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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Greenville County
The Honorable G. D. Morgan, Circuit Court Judge

RONNIE C. SWOFFORD, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT

Appellant Case No. 2021-001436

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF THE ISSUE

Was Petitioner denied effective assistance of counsel where counsel failed to challenge the prosecution's claim that Petitioner's fresh blood was splattered on the wall, where SLED found there was no blood on the wall, and where the freshness of the (nonexistent) blood was used to discredit Petitioner's alibi?

RESPONDENT'S COUNTER STATEMENT OF THE ISSUE

Did the PCR court correctly deny the application when Petitioner has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel ensured that it was clear that the State did not find any evidence that Petitioner's blood was on the victim's kitchen wall?

STATEMENT OF THE CASE

Petitioner was indicted at the November 2009 term of the Greenville County grand jury for 1st degree burglary (2009-GS-23-9403), assault and battery with intent to kill (2009-GS-23-9404 count 1), possession of a weapon during the commission of a violent crime (2009-GS-23-9404 count 2), and possession of a pistol by a person convicted of a violent crime (2009-GS-23-9405). In its September 2011 term, Petitioner was indicted for assault with intent to kill (2011 -GS-23-7263).

On May 14-17, 2012, Petitioner's case was called to trial with the Honorable Edward W. Miller presiding. Andrew Johnson, Esq., and Gerald Wilson, Esq., represented Petitioner on the charges and Assistant Solicitor Kris Hodge prosecuted the case. At the conclusion of trial, the jury found Petitioner guilty as indicted and Judge Miller sentenced Petitioner to concurrent terms of life without parole for burglary 1st degree and assault and battery with intent to kill, 5 years for possession of a pistol by a person convicted of a violent crime, and 10 years for assault with intent to kill. Due to the life sentence for count one, the judge did not sentence Petitioner for possession of a weapon during the commission of a violent crime (2009-GS-23-9404 count 2).

A timely notice of appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. The appeal was dismissed at the Applicant's request after his motion to relieve LaNelle DuRant, Esq., of the South Carolina Office of Appellate Defense was denied. Petitioner then filed a *pro se* motion for a new trial which was subsequently dismissed as was the appeal of its dismissal. The remittitur was issued July 9, 2014.

Petitioner filed a PCR application on July 8, 2014 (2014-CP-23-3767). An evidentiary hearing was convened on October 21, 2015, at the Greenville County Courthouse before the Honorable Perry H. Gravely. Mills Ariail, Esq., represented Petitioner and Assistant Attorney

General Karen Ratigan represented the State. The PCR court denied relief on December 30, 2015, by Order filed January 7, 2016. Petitioner filed an untimely Applicant's Motion for Reconsideration on February 2, 2016, which Judge Gravely denied February 18, 2016. Petitioner then filed a notice of appeal which was dismissed as untimely by Order filed September 27, 2018.

Petitioner filed a second PCR application (2018-CP-23-5662) on November 6, 2018. Petitioner alleged ineffective assistance of PCR counsel for failure to timely file an appeal from the Order filed on January 7, 2016, denying post-conviction relief. He further requested to argue issues as to the chain of custody of DNA evidence as outlined in his Motion for Reconsideration so that the issues may be adequately preserved for the appellate record.

An evidentiary hearing was convened on November 8, 2021, via CISCO WEBEX virtual platform in the Thirteenth Judicial Circuit, before the Honorable G.D. Morgan, Jr. Petitioner was present via video and telephonic audio and was represented by Susannah C. Ross, Esq. Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office represented Respondent. After considering the testimony and the record, the PCR court granted the *Austin* claim finding that Petitioner did not knowingly and voluntarily waive the appeal of the denial of his first PCR application.

The South Carolina Supreme Court received the Petitioner's Notice of Appeal on December 10, 2021, appealing Judge Gravely's Order of Dismissal of his previous PCR action filed on January 7, 2016. Petitioner filed the Petition for Writ of Certiorari and Appendix on July 11, 2022, raising the following issue:

> Was Petitioner denied effective assistance of counsel where counsel failed to challenge the prosecution's claim that Petitioner's fresh blood was splattered on the wall, where SLED found there was no blood on the wall, and where the freshness of the (nonexistent) blood was used to discredit Petitioner's alibi?

On the same day, Petitioner amended the petition to Petition for Writ of Certiorari Pursuant to *Austin v. State*. On November 27, 2022, Respondent submitted a letter in lieu of a return, notifying the Court that Respondent did not intend to submit a return as the State conceded Petitioner was entitled to the relief granted by the PCR court. Petitioner submitted a reply to the letter return on December 7, 2022. Respondent submitted its return to the *Austin* petition on December 7, 2022. The matter was transferred to the Court of Appeal son January 5, 2023. This Court granted certiorari and ordered the parties to dispense with further briefing.

