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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LAURENS COUNTY
Court of Common Pleas
B. Alex Hyman, Circuit Court Judge

Appellate Case No. 2025-001566

Christopher J. Wells,

Respondent,

v.

State of South Carolina,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

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ISSUES PRESENTED FOR REVIEW

1. The PCR court erred in finding Counsel ineffective for failing to investigate or discover additional evidence, where the PCR court failed to apply the appropriate *Strickland* standard for evaluating ineffective assistance, and where none of the evidence Counsel allegedly overlooked would have made any difference in the result of Respondent's trial.
2. The PCR court erred in finding Counsel ineffective for not impeaching Kelly Ball with purported inconsistencies between her statements on the body-worn camera videos and her trial testimony or with evidence of her history of treatment for bipolar disorder, where the record reflects Counsel thoroughly attacked Ball's credibility in multiple ways, where the PCR court failed to identify any inconsistencies in Ball's testimony that Counsel allegedly failed to explore, where no evidence suggests bipolar disorder is probative of truthfulness, and where the PCR court failed to apply to correct *Strickland* standard for evaluating ineffective assistance.

STATEMENT OF THE CASE

During its April 2015 term, the Laurens County Grand Jury indicted Respondent for murder (Indictment No. 2015-GS-30-1162), armed robbery (2015-GS-30-504), possession of a weapon during the commission of a violent crime (2015-GS-30-503), and criminal conspiracy (2015-GS-30-505). Deputy Solicitor Warren Mowry and Assistant Solicitor Ruston Neely of the Eighth Circuit Solicitor's Office prosecuted the case. Rodney Richey, Esquire ("Counsel"), represented Respondent.

On April 25, 2016, Respondent proceeded to a jury trial before the Honorable Frank R. Addy, Jr. The jury convicted Respondent as indicted on the armed robbery, possession of a weapon, and criminal conspiracy charges but acquitted Respondent on the charge of murder. Judge Addy sentenced Respondent to life imprisonment for armed robbery and a concurrent sentence of five years' imprisonment for criminal conspiracy. Pursuant to S.C. Code Ann. section 16-23-490(A), Judge Addy did not sentence Respondent for possession of a weapon during the commission of a violent crime because of Respondent's life sentence on the armed robbery charge.

Subsequently, Respondent timely appealed his sentences and convictions. On November 8, 2017, in an unpublished opinion, *State v. Wells*, 2017-UP-417 (Ct. App. filed Nov. 8, 2017), the South Carolina Court of Appeals affirmed Respondent's conviction. On May 14, 2018, the Remittur was issued to the lower court.

Summary of Trial Testimony

Late at night on October 31, 2013, Johnny Lee Cheeks ("Victim") was shot at his Enoree residence where he lived with Kelly Ball. Officers responding to the scene found David Lee Walker sitting on the porch, wounded. (App.pp.168-73). Victim told officers that Walker and Victim had shot each other after Walker came to his trailer and tried to rob him. (App.p.182;

pp.284–85). Victim died of his wounds hours later, but Walker survived.

Toris Moore, Walker’s niece, testified at trial. She testified that, on the evening of October 31, 2013, prior to the shooting, Walker, Respondent, and Johnny Saxon came to see her in Respondent’s car. (App.pp.109–10; p.112). Walker spoke to her and told her the three of them were planning to rob a drug dealer who lived with a white woman in Enoree. (App.p.110; pp.115–16). Walker stated Respondent already had a gun to use in the robbery, but he asked Moore if she could give them an additional gun. (App.pp.110–11; p.116). Moore did not want to get involved, so she told Walker she did not have a gun. (App.p.111). Moore identified the car the men arrived in as Respondent’s car. (App.p.112).

Kelly Ball was staying with Victim on the night of the shooting. She testified that, around 10:00–11:00 p.m., there was a knock at the door, and Victim opened the door and went outside. (App.pp.126–27). Ball testified she could hear a verbal altercation going on outside, and she heard the voices of two or three people, one of whom stated, “I’m here to rob you.” (App.pp.127–28). She then heard a single gunshot, followed ten or fifteen seconds later by several more gunshots. (App.p.129, lines 1–8).

Ball testified that, after hearing the first gunshot, she got up out of her seat and was heading to the door when the other shots went off. (App.p.129, lines 11–14). She went out into the yard to check on Victim and observed Victim and David Lee Walker lying on the ground. (App.pp.130–132). She also saw Respondent standing “eight to ten feet away” in the yard. (App.p.132, line 20). She testified she could see Respondent’s face for approximately fifteen seconds because he took several steps backward before turning around and running toward the getaway car. (App.p.132, line 24–p.133, line 6). Later, she was able to pick Respondent out of a photographic lineup. (App.pp.144–47; pp.291–92).

