fire and determine that distance. (App'x p. 279, ll. 8–14).

Richland County Sheriff's Department DNA analyst Jennifer Martin received several items for DNA testing. (App'x p. 361, ll. 3–13). Two swabs from the double–barreled shotgun positively matched the victim's DNA, but the matter tested was some other biological matter other than blood. (App'x p. 363, l. 4–p. 364, l. 24).

Doctor Amanda Durso (Durso) performed the autopsy on the 58–year–old victim. (App'x p. 425, ll. 3–6). She recorded a shotgun wound to the head as the cause of death. (App'x p. 427, ll. 11–12). The large wound "entered the right front of her face, kind of centered around the area of the right eye" and exited through the top of the skull. (App'x p. 427, ll. 6–10). "Some of it did exit the kind of back right top of the skull and very slightly left [to] right." (App'x p. 428, ll. 17–

18). Manipulating the edges of the wound, Durso pieced together a 2.8-inch by 3-inch entry wound. (App'x p. 428, ll. 1–9). Durso retrieved birdshot pellets from the victim. (App'x p. 428, ll. 11–13). She identified stippling on the left side of the victim's face, which she described as an indicator that the shotgun was within approximately 30 inches of the victim at the time the shot was fired. (App'x p. 430, l. 1–p. 431, l. 8). Durso testified that soot would be present if the shotgun were within 12 inches of the victim at the time of the shot. (App'x p. 432, ll. 9–18).

No soot was present, allowing Durso to estimate that the shot occurred between 12 and 30 inches from the victim. (App'x p. 431, l. 13; p. 432, ll. 14–15; p. 435, ll. 13–23). The victim's right eye was obliterated, as was a portion of the brain, such that "half of her brain actually fell out through this defect and was received separately in the body bag due to the force of the blast." (App'x p. 433, ll. 14–20). The victim sustained no other remarkable injuries to the remainder of her body. (App'x p. 436, ll. 2–9).

Jennifer Nates from SLED testified that two gunshot residue (GSR) kits were collected and submitted for testing in conjunction with this case. (App'x p. 446, ll. 8–16). The kit collected from the victim tested positive for a single particle of GSR, which is not inconsistent with a shooting victim who has faced the muzzle of a loaded gun. (App'x p. 451, ll. 16–25). The result gave no information as to the distance from which the victim sustained the gunshot. (App'x p. 452, ll. 4–7). The second kit, collected from Petitioner, was inconclusive because the Petitioner was swabbed for GSR beyond the 6-hour timeframe during which any probative test for GSR can be collected from a living person. (App'x p. 452, ll. 14–23). Although testing on the kit was halted halfway through the analysis, it did return one particle of GSR. (App'x p. 453, ll. 12–15).

Stan Richards (Richards), a lieutenant in the forensics division of the Richland County Sheriff's Department, testified about the bloodletting evidence at the scene photographed by Lee.

(App'x p. 458, ll. 21–24; p. 460, ll. 13–18). Richards attended the scene, identified the victim "slumped over on the sofa nearest the door" into the front of the mobile home, and observed the blood on the sofa cushions, extending up the sofa back, on the window shades, on the ceiling, and wrapping around the end of the couch to the windows and blinds on the short side of the room. (App'x p. 461, ll. 13–25). He witnessed brain matter "at the doorway on the floor" unaccompanied by "major blood." (App'x p. 462, ll. 1–4). Richards could tell from the nature of the wound on the victim's face that blood had gone from the point of impact outward as a result of "a very significant impact and a dynamic impact" of the shotgun blast. (App'x p. 462, ll. 10–15).

He identified several stains, small and large, as "individual stains of an overall pattern called impact spatter," which occurs as a result of a high-velocity impact. (App'x p. 462, ll. 18–24). Impact spatter created stains that radiate outward from the point of impact, up to the ceiling, and out towards the end of the room. (App'x p. 464, ll. 11–18). Richards "saw no indication of any major bloodletting going through the door in that area." (App'x p. 469, ll. 5–6). Blood was significantly present on the pillows, sofa, and blinds away from the front door. (App'x p. 472, ll. 10–25). Richards described the spatter stains as creating a V-shaped cone that began at the window and radiated out to the sofa and ceiling, stopping at or near the other furniture in the room. (App'x p. 473, l. 17–p. 476, l. 10).

Richards also attached significance to the lack of bloodletting in the area where the victim would have been sitting when the impact occurred. (App'x p. 480, l. 22–p. 481, l. 15). Because blood on the victim's leg was soaked into the area rather than dripping downward, it indicated that the victim was sitting during the duration of the bloodletting event. (App'x p. 488, ll. 12–21). He called the area without blood the void in which the victim sat during the impact. (App'x p. 488, l. 22–p. 489, l. 1).

Richards also classified the stains and biological matter appearing nearest the front door as outliers because the bloodletting was otherwise contained to the center and side of the sofa, farthest from the door, and because the area from the front door straight back contained no major bloodletting. (App'x p. 489, ll. 2–9). Richards also described that for the portion of the victim's scalp to land on the back of the sofa where it was found, the victim had to be on the couch in the sitting position. (App'x p. 489, ll. 11–17).