Petitioner submitted the Brief of Petitioner on July 22, 2024, and Respondent now submits the Brief of Respondent and will respectfully show this Court:

RESPONDENT'S STATEMENT OF FACTS

Curtis Wooten ("the victim") met Petitioner while the two were in prison when they were housed in the same room for a year or more, and the two became friends. (App. 59-61, 113). They lost touch with each other when the victim was released from prison but reconnected a few months before the shooting in the underlying criminal case when they bumped into each other at a gas station. (App. 61-62). They began seeing each other about four to five times a week usually spending time together at the victim's home. (App. 62-63). The victim and his girlfriend Danielle Edwards cohabitated at the time and were both living on government assistance checks of various types. (App. 63-64). The victim kept all his money on him in the form of cash and did not have a bank account. (App. 65-66). He testified at trial he lent about $750 to Petitioner about two days before the shooting, expecting to be repaid a few days later. (App. 67-68, 88). Instead of meeting the victim to repay him, Petitioner set up meetings with the victim by text message and then failed to keep them. (App. 68-69).

Sometime after 2:00 a.m. of the morning following the night at which Petitioner was supposed to repay the victim, the victim returned to his home after having gone to the grocery store. (App. 69-70, 86). Petitioner had texted the victim to say that he would not meet him that night, as they had originally planned. (App. 94). When the victim sat his groceries on his kitchen counter, he saw a man behind him; the victim recognized the intruder's .40 caliber Hi Point pistol and saw "his eyes and stuff" because the intruder wore a mask that only partially covered his face. (App. 70-73). The victim characterized the mask as ski mask that lacked a nose bridge covering, which allowed him to see the intruder's eyes. (App. 114-15). He knew the pistol because the intruder had shown it to him a few days beforehand and said that it was his

brother's.[1] (App. 73, 125-27). The intruder called out the victim's name and then shot him when the victim turned towards him. (App. 71). Edwards ran away and the victim saw the intruder shooting at her as she did so. (App. 71). He shot the intruder once with a pistol, and the intruder fled. (App. 71-72). The victim called 911 and he and Edwards drove to the hospital, with Edwards also making a call to 911 once they were on their way. (App. 74-75, 83).

The victim maintained he recognized the intruder as Petitioner. (App. 71). He told a law enforcement officer at the hospital Petitioner shot him and about the pistol Petitioner had used. (App. 84-85). Almost two months after the shooting, when the victim woke up from his post-shooting coma, he signed a statement for officers that identified Petitioner as the shooter. (App. 112-13). He testified Petitioner was the intruder and the pistol Petitioner used had been the same one Petitioner had shown to him the day before the shooting. (App. 85-87). He recognized Petitioner's voice when Petitioner called out his name before shooting him. (App. 131). He assumed that Petitioner had shot him to take his money. (App. 86). On cross-examination, the victim agreed he had left a voicemail for someone shortly before the shooting in which he may have threatened to cut his or her head off over some snack cakes. (App. 122-24). He also admitted that he had taken 75 milligrams of methadone about fifteen hours before the shooting but denied he had been taking any other medications at the time. (App. 129-30).

Sergeant David Hayes of the Greenville County Sheriff's Office responded to the victim's 911 call, arriving at the hospital at approximately 2:45 a.m. on the morning of the shooting. (App. 142-43). Sgt. Hayes was able to speak briefly with the victim at the hospital, and the victim told him that an unknown assailant in dark clothing entered his home and started shooting

[1] The victim clarified that he could not tell that the pistol that Petitioner was using during the shooting was a .40 caliber one, but he recognized Petitioner and saw that Petitioner was holding a Hi Point, and made an assumption that it was the same .40 caliber Hi Point that Petitioner had shown him the day before. (App. 127).

at him, and then identified Petitioner as the shooter, explaining that Petitioner owed him money. (App. 143-44). The victim told Sgt. Hayes that he was not "totally certain" Petitioner was the intruder, but said Petitioner owned a .40 caliber handgun like the one used to shoot him. (App. 144). The victim had lost over thirty to forty percent of his blood from the gunshot wound, was intubated, had his spleen and one of his kidneys removed, had a portion of his small intestine and colon removed, underwent a tracheostomy due to his going into respiratory failure, and had to have his abdomen kept open for multiple days. Additionally, the victim suffered complications from his injuries, such as having open wounds that needed tending, infections with a fungus in his blood stream, and developing pneumonia. (App. 136-39).