Once Respondent had left in the getaway car, Ball pulled Victim into the trailer and locked the door. (App.p.138, lines 5–12). A short while later, David Walker came to the porch and knocked on the door, but Victim told Ball not to open the door because Walker was the one that had shot him. (App.p.139, lines 3–17). Victim begged Ball to take him to the hospital, but Ball discovered Victim’s car keys had been stolen, along with his house keys, his wallet, and all his cash. (App.p.140, lines 4–23).

After calling 911, Kelly Ball gave a description of the getaway vehicle. Officer Andrew Ashley testified he was driving north on Highway 101 when he heard a description of the car over the radio. (App.p.213–14). He then observed a vehicle that matched the description heading south on Highway 101, and he turned around and began following it. (App.p.214). The vehicle eventually turned left from Highway 101 onto Pleasant View Drive. (App.p.216, lines 1–13; p.226; p.229). Along with Deputy Jeremy McMahan, Ashley followed the vehicle to a residence on Jones Hill Road, and McMahan knocked on the door. (App.p.218). Respondent was inside. (App.pp.218–19). Respondent admitted he had been driving the car, claiming he was coming from a female friend’s house in Spartanburg; however, he refused to give the “friend’s” name or address and seemed “very vague and reluctant.” (App.pp.230–31).

The following day, Antonio Morris was walking at the corner of Highway 101 and Pleasant View drive when he found a discarded wallet lying on the side of the road. (App.p.275). Inside the wallet was a single dollar bill and the ID of the victim, Johnny Lee Cheeks. (App.p.276). After hearing from his aunt that a man named Cheeks had been killed, Morris alerted law enforcement and led Officer Bryant Cheek to the wallet, which was collected as evidence. (App.pp.277–78; p.293). Kelly Ball identified the wallet as belonging to Victim and confirmed that Victim’s ID was inside, although she testified that there were thousands of dollars inside the wallet the last time

she saw Victim using it, which were now missing. (App.pp.124–25).

The wallet was found more than eight miles away from the site of the shooting, but less than one mile away from the house on Jones Hill Road to which law enforcement had followed Respondent. (App.p.290). Officer Ashley, while following Respondent on the night of the crime, had seen Respondent’s car turn left from Highway 101 onto Pleasant View Road, at the exact intersection where Morris later found the victim’s wallet. (App.p.216, lines 1–13; p.226; p.275).

Present Application

Respondent filed an application for post-conviction relief (“PCR”) on February 19, 2019, raising numerous allegations of ineffective assistance of counsel. Respondent then filed an amended application on December 4, 2023, raising additional allegations. Pertinent to this Petition are the following allegations from the amended application:

1. “Ineffective Assistance of Counsel of Rodney W. Richey, Esquire:”

- ...
 - e. “Failure to challenge or request further discovery from the Solicitor’s office. There was a phone with text messages on it as well as body camera video that was available that Mr. Saxon, the Applicant’s co-defendant, was able to obtain through his attorney, Ms. Aimee Zmroczek, but Mr. Richey never had.”
 - ...
 - g. “Failure to adequately cross-examine Kelly Ball about her inconsistent statements given to police and her testimony in trial.”

The PCR court convened an evidentiary hearing into the matter on November 28, 2023. On July 18, 2024, the PCR court issued an order granting relief. The State filed a motion to alter or amend the order pursuant to Rule 59(e), SCRCPP, which the PCR court denied on July 28, 2025. The State now petitions this Court for a writ of certiorari to review the decision of the PCR court.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On review, the appellate courts will uphold a PCR court's findings of fact and will uphold them if there is any evidence of probative value to support them; however, the PCR court's factual findings will not be upheld when there is no probative evidence to support them. *Pierce v. State*, 338 S.C. 139, 144–45, 526 S.E.2d 222, 225 (2000). Furthermore, appellate courts review questions of law de novo, without deference to the PCR court's rulings. *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- 1. The PCR court erred in finding Counsel ineffective for failing to investigate or discover additional evidence, where the PCR court failed to apply the appropriate *Strickland* standard for evaluating ineffective assistance, and where none of the evidence Counsel allegedly overlooked would have made any difference in the result of Respondent’s trial.**