Petitioner put forward Christopher Robinson (Robinson), who testified as an expert in crime scene reconstruction, blood spatter analysis, and firearms analysis. (App'x p. 591, ll. 5–9). Robinson addressed the double-barreled shotgun and assessed its trigger pull as averaging 6 $\frac{3}{4}$ pounds of pressure. (App'x p. 592, ll. 9–17). He opined that the safety on the gun was not acting as intended and that the weapon was unsafe. (App'x p. 594, ll. 1–7). He measured the overall length of the weapon as 44.5 inches. (App'x p. 592, ll. 19–20).

As for the victim's injury, Robinson opined "the shot occurred from a distance of approximately three to four inches or less" from the victim's face, with gas pressure from the chamber causing the expansive injury to the skull. (App'x p. 594, ll. 16–25; p. 596, ll. 21–25; p. 598, l. 22–p. 599, l. 5). Based on the pattern of blood dispersion, he described the shot as an "upward shot through the head." (App'x p. 595, ll. 20–25). He testified, "reportedly, she's standing at the end of the couch when the shot occurs, driving her over onto the couch," and Petitioner was "going out the door." (App'x p. 599, ll. 8–11). He clarified for the record that he assessed the positioning of the parties at the time of the shot based upon Petitioner's statement to law enforcement. (App'x p. 614, l. 14–p. 615, l. 6).

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 post-conviction relief 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 post-conviction relief court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court correctly determined Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective regarding the investigation into and handling of a t-shirt that was purportedly worn by Petitioner during the fatal shooting of his wife because Petitioner failed to establish that any beneficial evidence or successful arguments could have been gleaned from the t-shirt, and, accordingly, counsel could not have been deficient nor could there have been a reasonable probability that the result of Petitioner's trial would have been different but for counsel's handling of this t-shirt.

On appeal, Petitioner asserts that the post-conviction relief court erred in not finding trial counsel's representation constitutionally ineffective for failing to investigate or properly address the destruction of the bloody t-shirt evidence due to a break in the chain of custody. Petitioner further contends that the post-conviction relief court erred in finding Petitioner was not prejudiced by trial counsel's deficiency. Specifically, Petitioner contends that the post-conviction relief court erred in its assessment of trial counsel's handling of the evidence on the basis that the probative value of the evidence was speculative. Petitioner further contends he suffered prejudice from the trial court's refusal to give a spoliation charge where it could have added weight to the argument that the State's "handling and use of blood pattern evidence was unreliable." (PWC p. 17). However, as the post-conviction relief court properly found, Petitioner failed to demonstrate how further investigation or testimony regarding the t-shirt would have affected the outcome of his trial, given that he presented no expert witnesses to testify, and the post-conviction relief court was clearly not persuaded by Petitioner's testimony. Furthermore, Petitioner failed to establish the requisite prejudice necessary for relief—that the result of his proceeding would have been different but for trial counsel's failure to investigate or properly address the destruction of the t-shirt evidence, where Petitioner's arguments regarding the t-shirt were based squarely on speculation. The post-conviction relief court correctly determined Petitioner was not entitled to relief since he

failed to meet his burden of establishing either deficiency or prejudice as required. This Court should deny certiorari.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assist[ance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the Petitioner's conviction. Id. at 687. To obtain relief, a post-conviction relief Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing Strickland, 466 U.S. at 104). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700.

Petitioner bears the heavy burden of establishing both prongs of the Strickland standard. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the Petitioner must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." Strickland, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

With respect to prejudice, the Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the

outcome." Id. When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of the [totality of the] evidence presented to the jury." Smalls, 422 S.C. at 188, 810 S.E.2d at 843. Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690–91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75–76, 659 S.E.2d 140, 145–46 (2008) (citing Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a

different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

Here, Petitioner contends that the post-conviction relief court erred in its findings on two points: 1) the t-shirt would have been admissible at trial, so it had not lost its evidentiary value due to a break in the chain of custody¹; and 2) the post-conviction relief court should have examined how counsel handled the t-shirt and failed to lay a proper foundation for a spoliation charge. In furtherance of Petitioner's spoliation argument, he contends that had counsel elicited testimony describing the t-shirt, then it would have been connected to the fatal shooting and the trial court would have given a spoliation charge. Petitioner's argument misses the mark.

¹ Petitioner asserts that the t-shirt in question was a non-fungible item, which ostensibly negates the need for a stringent chain of custody. However, this argument overlooks a critical point: while the t-shirt itself may be unique, the bloodstains on it were undeniably fungible. Furthermore, the matter of whether the chain of custody was compromised remains contentious, as there exists conflicting testimony that casts doubt on the Petitioner's simplistic narrative.