Officer John Derby of Greenville County Forensics went to the victim's home to collect evidence. (App. 151-53). Officer Derby collected three spent cartridge casings on the floor. (App. 160, 168, 189). Officer Derby located a projectile hole in the wall in the victim's kitchen and was able to recover a projectile and a projectile jacket from the area underneath a kitchen cabinet. (App. 162-64). That projectile jacket was admitted into evidence as State's Exhibit 48. (App. 173). It was a fired bullet jacket, which the State's expert firearms examiner testified was consistent with a .380 auto caliber projectile. (App. 226). The projectile was admitted as State's Exhibit 49. (App. 173-74). It was a fired bullet specimen, which the firearms examiner identified as having been a .40 caliber projectile, which was more than likely manufactured by Hi Point.[2] (App. 226-27). Officer Derby found what appeared to be a wad of fabric next to the projectile hole and noted the area around the hole had "stains" that he did not see appearing anywhere else on the wall. (App. 164-65). He cut away that section of the wall so he could collect it for the

[2] The firearms examiner testified that the rifling characteristics imprinted on State's Exhibit 49 when it was fired matched Hi Point only, according to a rifling characteristics database maintained by the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives, but admitted that it was possible that there were other manufacturers with those characteristics of which the agencies were not aware. (App. 230-31).

investigation due to the fact that section contained "suspected blood" and fabric that was visible. (App. 165-66, 177-78). Officer Derby testified he determined the projectile had "blood and possible tissue" and "possible suspected tissue or fabric" inside of it. (App. 172, 184).

Sergeant Darwin Shaw of the Department of Public Safety's Forensics Division went to the victim's home at the request of Investigator Christopher Miller of the Greenville County Sheriff's Office to further the investigation. (App. 198-203). Sgt. Shaw went to the scene with the portion of wall Officer Derby had already removed so that he could put it back in place to see if that helped him gather more information or evidence. (App. 204-05). Sgt. Shaw cut away an even-larger piece of the wall, at which point he found a projectile between some black fiber board and a brick wall that divided the kitchen from the bathroom. (App. 209). He collected that projectile, which was admitted into evidence as State's Exhibit 64. (App. 210-11). He then saw there was another projectile hole leading from the kitchen wall into a bathroom, he went into the bathroom and found another projectile that had entered the bathroom next to a toilet. (App. 212-13). He collected that projectile, which was admitted into evidence as State's Exhibit 55. (App. 213- 14). He testified that the fact that this projectile was still jacketed indicated it had not hit anything hard enough to cause the jacket to separate from the remainder of the projectile. (App. 214).

Sergeant David Weiner of the Greenville County Sheriff's Office searched the victim's home right after 4:00 a.m. on the morning of the shooting. (App. 233-34). He observed a hole in the wall between the living room and kitchen that had a "little bit" of fabric next to it and what appeared to be blood around it. (App. 235). He also saw the victim's mobile phone had been exchanging text messages after or around midnight with another number that was attributed to "Ronnie" in the victim's phone. (App. 236, 241-42). He called the number for "Ronnie," but

received no response until Petitioner returned his call two days later. Petitioner admitted he had been communicating with the victim that night but said he could not remember why he had been looking for the victim so early in the morning, denied having any involvement in the shooting of the victim, and did not express any concern about the victim or inquire about the victim's condition. (App. 237-39, 306).

Verona Gibson, an evidence processing technician in the DNA Department at the South Carolina Law Enforcement Division ("SLED"), testified she performed a test for the presumptive presence of blood on the section of wall cut out of the victim's home and collected a possible hair and what appeared to be fibers. (App. 246, 252). The test was negative for the presence of blood. (App. 253). Ila Simmons, a trace evidence examiner at SLED, determined the fibers collected from the wall cutout were black polyester fibers. (App. 255-261). Adrian Hefney, a forensics DNA analyst with SLED, compared the DNA profile she was able to take from the swab of the projectile jacket admitted as State's Exhibit 48, which she characterized as "suspected blood tissue from the kitchen floor," to the DNA sample taken from Petitioner. (App. 265-70). She determined the two DNA profiles matched, and the probability of randomly selecting an unrelated individual with a matching DNA profile was approximately one in 24 quadrillion. (App. 270-71). She also determined the DNA profile of the hair collected from the wall cutout matched Petitioner's DNA profile, and with the same one-in-24-quadrillion probability as the projectile swab. (App. 274).

Inv. Miller was the Sheriff's Office's lead investigator into the shooting. (App. 297-98). Edwards told him at the hospital after the shooting that a masked intruder dressed in black entered the victim's home and shot him, that she ran for the door and heard a shot, and that she learned afterwards that the victim had shot the intruder. (App. 301). She could not identify the

intruder. (App. 301). Describing the scene at the victim's home, Inv. Miller testified there was blood near a phone line in the kitchen and blood and tissue "splattered" on the wall near a "gunshot projectile on the paneling . . . ." (App. 302). He tried to contact Petitioner using the phone number Sgt. Weiner previously used, but Petitioner never called him back. (App. 306-07). Inv. Miller sent a swab from the projectile found on the floor of the victim's kitchen, among other samples, to SLED for blood DNA analysis. (App. 311). He tried again to make contact with Petitioner by going to his residence. (App. 314-16). He secured arrest warrants for Petitioner after SLED's preliminary analysis showed Petitioner's DNA matched the DNA taken from one of the items he submitted for testing. (App. 316-17).