At the PCR hearing, Respondent presented testimony from Aimee Zmroczek, the attorney who represented Respondent’s co-defendant Johnny Saxon during his trial, which resulted in a hung jury on the charge of criminal conspiracy and an acquittal on the remaining charges. Ms. Zmroczek testified as to several avenues of investigation she pursued during her representation of Saxon, and the evidence she was able to discover as a result of her investigation was introduced as exhibits at the PCR hearing. The PCR court found that Counsel was deficient for not pursuing those same lines of investigation. The PCR court also found Respondent was prejudiced because “these exhibits and these efforts of Ms. Zmroczek . . . show reasonable doubt that [Counsel] did not explore in the trial of [Respondent].” (App.pp.538–41). In so finding, the PCR court appears to have relied chiefly on comparing the outcome of Saxon’s trial to the outcome of Respondent’s trial, ignoring the proper standard for assessing claims of ineffective assistance of counsel. Applying the correct standard—whether Respondent has shown a “reasonable probability” that, but for Counsel’s omissions, the result of Respondent’s trial would have been different—it is clear that none of the additional evidence presented at the PCR hearing supports the PCR court’s grant of relief on this ground.

In a PCR action, the applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC. Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel's conduct so undermined the proper

functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that counsel’s performance was deficient. *Strickland*, 466 U.S. at 686; *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*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003); *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). The applicant must overcome this presumption to receive relief. *See Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 117–18, 386 S.E.2d at 625. “A reasonable

probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “The likelihood of a different result must be substantial, not just conceivable.” *Harrington*, 562 U.S. at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

The PCR court devoted much of its analysis on this issue, not to Counsel’s representation of Respondent, but to Ms. Zmroczek’s representation of Johnny Saxon. The PCR court found four specific instances where Ms. Zmroczek obtained information that Counsel either did not obtain or did not make use of at Respondent’s trial: body-worn camera footage from officers responding to the crime scene, in addition to the footage already disclosed in discovery; text messages sent to the victim’s phone “that could be considered threatening in nature”; Ms. Zmroczek’s own visit to the crime scene at night to gauge how dark it would have been on the night of the murder; and a map prepared by Ms. Zmroczek purporting to show the route taken by the getaway car and the locations of other people “supposedly involved in the crime.” (App.pp.538–41).

There are several serious flaws with the PCR court’s analysis. As an initial matter, the PCR court totally failed to consider the fact that Respondent and Saxon were not similarly situated defendants. The evidence against Respondent was far stronger than the evidence against Saxon:

Within seconds of the shooting, the State’s witness Kelly Ball testified she looked out the door of the Victim’s trailer and saw Respondent standing “eight to ten feet away” in the yard. (App.p.132, line 20). She testified she could see Respondent’s face for approximately fifteen seconds because he took several steps backward before turning around and running toward the getaway car. (App.p.132, line 24–p.133, line 6). Later, she was able to pick him out of a

photographic lineup. (App.pp.144–47; pp.291–92).

By contrast, Kelly Ball never claimed to have seen Johnny Saxon at the scene and candidly admitted she could not tell who else may have been inside the getaway car. (App.p.136, lines 1–3). At the PCR hearing, Ms. Zmroczek acknowledged that Ball testified during Johnny Saxon’s trial and expressly denied seeing Saxon at all on the night of the murder. (App.p.513, line 17–p.514, line 10). Ms. Zmroczek admitted that Saxon’s acquittal “absolutely” could have been due to the fact that the State’s only eye-witness to the crime expressly denied seeing Johnny Saxon at the scene. (App.p.514, lines 6–10).

Ball gave a description of the getaway vehicle to law enforcement. Officer Ashley who was driving along Highway 101, heard the description over his radio. (App.pp.213–14). He observed a vehicle matching the description, and he followed it to a residence on Jones Hill Road, where he and Deputy McMahan made contact with Respondent. (App.pp.214–19). Respondent admitted he had been driving the car, but he refused to say specifically where he had been. (App.pp.230–31). However, neither Ashley nor McMahan mentioned seeing Johnny Saxon in the car or at the house.

Finally, on the day after the murder, Antonio Morris found the victim’s discarded wallet lying on the side of the road at the intersection of Highway 101 and Pleasant View Drive. (App.pp.275–78). That intersection was more than eight miles from the crime scene, but less than one mile away from Respondent’s house; in addition, it was part of the same route that Ashley had observed Respondent taking the previous night. (App.p.216, lines 1–13; p.226; p.275; p.290). Nothing connected the location of the wallet with Johnny Saxon, however.

In fact, the only evidence implicating Johnny Saxon as a co-conspirator in the murder and armed robbery of the victim was the testimony of Toris Moore, who testified that Saxon had

accompanied Respondent and David Walker when the latter came to see her before the murder. (App.pp.109–10; p.112). Moore testified Walker told her they were planning to rob a drug dealer using Respondent’s gun, and the three men were riding in Respondent’s car. (App.pp.110–16). Although Moore said Saxon was with Walker and Respondent in the car, she did not testify to Saxon saying or doing anything during this interaction.