At trial, Petitioner's daughter, Tameika Marshall, testified that after the minivan was released from the sheriff's department's custody, she found a t-shirt in a bag in the van and was told she could dispose of it. (App'x pp. 381–382). Richland County Sheriff's Deputy Joe Clark testified that he heard some items were turned in after the van was released, and he heard the t-shirt was thrown away. (App'x p. 573).

At the post-conviction relief hearing, Petitioner testified that trial counsel questioned his daughter about the t-shirt; she initially lied about it, then told the truth and informed trial counsel that she had returned it to the sheriff's department. (PCR Tr. pp. 16–17). On direct examination, Steven Krzyston testified that he remembered there being discussions about the t-shirt that was returned to the sheriff's department and that it was destroyed before trial. (PCR Tr. p. 30). On direct examination, Deputy Solicitor April Sampson testified that the t-shirt was received from Petitioner's daughter through law enforcement and was ultimately destroyed because the chain of custody had been broken. (PCR Tr. p. 37).

Notably, Petitioner's reliance on State v. Reaves² to assert that this Court has "approved charging the jury on spoliation" is misguided. In Reaves, this Court was presented with a case in which a spoliation charge was given in a criminal case; however, this Court specifically noted that "the propriety of this charge under state evidence law is not before the Court." Reaves, 414 S.C. at 128, 777 S.E.2d at 218 n.5. This Court further noted that "a spoliation of evidence charge has been limited to civil cases in South Carolina." Id. Nevertheless, even assuming spoliation charges were permitted in criminal cases in South Carolina, Petitioner cannot show that the t-shirt was destroyed in bad faith by law enforcement. Furthermore, trial counsel cannot be deficient for not laying a proper foundation for a jury charge that is yet to be recognized as a correct statement of law in South Carolina. See State v. Batson, 261 S.C. 128, 138, 198 S.E.2d 517, 522 (1973) (contemplating "grave doubt as to the propriety, in a criminal case, of the rule of an adverse inference from the failure to produce a material witness"); id. (stating "a charge of this proposition to a jury on ... behalf of either the State or the defense is not warranted except under most unusual circumstances"); State v. McBride, 416 S.C. 379, 389, 786 S.E.2d 435, 440 (Ct. App. 2016) ("Adverse inference charges are rarely permitted in criminal cases."); State v. Breeze, 379 S.C. 538, 547, 665 S.E.2d 247, 252 (Ct. App. 2008) (affirming the denial of a requested jury charge that an adverse inference could be drawn against the State for failing to produce the marijuana).

Moreover, to the extent Petitioner relies on Youngblood³, Petitioner has not shown that the t-shirt contained exculpatory or potentially exculpatory evidence. Instead, Petitioner has only offered speculation as to what the t-shirt may have shown. Petitioner provided no expert witness in blood pattern analysis at the post-conviction relief hearing to testify as to what a t-shirt soaked

² 414 S.C. 118, 777 S.E.2d 213 (2015).

³ Arizona v. Youngblood, 488 U.S. 51 (1988).

in blood could or could not have potentially shown. Petitioner also failed to call his daughter, Tameika Marshall, to testify at the evidentiary hearing. Cf. Vanover v. State, 433 S.C. 31, 44, 856 S.E.2d 160, 167 (Ct. App. 2021) ("We have no idea what Daughter's answer or explanation for the Doe allegation would have been. . . . We do not see how we could find this alleged deficiency to be prejudicial without some sense of what Daughter's explanation would have been."). Nevertheless, assuming, *arguendo*, that Petitioner's assertion that the t-shirt would have shown the victim was standing and not sitting, it is irrelevant because this was a contested fact before the jury, and the question before the jury was not whether the victim was standing or sitting; instead, it was whether Petitioner murdered his wife or whether it was an accident. The post-conviction relief court appropriately determined that trial counsel's performance was not deficient, as Petitioner failed to provide credible evidence demonstrating how additional investigation and testimony could have altered the trial's verdict. For the same reasons, Petitioner is unable to establish any prejudice where any objection pursuant to Youngblood would not have been successful.

Additionally, Petitioner contends that he was prejudiced by trial counsel's lack of fervency in pursuit of a spoliation charge because had a spoliation charge been given, it would have "added weight to the argument that the [S]tate's handling and use of the blood pattern evidence was unreliable." (PWC p. 17). However, to accept Petitioner's argument, it must be conceded that a spoliation charge is a correct statement of law in South Carolina, which is not the case. See Reaves, Batson, McBride, Breeze, supra. The post-conviction relief court correctly found Petitioner was not prejudiced by trial counsel's performance, as the only evidence presented by Petitioner was rife with speculation, and speculation cannot satisfy Petitioner's burden of proving prejudice. This Court should deny certiorari.

CONCLUSION

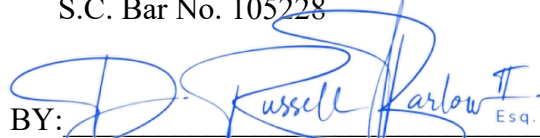
For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the post-conviction relief court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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September 5, 2025