Jeffrey Hunter Smalley testified as a defense witness. (App. 363). He had been working for Petitioner on various metal fabrication jobs for about two to three years prior to the shooting. Smalley testified he was "pretty sure" he and Petitioner went to high school together and had known Petitioner about 20 years prior to working with him. (App. 363-65). He agreed that he had been friends with Petitioner for some years. (App. 370-71). He testified when Petitioner was working with him on July 22, he noticed Petitioner's arm was injured and covered with a gauze bandage, which looked as if it had been put on by Petitioner himself. (App. 369-70). He said the wound was on Petitioner's left arm and was consistent with two pierce marks that looked as if something had passed through the arm. (App. 370). Petitioner told him that he had gotten the injury when a friend's gun had discharged. (App. 372-73). He testified he did not know what Petitioner was doing in the early morning hours of July 22. (App. 373).

Petitioner's mother Phyllis Swofford testified Petitioner's birthday is on July 25. (App. 374). She noticed a bandage on Petitioner's left arm on July 23, and described the bandage as a "band-aid." (App. 377-79). She applied an antibiotic ointment to it and replaced the "band-aid,"

and thought that the wound, which looked like a "burnt place," must have been caused by Petitioner's pressure washing wand. (App. 378-79). On cross-examination, she testified she knew Petitioner had had "the place" on his arm on July 23, and then said after a follow-up question from the solicitor that Petitioner had two "places" on his arm. (App. 385). She agreed she had not told law enforcement or the solicitor about her recollection of the injury to her son's arm before trial, even though she had learned it was an important fact in the case. She explained her failure to do so by testifying that she does not drive and was unable to drive herself to Greenville, although she admitted that she had a phone. (App. 383-86).

The defense called Charlie Duffie, who testified he had known Petitioner since they worked together in the late 1980s and that he and Petitioner had become "fairly close" friends over the past seven or eight years.[3] (App. 390-91). Duffie later agreed he and Petitioner were "real close." (App. 396). Duffie testified he noticed a bandage on Petitioner's left arm on July 23 when they were celebrating Petitioner's birthday. (App. 391-93). He said the bandage consisted of two band-aids, one on the front of Petitioner's forearm and another on the rear. (App. 393). He testified Petitioner peeled off the front bandage to show him the wound, which he characterized as a round, cigarette-like burn. (App. 394). Duffie admitted to his criminal record, which included convictions for failure to stop for a blue light, assault and battery of a high and aggravated nature, shoplifting, financial transaction card fraud, and forgery. (App. 394-95). On cross-examination, Duffie testified he learned immediately after Petitioner was arrested that the injury to Petitioner's arm was significant, but he did not go to police with that information because he did not think the information was relevant. He added he figured that Petitioner and

[3] The solicitor's investigator reported during trial that he had seen Petitioner's girlfriend Shannon Lee Lawter and Duffie whispering outside the courtroom despite the sequestration order that was in effect. Lawter denied that she had communicated with Duffie. The trial court warned defense counsel that witnesses would go to jail if they defied the order. (App. 400-04).

Petitioner's lawyer would come to him if they had questions about it. (App. 397-99). He did not know Petitioner's location in the early morning hours of July 27, 2009. (App. 399).

Shannon Lee Lawter testified she had been in a relationship with Petitioner for six years and she and Petitioner shared a two-and-a-half-year-old child. (App. 405). She agreed that she had a previous conviction for filing a false police report. (App. 419). She testified Petitioner's birthday is July 25, and she was with Petitioner at a birthday meal for him at a Japanese restaurant on July 25, 2009. (App. 406-08). She said she first noticed an injury to Petitioner's left arm around July 22, and testified she saw "a place" on the arm, describing it as a burn or a graze wound. (App. 408-10). Lawter testified Petitioner arrived home from work at about 1:30 a.m. on July 27, 2009, and that it was not unusual for Petitioner to get home from work early in the morning. (App. 413-14). She said Petitioner did not leave once he arrived at home, until he left to go to Charlotte that same morning at about 6:00 a.m. (App. 416-17). She testified that she told the law enforcement officers who came to the house investigating the shooting that Petitioner had not been shot because she thought that the injury looked like a burn. (App. 418-19). She testified she told Petitioner the officers had come to the home to ask to speak to him, and that Petitioner told her he did not know why they were looking for him. (App. 426-27). Petitioner was still driving her to work, and she admitted she would experience financial hardship if he were to go to prison. (App. 424-25). Lawter said that Petitioner told her initially he had injured his arm on a lawn mower. (App. 428-29). She said that she believed his explanation because the injury was not a big wound and looked "like a graze to [her], like a scratch pretty much." (App. 444). She said Petitioner later told her the victim had accidentally shot him on July 21 and he had not reported it to the police so the victim would not have to go to jail; she testified that she did not relay that information to police because she did not trust them. (App. 445-47). She explained