Clearly, the evidence against Respondent was far stronger than the evidence against Saxon. The sole eyewitness saw Respondent’s face for several seconds at the crime scene, picked him out of a lineup, and described his car to the police with enough specificity that Officer Ashley was able to follow a matching car to the house where Respondent was staying. The next day, the victim’s wallet, sans cash, was found near Respondent’s residence along the very same path that Ashley had followed Respondent’s vehicle the night before. Finally, the codefendant Walker told his niece that Respondent had provided the gun they were planning to use in the robbery. In light of all this evidence, Counsel faced a much different and more difficult task in defending Respondent than Ms. Zmroczek faced in defending Saxon. The specific actions taken by Ms. Zmroczek to defend her client, therefore, are totally irrelevant to the question of whether Counsel provided constitutionally adequate representation for Respondent.

The PCR court’s reliance on Ms. Zmroczek’s actions, as if her strategy provided a “checklist for judicial evaluation of attorney performance,” was not appropriate. *Strickland* 466 U.S. at 688. As the United States Supreme Court recognized in *Strickland*:

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689. Much less, therefore, should different attorneys be expected to defend *different* clients, with materially *different* cases, in the same way.

The PCR court’s order did not include any discussion of the major factual differences between Respondent’s case and Saxon’s case. The court’s approach was contrary to *Strickland*, which requires courts to “judge the reasonableness of counsel's challenged conduct *on the facts of the particular case*, viewed as of the time of counsel's conduct.” *Id.* at 690 (emphasis added).

In addition, Saxon was tried *after* Respondent. Ms. Zmroczek even testified, “I had the benefit of both co-defendants had already gone to trial. So I had trial transcripts as well. I had all of that.” (App.p.491, lines 17–19). Ms. Zmroczek had the advantage of already knowing the result of Respondent’s trial at the time she was preparing her strategy for Saxon’s defense—an advantage which obviously was not available to Counsel. “A fair assessment of attorney performance requires that every effort be made to eliminate the *distorting effects of hindsight*, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from *counsel's perspective at the time*.” *Id.* at 689 (emphasis added). The PCR court did not evaluate Counsel’s conduct based on Counsel’s perspective at the time of Respondent’s trial; rather, it erroneously relied on *Ms. Zmroczek’s* perspective at the time of *Saxon’s* trial. Ms. Zmroczek’s decisions were made “with the benefit of hindsight,” and should not be used as the rubric for evaluating Counsel’s conduct at the time he was preparing for Respondent’s trial. *Yarborough*, 540 U.S. at 6.

Because the PCR court failed to faithfully assess deficiency under the *Strickland* standard, it erred as a matter of law in finding that Counsel was ineffective. However, even if the PCR court had correctly evaluated the deficiency prong, it erred as a matter of law in finding that Respondent was prejudiced. Although the PCR court identified four specific items of evidence that Counsel failed to obtain, it did not apply the correct *Strickland* standard for assessing prejudice, and its

prejudice findings for each item were conclusory and totally unsupported by the evidence:

A. Additional Body-Worn Camera Footage

The PCR court’s order criticizes Counsel for not obtaining body-worn camera footage from additional officers who responded to the crime scene. However, the additional footage was essentially duplicative of the testimony given by the responding officers and by Kelly Ball. Counsel cannot have been deficient, nor can Applicant have been prejudiced, merely by the failure to present totally cumulative evidence at trial.¹

The only issue the PCR court mentions as being uniquely depicted on the additional body-worn camera footage is an unspecified “issue with the gun” that was found in the grass. (App.p.540). The PCR court does not explain this vague “issue,” but it appears to be a reference to Ms. Zmroczek’s testimony that one of the additional videos she obtained appeared—in Ms. Zmroczek’s opinion—to depict an officer picking up a gun at the scene of the crime and “wiping it off.” (App.p.504, line 21–p.506, line 4).² Ms. Zmroczek testified that she used that portion of the video to cross-examine the officer about his handling of the evidence. (App.p.505, lines 2–4).

¹ In a different section of the order, the PCR court claims the additional footage contains a statement from Ball that contradicts her later statements and is not consistent with the 911 call. (App.pp.541–42). The PCR court does not even bother to articulate what this “contradicting” statement is supposed to have been, much less explain how the allegedly inconsistent testimony might have prejudiced Respondent. The PCR court’s finding that Respondent was prejudiced is purely conclusory and not supported by the evidence. Moreover, as discussed below in Argument 2 of this Petition, Counsel devoted considerable effort to exposing purported inconsistencies between Ball’s initial statements to law enforcement and her testimony at trial. Ball was able to clarify her statements, and she also explained that any mistakes she initially made were due to her extreme emotional disturbance on the night of the murder. (App.p.158, lines 18–22).

² Bizarrely, this alleged interaction with the gun does not appear to be depicted in any of the videos actually presented to the PCR court. (Applicant’s Ex. #7). The PCR court’s reliance on this specific incident, which is not reflected in the videos, calls into question whether the court even *watched* the videos in question before issuing its order.

However, she admitted that the officer testified that he was simply racking the slide. (App.p.505, lines 4–11). At Respondent’s trial, Officer Taylor testified that it was department policy for weapons to be checked for ammunition and made safe before being placed into evidence. (App.p.207, lines 9–13).

The PCR court found prejudice because “the issue related to the gun in the grass” was “reasonable doubt and *could* have changed the outcome of [Respondent]’s trial.” (App.p.540) (emphasis added). This finding, in addition to being vague and conclusory, also applies the wrong legal standard. “It is not enough for the defendant to show that the errors had some conceivable effect upon the outcome of the proceeding.” *Strickland*, 466 U.S. at 693. The question is not whether the result of the proceeding “could have” been different, but whether “there is a *reasonable probability* that . . . the result of the proceeding *would* have been different.” *Id.* at 694 (emphasis added). “The likelihood of a different result must be substantial, not just conceivable.” *Harrington*, 562 U.S. at 112. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 291 (1999) (Although the lower court “was surely correct that there is a reasonable *possibility* that [additional evidence] might have produced a different result, . . . petitioner's burden is to establish a reasonable *probability* of a different result.”) (emphasis in original).

Evaluated under the proper standard, there is no support for any finding of prejudice on this ground. The mere possibility of pursuing additional cross-examination based on the body-worn camera videos is not sufficient to establish prejudice. *See Strickland*, 466 U.S. at 693 (The prejudice standard is *not* whether counsel’s alleged error “impaired the presentation of the defense”; such a standard would be “inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.”). Rather, the question is whether Respondent has shown a “reasonable probability” that additional

cross-examination would have changed the result of his trial—and the answer is, he has not. Had Counsel pursued this line of cross-examination, the officer would likely have given the same innocuous response he gave to Ms. Zmroczek: he was not “wiping” the gun but simply racking the slide to ensure it was safe, in accordance with department policy.

More importantly, the use of the gun in question was not a critical part of the State’s case. In fact, to the extent the identity of the shooter was even considered, all the evidence tended to point *away* from Respondent and *toward* his co-defendant, David Walker. At Respondent’s trial, the solicitor acknowledged that the State had no proof that Respondent was the person who actually fired the gun at the victim: “Now, can we prove to you that [Respondent] was the trigger man? No. We don’t have any eyewitnesses who can come in here and testify to that. . . . [W]e cannot prove that [Respondent] was in actual physical custody of that gun. We cannot prove to you that he’s the one who pulled the trigger.” (App.p.330, lines 9–17). Rather, the State argued Respondent was guilty based on the “hand of one, hand of all” doctrine. (App.p.331, lines 4–25; p.343, lines 4–7). Counsel then argued to the jury that the State had effectively admitted that David Walker, not Respondent, was the shooter: “[T]his prosecutor stood up in [his] opening statement and tell you he don’t know who shot [the victim,] he does know. They told him, David Lee Walker. . . . And we know [Respondent] didn’t shoot him. They tell you that.” (App.p.344, lines 2–5; p.347, lines 5–6).

This was an accomplice liability case. The identity of the trigger man was not dispositive of the issue of guilt. Moreover, any conceivable evidentiary issues related to the gun would not have affected the other substantial evidence of Respondent’s guilt: David Walker’s statement to Toris Moore implicating Respondent as a participant in the planned robbery; Kelly Ball’s identification of Respondent as the person she saw standing in the yard seconds after the shooting;

Officer Ashley's and Deputy McMahan's pursuit of the suspect vehicle, which Respondent admitted driving on the night of the murder; and the location of the stolen wallet. *Strickland* requires courts to "consider the totality of the evidence before the judge or jury," and specifically to consider all the facts that were "unaffected by the errors." *Strickland*, 466 U.S. at 695. The PCR court, however, did not discuss the impact of the "issue with the gun" on any of these facts.

B. Text messages sent to the victim's phone

The PCR court also found Respondent was prejudiced by Counsel's failure to obtain text messages from the victim's phone. The court's order vaguely states that "some text messages . . . could be considered threatening in nature to the victim in this case." (App.p.540). Again applying the incorrect prejudice standard, the PCR court found "these messages are reasonable doubt and could have changed the outcome of [Respondent's] trial." (App.p.540). The correct standard, of course, is whether Respondent has shown a *reasonable probability* that the text messages *would* have changed the outcome. *Strickland*, 466 U.S. at 694. Under that standard, the answer is clearly "No."