her statement to officers that Petitioner was working in Columbia when they came to the house to speak to him by saying that he had actually been in Atlanta and that she had been confused when she talked to the officers. (App. 430). She denied she told her former neighbor Deborah Martinez that Petitioner had confessed to her that he shot a man in Greer and that she could use that information to "bury him." (App. 442). She denied she told Martinez Petitioner told her details about the shooting and denied that she told Martinez that she would lie for Petitioner at his trial. (App. 442). She denied sending text messages to Stephen Parham saying that he needed to be at Petitioner's trial. (App. 443). She denied she and Petitioner had discussed what they would say while on the witness stand at trial, but later admitted, at least to some extent, she had discussed the case with Petitioner. (App. 443, 447-48).

Lawter's son, Jordan, (Petitioner's stepson), testified Petitioner was like his father. (App. 449). He testified Petitioner was in Petitioner's bedroom at 2:20 a.m. on July 27, 2009, and that he went to Charlotte with Petitioner later that morning at 6:00 a.m. (App. 452-53). He said he saw a bandage on Petitioner's arm when they went to Charlotte, but he did not know the details of Petitioner's injury. (App. 459). Jordan still lived with Petitioner. (App. 455). He said he did not tell the officers when they showed up to arrest Petitioner that Petitioner had been at home at the time of the shooting because he did not want to talk to officers who were not there for him and because he did not know why they were there. (App. 461-62). He agreed he wanted Petitioner to be at home with him and testified, "I'll do whatever I can for him." (App. 462).

Otis Pullen testified that he had known Petitioner for twelve or thirteen years - maybe more. Petitioner testified he met Pullen when they were both imprisoned together. (App. 463, 603-04). Pullen said he saw Petitioner's vehicle drive by him at about 1:15 a.m. on July 27, 2009, and he called Petitioner and had a phone conversation with him. (App. 465-68). He put

that phone call between 1:30 and 1:35 a.m. (App. 469). He said that he did not share his information with officers even though he was aware that Petitioner had been arrested. (App. 471-72). He did not know Petitioner's location at the time of the shooting. (App. 472).

Stephen Parham, who has a learning disability and is Martinez's son and Petitioner's former neighbor, testified that he is friends with Petitioner. (App. 472-73, 482, 628). He claimed to have talked to Petitioner right outside Petitioner's home at 1:36 a.m. on July 27, 2009, and that Petitioner went inside his house afterwards and did not leave again. (App. 478-79). Lawter sent a text message to him on the night before his testimony telling him that a warrant would be issued for his arrest if he did not come to trial. (App. 481). Lawter drove him to court for his testimony and asked him as she exited the courtroom after her testimony if he had been talking to the prosecution. (App. 481-82). He admitted that he told the solicitor's investigators the week before trial that he was not "100 percent certain" that Petitioner had gone into his house that night. (App. 482).

When he met with trial counsel, Petitioner had driven him to the appointment and bought him breakfast along the way, and told him that, when the case was over, he and Petitioner would "hang out together, catch up on lost time," and that Petitioner would get a gym membership and show him how to work out. (App. 483). He agreed Petitioner had shown his entire case file to him and said that he wanted him to testify that he saw Petitioner walk into his house at a specific time. (App. 483). He admitted that he had told the solicitor's investigator the week before trial that he wanted the case to be over because he "[could not] stand being in front of anybody, trying to put somebody away, not knowing what the person may or may not do," and that he told the investigator that he was scared. (App. 486). He agreed that he told the investigator that he was feeling threatened and wanted the case over. (App. 486-87). He agreed that he had started to feel

as if Petitioner had been trying to manipulate him in order to get him to say certain things. (App. 487).

Petitioner's brother James B. Swofford testified that he was at the Japanese restaurant with Petitioner and others on Petitioner's birthday. (App. 497-98). He identified some photographs as those that he took with his mobile phone while at that birthday party. (App. 499-500). He explained that one of the photographs showed the bandage on Petitioner's arm. (App. 499).