Ms. Zmroczek testified that she arranged for an expert to extract text messages from the victim's cell phone. (App.p.492, line 6–p.493, line 10). She pointed to three texts from the night of the murder, which she characterized as threatening. (Applicant's Ex. #1 and #2). The three texts at issue state:

9:22 PM: Hey this is teresa you dont have to lie if you with your lil ho kelly just be a man about it and tell me so dont be sacred love you

9:38 PM: You going down

10:07 PM: The trueth will set you free love you and sick of the games your playing with me

(Applicant's Ex. #1 and #2) [errors in original]. Clearly, none of these texts includes any express

or even implied threats of violence. Two of them even include the words “love you,” which are not words typically included in a death threat. The most that can be said about them is that they convey a tone of annoyance, but that falls far short of threatening violence. Nevertheless, Ms. Zmroczek maintained that the person who sent these messages—“Teresa”—was actually threatening the victim. (App.p.494, lines 6–23). On cross-examination, Ms. Zmroczek acknowledged that the “threat” was not plain from the text of the messages, but she believed it was “certainly something I think reasonable that a jury can consider either way.” (App.p.509, lines 11–20).

In effect, Ms. Zmroczek took the position that the texts could have supported an inference of third-party guilt. But the test for admissibility of “third-party guilt” evidence is strict:

[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have [no] other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. . . . [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534–35 (1941). Under South Carolina law, evidence which merely permits a “conjectural inference as to the commission of the crime by another” is not admissible. *Id.* The text messages in question do not even come close to establishing “such a train of facts and circumstances” as to clearly point out Teresa “as the guilty party.” Other than the absurd characterization of the three text messages above as “threats,” there is no evidence whatsoever that Teresa was the person who robbed and murdered the victim. Even if Counsel had obtained those text messages, they would have been inadmissible as a matter of law.

However, even if Counsel were to introduce the text messages at Respondent’s trial, their

effect on the outcome of the trial would have been nil. Ms. Zmroczek's theory of third-party guilt is impossible to reconcile with the facts of this case. David Walker was found at the scene of the crime, bleeding from a gunshot wound inflicted by the victim. The victim himself lived long enough to tell the police that Walker was the man who shot him and that the motive for the shooting was a robbery. Toris Moore testified that Walker was planning to rob the victim earlier that day, along with Respondent. The victim's wallet was stolen and found several miles away with most of the money removed, along the route that Respondent was seen driving shortly after the murder. Walker was ultimately convicted of murder and armed robbery. The idea that the shooting was actually perpetrated by this "Teresa," and that the motive was something other than armed robbery, is totally unbelievable, especially when the only evidence in support of that theory are three vaguely worded text messages.

Again, the PCR court failed to "consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. The PCR court's order does not even attempt to explain how Respondent's third-party guilt theory could possibly be reconciled with the rest of the evidence presented at trial.

C. Personal observations at the crime scene

The PCR court also found Counsel was ineffective for failing to go to the crime scene, as Ms. Zmroczek did, and to examine for himself the lack of visibility at night. The PCR court refers to Ms. Zmroczek's testimony that, "in her mind, there was no way Kelly Ball could have seen anyone *up on the hill or in the street*, let alone the person *driving the car*." (App.p.540) (emphasis added). This passage proves that both Ms. Zmroczek and the PCR court completely misunderstood the testimony given at Respondent's trial. Ball did not claim that she saw Respondent "up on the hill" or "in the street," and she expressly denied seeing anyone inside the car. (App.p.136, lines

1–3). On the contrary, she clearly testified that Respondent was only “eight to ten feet” away from her when she saw him, and the motion-sensor light was on. (App.p.132, lines 18–23). At that distance, Respondent would certainly have been close enough for Ball to make out his features by the light coming from the porch.³ The PCR court’s analysis of this issue is clearly based on a gross misunderstanding of Ball’s actual testimony.

In addition, the PCR court once again failed to apply the analysis mandated by *Strickland*. The order states that the lack of visibility at the crime scene was “reasonable doubt that [Counsel] did not explore in the trial of Mr. Wells.” (App.p.540). However, the proper standard is not whether counsel “explored” every possible argument that could have established “reasonable doubt,” but whether “there is a reasonable probability that . . . the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Furthermore, the PCR court once again failed to “consider the totality of the evidence before the judge or jury.” *Id.* at 695. Ball’s identification of Respondent was corroborated by Toris Moore’s testimony that Respondent was with Walker when the robbery was being planned, by Ashley and McMahan’s testimony that they followed a car matching the description given by Ball and discovered that it was being driven by Respondent, and by Morris and Cheek’s testimony that the stolen wallet was found within a mile of Respondent’s house along the route Respondent was driving on the night of the murder. Once again, the PCR court’s order omits to even mention any of this substantial corroborating evidence in its cursory prejudice analysis.

D. Map

³ Although the videos taken from the responding officers’ body-worn cameras are not high-quality, they clearly depict that the area near the porch and immediately in front of the trailer is illuminated by a porch light and two bright floodlights on either side of the trailer. (Applicant’s Ex. #7).

Finally, the PCR court notes that Ms. Zmroczek prepared a map that “showed the path the car that was there during the crime had taken and the locations of the other people supposedly involved in the crime.” (Applicant’s Ex. #6). However, there was no testimony presented at the evidentiary hearing explaining how Ms. Zmroczek came up with this map, how she determined the path supposedly taken by the car, or why her map should be deemed any more accurate or informative than the map used at Respondent’s trial. Nor does the PCR court’s order propose any such explanation; the PCR court simply announces its conclusory finding that the map showed “reasonable doubt that [Counsel] did not explore in the trial of Mr. Wells.” (App.p.540). Again, the PCR court erred in failing to apply the *Strickland* standard.

Applicant’s exhibit #6 inexplicably leaves out the entire Gray Court area, including Highway 101 and the streets leading to Respondent’s residence, from the purported “path” of the getaway car. This is totally inconsistent with the detailed testimony by Officer Ashley and Deputy McMahan regarding their pursuit of the suspect vehicle from Highway 101 onto Pleasant View Drive and, ultimately, to the house where Respondent was staying. The rationale for this bizarre omission is entirely absent from the record and from the PCR court’s order. There is simply no evidence in the record from which to conclude that this map would have helped Respondent in any way at trial.

The section of the PCR court’s order finding Counsel’s investigation ineffective packs an enormous quantity of errors into a few paragraphs. The order fails to faithfully apply the *Strickland* standard to either deficiency or prejudice, presents conclusory findings under an incorrect legal standard, and ignores or outright contradicts the evidence and records before it. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the PCR court’s order granting relief on this ground.

2. **The PCR court erred in finding Counsel ineffective for not impeaching Kelly Ball with purported inconsistencies between her statements on the body-worn camera videos and her trial testimony or with evidence of her history of treatment for bipolar disorder, where the record reflects Counsel thoroughly attacked Ball’s credibility in multiple ways, where the PCR court failed to identify any inconsistencies in Ball’s testimony that Counsel allegedly failed to explore, where no evidence suggests bipolar disorder is probative of truthfulness, and where the PCR court failed to apply to correct *Strickland* standard for evaluating ineffective assistance.**

In its order, the PCR court also finds Counsel was ineffective for failing to cross-examine Kelly Ball based on her mental health records and drug use. (App.pp.541–42). The PCR court relies on Ms. Zmroczek’s testimony about her own investigation into Ball’s mental health history, explaining that Ms. Zmroczek obtained “mental health records from the ER and Marshall Pickens.” (App.p.541). The PCR court then recites—as if it were evidence—Ms. Zmroczek’s personal “impression . . . that Ms. Ball was very mentally ill and self-medicated as well as being bi-polar.” (App.p.541). The court repeats Ms. Zmroczek’s testimony that “her goal in cross-examining Ms. Ball [was] to show that Ms. Ball was a drug addict and unstable.” (App.p.542). The court criticizes Counsel for failing to obtain Ball’s mental health records so that his cross-examination of her might have been more thorough. (App.p.542).

Again, the PCR court erred in placing undue emphasis on Ms. Zmroczek’s personal beliefs and the strategic choices she made during her representation of Johnny Saxon. As already explained, there is no constitutional requirement that, just because Ms. Zmroczek chose to pursue a certain cross-examination strategy, Counsel had to do so as well.⁴ “There are countless ways to

⁴ Counsel testified that he was personally convinced—based on Respondent’s steadfast refusal to give Counsel any information about his whereabouts on the night in question—that Respondent had been present during the crime. (App.p.517, lines 14–22; p.519, line 21–p.520, line 7; p.523 lines 17–19). Accordingly, Counsel testified he had to be careful in cross-examining Ball because “this is kind of a slippery slope . . . to impeach her on stuff that I know not to be true . . . that’s [a] hard thing to do.” (App.p.523, lines 17–22). The PCR court’s order expressly acknowledges Counsel’s belief that trying to contradict Kelly Ball concerning Respondent’s presence at the crime

provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 688.