Petitioner testified in his own defense. After admitting to a redacted version of his own criminal record, Petitioner testified that he became friends with the victim in prison and then reconnected with him on the outside. (App. 500-18). He testified that the victim had exaggerated the number of times on which they met, though. (App. 520-22). He denied that he had borrowed money from the victim, but said that he had reluctantly accepted a gift of $850 from the victim and deposited $750 of it into his account. (App. 530, 549-50, 594). He said that he stopped by the victim's home on July 21, that the victim appeared to be high at that time, that the victim accidentally shot him in the arm, and that he did not seek medical attention for the wound so that the victim would not get in criminal trouble for having the firearms, even though he has acquired immunodeficiency syndrome ("AIDS"). (App. 532-42). He went to his home, cleaned it, and wrapped it in gauze bandages. (App. 542). Since he and Lawter owned dogs, he had medical supplies for dogs at home. (App. 542). He did not seek medical attention other than to ask a veterinarian's advice. (App. 542). He would not have been surprised to know that his blood was in the victim's home due to the accidental shooting. (App. 542).

Petitioner said that he originally told Lawter that he had injured his arm on the lawnmower and that he told the version from his trial testimony with her right before he had

been arrested. (App. 544-45). Petitioner testified that he went to his birthday dinner on July 25, and that the photographs taken there show the injury to his arm and that others saw his injury. (App. 552-53). He kept the wounds covered because they looked like burns, and he was wearing a butterfly bandage at some point. (App. 553). He said that, on the morning of the shooting, he left work at 12:05 a.m., dropped an employee off at the employee's home at 12:35 a.m., received a call from Pullen, arrived at home at 1:35 a.m., and stayed there until 5:55 a.m. (App. 557-65). He said that he did not return the officer's phone call because he forgot to do so and was not thrilled to talk to officers. (App. 566-67). He denied that he shot the victim. (App. 569).

Petitioner testified that, when he saw his AIDS counselor on July 21, his counselor did not raise concerns about the bandage on his arm and told him later that he had not noticed the bandage. App. 576-78. He said that he initially told three people about the accidental shooting: Hunter Smalley, Duffie, and a co-worked named Terry. App. 581. He did not seek medical attention for his wound, despite his medical condition, out of "loyalty" to the victim due to their friendship and because he could see that the bullet had exited his arm. App. 582-83. He said that he rinsed his arm with a garden hose in front of the victim's house after the accidental shooting, and decided then that he did not need to seek medical attention because "it was just an incident in the arm." App. 592. While Petitioner was testifying about the mechanics of the accidental shooting, the solicitor asked him if he was crafting a narrative to explain the bullet hole and his DNA splattered on the victim's wall. App. 589. He could not remember what happened to the clothes he was wearing during the accidental shooting. App. 590-91. He knew that officers wanted to talk with him and check him for a gunshot wound after the victim was shot, and he was unsure if the victim had told them about the accidental shooting. App. 601. Even after the officers arrested him for shooting the victim and were taking photographs of the gunshot wound

on his arm, he did not tell the officers about any of the witnesses who allegedly saw him during the early morning hours of the shooting or about the alleged accidental shooting because he wanted to exercise his right to remain silent, although he was making statements to the officers. (App. 615-18).

Martinez testified during the State's case-in-reply that she was Petitioner's and Lawter's neighbor. (App. 625). She testified that Lawter had visited her in February of 2019 after having had an argument with Petitioner and said that Petitioner told her that he had shot the victim in self-defense, and that Lawter said that she did not want to testify against Petitioner because they had a son together and that she would not say in court what Petitioner had told her. (App. 629-33).

Inv. Miller also took the stand again. He testified that Petitioner's witnesses had not told him the things about which they testified. (App. 635-36). After trial counsel said outside the presence of the jury that the determination of whether a blood smear on a wall is "fresh" was a matter within lay knowledge, Inv. Miller testified before the jury that a photograph of the victim's wall appeared to show "fresh blood, tissue, [and] hair." (App. 639-42). He believed that the blood was "fresh" because it was red and still in a liquid state. (App. 642, 645).

During closing arguments, the issue of the suspected blood on the wall came up again. Trial counsel admitted that Petitioner's DNA was in the victim's home, but argued that the State had not performed analysis to determine the length of time that the blood had been on the victim's wall, disagreed with Inv. Miller's opinion that the blood was fresh, and said that the officers must have told the victim about the presence of Petitioner's blood on the wall before the victim gave his written statement. (App. 654-55, 665). The solicitor argued that Petitioner's allegation that his body tissue, hair, and suspected blood had been in the victim's home for the

six days between the alleged accidental shooting and the shooting of the victim was not credible, argued that the body tissue and blood were fresh because the blood on the wall had not yet turned brown when the photograph of it had been taken, and said that the State had tissue, hair, and blood DNA that put Petitioner at the crime scene. (App. 691, 703). The jury found Petitioner guilty as indicted on all counts, and the trial court issued the mandatory life sentences. (App. 725-26, 731).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues 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 there is probative evidence in the record to support 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 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443,448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will only 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

I. The PCR court was correct to deny the application because Petitioner has failed to prove there is a reasonable likelihood the outcome of his trial would have been different had trial counsel ensured it was clear that the State did not find any evidence that Petitioner's blood was on the victim's kitchen wall.