Although Counsel did not focus his questioning of Kelly Ball on her mental health history, he did cross-examine her and successfully elicited testimony from her on several important points, including the fact that she had tried to conceal the victim’s gun under the bed before the police arrived; the fact that, according to Ball, the victim went outside willingly to meet Respondent and Walker just before the shooting; the fact that she initially described the man she saw standing in the yard as resembling somebody she knew named “Ty”; the fact that her description of the suspect as a “dark-skinned, large man” more closely describes Ty than it does Respondent; the fact that Ty was involved in the victim’s drug dealing business; the fact that drug dealing is an inherently dangerous occupation; the fact that drug dealers often get in arguments and carry weapons; the fact that the victim knew “tons” of dangerous guys to buy “dope” from; the fact that “it’s not a mystery” the victim was shot by David Walker; the fact that she did not recall ever being shown a photo lineup with Ty in it; the fact that she never mentioned hearing anything about a robbery in her first statement to police; the fact that she told police the car was brown, when the other witnesses described it as gray, silver, or blue; and the fact that she could not see who was in the car or how many people were in the car. (App.pp.148–62). In addition, Ball had already testified on direct examination that she used drugs. (App.p.121, lines 19–25).

The PCR court made no effort to explain how merely bringing up Ball’s history of treatment for bipolar disorder would have meaningfully increased the strength of Counsel’s

scene would be “risky.” (App.p.541). However, on the very next page, the court’s order states that Counsel “was not able to articulate any strategic decisions on the way he cross-examined Ms. Ball.” (App.p.542). The PCR court’s analysis of this issue is internally inconsistent, in addition to its other flaws.

already extensive cross-examination. Ball’s bipolar disorder does not have any apparent relevance to her credibility. *C.f. State v. Galloway*, 443 S.C. 229, 240, 904 S.E.2d 866, 872 (2024) (holding testimony about a victim’s schizoaffective disorder “gives the jury nothing it can use to determine this victim's credibility other than to guess”). Nor does her bipolar disorder have anything to do with any of the material facts to which she testified. *C.f. id.* (Unless victim’s schizoaffective disorder diagnosis is connected “to the facts of a particular case, the jury has no basis on which to use the knowledge except to speculate whether it could have played a role in the case.”).

The PCR court also states that Ball “gave multiple inconsistent statements,” that her testimony “did not conform to the evidence,” and that her statements on the body-worn camera footage contradicted her later written statements and her testimony at trial. (App.pp.541–42). However, the court does not provide *any* specific examples of contradictions or inconsistencies. As already shown, Counsel successfully exposed numerous minor inconsistencies and contradictions between Ball’s own statements and the other evidence at trial; the court’s order does not explain what other purported inconsistencies Counsel should have pressed her on.

The PCR court then states that, had Counsel obtained Ball’s mental health records and the additional body-worn camera footage, his “cross-examination of Ms. Ball would have been more thorough and *possibly* changed the outcome of [Respondent’s] trial.” At the risk of becoming tedious, it bears repeating once more that this is *not* the appropriate standard for evaluating prejudice under *Strickland*. Respondent had the burden of proving a *reasonable probability* of a different outcome, not a mere *possibility*. *Strickland*, 466 U.S. at 694. The PCR court once again applied the wrong standard.

Finally, the PCR court made no effort to “consider the totality of the evidence before the judge or jury” in assessing the impact of Counsel’s cross-examination on Ball’s testimony. *Id.* at

695. As already discussed, Ball's identification of Respondent is strongly corroborated by the other evidence at trial, all of which pointed toward Respondent's presence at the scene and participation in the robbery. Furthermore, at Respondent's trial, Ball was able to explain away the minor inconsistencies pointed out by Counsel as resulting from the extreme stress she was experiencing at the time of the crime, as well as the fact that she saw Respondent and his car under a mercury light, which caused colors to appear differently than they would appear under natural light. Any other supposed inconsistencies—which, again, the PCR court did not bother to articulate—would likely have been explained away for the same reasons.

Accordingly, Petitioner respectfully submits that the PCR court failed to faithfully apply the *Strickland* standard regarding either deficiency or prejudice, and the court's findings are purely conclusory and unsupported by the evidence. This Court, therefore, should grant the petition for a writ of certiorari and reverse the PCR court's order granting relief on this ground.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to grant the Petition for a Writ of Certiorari and to reverse the decision of the PCR court.

Respectfully submitted,

ALAN WILSON
Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
S.C. Bar No. 104174
Assistant Attorney General

By: s/Zachary W. Jones
ATTORNEYS FOR PETITIONER

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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