Petitioner asserts error in the PCR court's analysis of *Strickland* deficiency and prejudice as to his PCR allegation that trial counsel failed to challenge the prosecutor's claims that Petitioner's fresh blood was splattered on the wall. Petitioner claimed the solicitor improperly discussed the observed blood splatter after SLED determined there was no blood on the wall which discredited Petitioner's alibi that he was accidentally shot by the victim days before the shooting occurred. Despite Petitioner's contention, the PCR court made reasonable findings based on the evidence and the record before it, and properly applied *Strickland* to the circumstances of Petitioner's case.

In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*). The second prong of the *Strickland* analysis is that the deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for [the lawyer's] unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

"Representation is an art, and an act or omission that is unprofessional in one case may be sound of even brilliant in another. Even if a defendant shows that particular errors of counsel

were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted).

The PCR court found trial counsel was not deficient for not vigorously challenging witness testimony and solicitor remarks regarding fresh blood splatter on the kitchen wall in the victim's home. Trial counsel's representation is measured by reasonableness of his actions at the time of trial, not in hindsight. *See generally*, *Strickland*.

An indicative overview of the defense strategy is illuminated in trial counsel's closing argument in which he specifically references the lack of forensic evidence as to the alleged splattered blood in the victim's kitchen. Trial counsel notes the State did ample tests on different genetic material, yet did not do the same with the blood evidence. He reiterates there was no forensic testimony as to how long the blood had been in the victim's kitchen nor were there any reports observing the blood to appear fresh. Trial counsel criticized Inv. Miller's testimony that he could discern whether blood is fresh by observing a photograph, noting that the blood in the victim's kitchen was not in a liquid state dripping down the wall.

Any mention of the blood in the kitchen was based off observation and appearance. Sgt. Weiner testified he remembered there was a spot on the wall between the kitchen and living room that "looked to me" like blood. (App. 235). Apparently, the substance on the wall looked like blood to the naked eye and Sgt. Weiner only described the scene as he had observed at that time. The fact that even trial counsel and Petitioner seem to have conceded the substance looked like blood mitigates any reason to think that the witnesses' descriptions of the substance as blood were insincere; in fact, trial counsel offered a reasonable explanation that, at some points in the trial, the technical terms for the biological substances found at the crime scene may have been used interchangeably. It is unclear from the record if the photograph that Inv. Miller was looking

at when he testified about the freshness of the blood depicted the substance that the SLED agents had tested or if it depicted some other substance on the wall that was not specifically identified in a way that would be illuminating to one studying the trial transcript. Further, the jury heard SLED Agent Gibson clarify that the swabbed portion of the wall tested negative for the presence of blood. (App. 252-53).

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Strickland*, at 689, 104 S.Ct. 2052. Trial counsel criticized Inv. Miller's identification of "fresh" blood in his closing argument, asserting that Inv. Miller cannot identify the status of the blood via observation of a photograph. The issue of the "freshness" of the blood in the kitchen did not go unaddressed by trial counsel. Trial counsel objected to qualifying Inv. Miller as an expert and to his testimony concerning a determination of "freshness." (App. 632-42). The trial court found Inv. Miller did not need to be an expert to testify as to whether the blood was fresh.

While Petitioner asserts trial counsel failed to challenge the blood matter, trial counsel clearly raised issue with the description of the blood as being fresh. He again addressed Inv. Miller's testimony in closing and focused on inconsistent results of the forensic testing offered by the State. The PCR court reasonably and with supporting evidence, found trial counsel did not act deficiently and that Petitioner failed to meet his burden of proof under *Strickland*.

The second prong of *Strickland* - a prejudice analysis - supports that absent testimony regarding "fresh" blood on the wall in the kitchen of the victim's home, based on the additional evidence and testimony provided, Petitioner could not overcome the *Strickland* standard of prejudice. *See Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625 (because of counsel's alleged error,

"there is a reasonable probability that, but for [the lawyer's] unprofessional errors, the result of the proceeding would have been different.").

"[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Harrington v. Richter*, 562 U.S. 86, 111, 131 S. Ct. 770, 791, 178 L. Ed. 2d 624 (2011); *See Wong v. Belmontes*, 558 U.S. 15, 27, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009) (per curiam); *Strickland*, 466 U.S., at 693, 104 S.Ct. 2052. "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington*, 562 U.S., at 111, 131 S. Ct. 792; *Strickland*, at 696, 104 S.Ct. 2052. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case." *Harrington*, 562 U.S., at 112, 131 S. Ct. 792; *Strickland*, at 693, 697, 104 S.Ct. 2052. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S., at 111, 131 S. Ct. 792; *Strickland*., at 693, 104 S.Ct. 2052.

As to Petitioner's defense strategy, his greatest challenge was that he had to overcome the victim's identification of him as the intruder while also explaining away the gunshot wound in his arm. Petitioner conceded he was in the victim's house previously, and the victim had accidentally shot him, which would explain the presence of his blood in the victim's house.

However, it is not hard to objectively scrutinize Petitioner's attempted explanation for not going to the hospital or reporting the victim to law enforcement. Petitioner contradicts the extent of his relationship with the victim, suggesting that he did not go to law enforcement out of loyalty to his friend, but downplayed their friendship and the frequency with which they saw each other. Further, Petitioner testified he was diagnosed with HIV in 1989, which he contracted

from prison tattoos while he was incarcerated. Petitioner testified that he started frequently getting sick and he went to the doctor where his blood count was regularly monitored. (App. 513). He eventually started taking medication due to his condition. (App. 513). It is common knowledge how HIV can be contracted, and Petitioner's testimony that he never went to get medical treatment from an injury that has been referred to as a "pierce" or a "burn" and significant enough to need a bandage raises inquiry as to why he did not get treatment. Instead, he testified he rinsed his arm with a garden hose and doctored it himself with veterinarian supplies from home.

Petitioner also faces the challenge of overcoming the victim's identification of him on the night of the shooting in which Petitioner testified he recognized Petitioner's voice and eyes through the cuts in his ski mask. The victim testified that he had spent several days a week with Petitioner since they had been released, and that he considered them to be good friends. Such good friends, in fact, that the victim lent Petitioner money to pay his bills, yet Petitioner evaded re-payment – a suggested motive for the shooting.

Additionally, Petitioner presented witnesses that objectively warrant credibility concerns. Petitioner's mother gave a description of the dressings on Petitioner's alleged wounds that differed from his own. She further testified that she did not inform law enforcement about the Petitioner's injuries because she did not have a car and could not drive to Greenville – yet confirmed she did have phone. And as of note, she had impeachable criminal convictions on her record. Of course there is the inherent interest of protecting her son, and her testimony suggests that she would want to help Petitioner. Petitioner also presented the testimony of a close friend, who gave a description of Petitioner's wound dressing that differed from Petitioner's own, who

gave a non-credible explanation for his pre-trial silence about the timing of Petitioner's alleged arm wound, and who had impeachable criminal convictions on his record.

Petitioner presented his ex-girlfriend and mother of his child, who is an important witness considering he claimed to be at home with her at the time of the shooting. She gave an evasive explanation for her pre-trial silence about the alleged wound on Petitioner's arm, whose testimony was cast in doubt by (among other things) another witness's rebuttal testimony. The rebuttal testimony impacted the ex-girlfriend's credibility as it revealed she had said that she would not reveal the truth of the matter at trial, made threatening statements to another of Petitioner's witnesses in an apparent attempt to secure his favorable testimony for Petitioner, and had an impeachable criminal conviction on her record. Another witness who raised concern as to Petitioner and his presented witness credibility, was a special needs young man who unexpectedly conceded that his initial testimony had been a recitation of what Petitioner wanted him to say, that Petitioner's girlfriend had communicated with him in advance of trial about his testimony in a way that made him feel threatened, that he felt that Petitioner was trying to manipulate him, and that he felt scared to testify against Petitioner.

Considering the testimony and evidence before the jury, the allegation Petitioner again raises does not warrant relief. The alleged deficiency simply was not shown, or if shown, Petitioner failed to show a reasonable probability of a different outcome. Petitioner's testimony and witness testimony lacked credibility and was blatantly bias, the forensic evidence placed Petitioner in the victim's home, and the victim himself identified Petitioner as being the intruder. The PCR Court reasonably concluded that Petitioner was not prejudiced as a result of trial counsel's alleged deficiency.

CONCLUSION

Based on the foregoing reasons, Respondent respectfully requests this Court to affirm the denial of relief.

Respectfully submitted,

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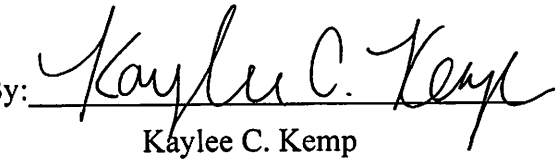
By: 
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Greenville County
The Honorable G.D. Morgan Jr., Post-Conviction Relief Judge
Appellate Case No: 2021-001436

RONNIE C. SWOFFORD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that as per the March 20, 2020 Order of the Chief Justice, the *Brief of Respondent* has been forwarded to Appellant' s counsel, Joanna K. Delany, Esquire, via email today to delany@sccid.sc.gov and to her assistant Sara McInnis, at smcinnis@sccid.sc.gov.

This 20th day of November 2024.

By: Kaylee C. Kemp
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