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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Richland County
Honorable L. Casey Manning, Trial Judge
Honorable William A. McKinnon, Post-Conviction Relief Judge

Appellate Case No. 2025–001597

Ricardo L. Middleton, #381526,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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- I. Pursuant to the law-of-the-case doctrine, Petitioner's challenge to the propriety of the post-conviction relief court's denying the testimony of Marquez Johnson was newly or after-discovered evidence cannot be successful on appeal as a matter of law because Petitioner has only raised challenges to some of the multiple stand-alone grounds upon which the ruling was based, which means the unchallenged ground of untimeliness has now become the law of the case regardless of whether it was right or wrong. Furthermore, notwithstanding the applicability of the law-of-the-case doctrine, the post-conviction relief court properly determined Petitioner failed to establish that the testimony of Marquez Johnson was newly discovered evidence, where Johnson chose not to testify at Petitioner's trial, and the information he testified to at the evidentiary hearing was not newly discovered evidence, but rather just newly available to Petitioner now.
- II. Whether the post-conviction relief court properly denied relief and found that the affidavit of Natasha Coad was not newly or after-discovered evidence, nor suppressed, and Trial Counsel extensively cross-examined her, and there was no reasonable probability of a different result should the affidavit have been available at trial?
- III. Whether the post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's failure to object to the references to the motorcycle clubs as gangs where it was admissible to prove motive, and Trial Counsel's strategic decision was reasonable, and no reasonable probability of a different result exists?
- IV. Whether the post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's failure to object to the testimony of Investigator Jordan as it was permissible lay witness testimony of which he had personal knowledge as an undercover member of the Gang Task Force?
- V. Whether the post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's closing statement regarding the failure to testify in England, which is held against a defendant where Trial Counsel provided a strategic reason for that comment?
- VI. Whether the post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's failure to request a self-defense charge where Petitioner's defense was that it was not him, and he was not present at the shooting?
- VII. Whether the post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective, where the post-conviction relief court found Trial Counsel's testimony credible that Petitioner did not want to testify, and the record reflects that Trial Counsel presented a defense, and Jayrell Johnson would not have been helpful to Petitioner's case?

STATEMENT OF THE CASE

Petitioner Ricardo L. Middleton was indicted at the October 2017 term of the Richland County Grand Jury for two counts of Murder (2017-GS-40-5854; -5855) and one count of Attempted Murder (2017-GS-40-5852). Applicant was represented by Trial Counsel. Fifth Circuit Assistant Solicitors Lamar J. Fyall, Jeremiah J. Shellenberg, and John W. Steadman prosecuted the case. Petitioner proceeded to a jury trial on August 19–22, 2019, before the Honorable L. Casey Manning. The jury convicted Applicant of the murder of Sydni Collins, not guilty of the attempted murder of Ricky Montgomery, and could not decide guilt as to the murder of Aaron Collins. His sentencing was deferred. On September 26, 2019, Judge Manning sentenced Applicant to serve life imprisonment. Applicant renewed his motion and objections from trial and made a Motion for a New Trial. On October 3, 2019, Applicant prematurely filed a notice of appeal. On November 13, 2019, Applicant moved to dismiss the appeal as premature because his post-trial motions had not yet been resolved. The South Carolina Court of Appeals granted Applicant's Motion to Dismiss the appeal as premature on January 3, 2020. The Remittitur was returned to the lower court on January 24, 2020. On February 21, 2020. Judge Manning denied Applicant's motion for a new trial.

Applicant filed a timely Notice of Appeal. On December 1, 2020, Applicant moved to withdraw his direct appeal through counsel, C. Rauch Wise, Esquire, so that he could proceed with a PCR action. On December 21, 2020, Applicant filed a signed affidavit stating he was advised of the pros and cons of continuing the appeal in his case, that based on discussions with counsel, he believed it was in his best interest to proceed with PCR, and that he understood that he would not be able to raise direct appeal issues on PCR. The Remittitur was returned to the lower court on January 27, 2021.

Petitioner filed his post-conviction relief application on April 16, 2021. On September 26, 2024, an evidentiary hearing was convened before the Honorable William A. McKinnon via the Webex Virtual Courtroom. Petitioner was present and represented by C. Rauch Wise, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General D. Russell Barlow, II. Petitioner testified on his own behalf and called Marquez Johnson. Respondent called Tivis C. Sutherland, IV, Esquire, and Lamar J. Fyall, Esquire. At the end of the evidentiary hearing, Judge McKinnon requested proposed orders from both parties. On July 18, 2025, Judge McKinnon issued the order denying Petitioner's application for post-conviction relief.

This petition follows.

STANDARD OF REVIEW

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

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [defective] as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. Id. at 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

ARGUMENT

- I. Pursuant to the law-of-the-case doctrine, Petitioner's challenge to the propriety of the post-conviction relief court's denying the testimony of Marquez Johnson was newly or after-discovered evidence cannot be successful on appeal as a matter of law because Petitioner has only raised challenges to some of the multiple stand-alone grounds upon which the ruling was based, which means the unchallenged ground of untimeliness has now become the law of the case regardless of whether it was right or wrong. Furthermore, notwithstanding the applicability of the law-of-the-case doctrine, the post-conviction relief court properly determined Petitioner failed to establish that the testimony of Marquez Johnson was newly discovered evidence, where Johnson chose not to testify at Petitioner's trial, and the information he testified to at the evidentiary hearing was not newly discovered evidence, but rather just newly available to Petitioner now.

On appeal, Petitioner first contends that the post-conviction relief court erred in denying a new trial based on the testimony of co-defendant Marquez Johnson (Marquez), which Petitioner now characterizes as newly discovered evidence supporting a self-defense claim. This argument fails at the outset. The post-conviction relief court correctly found that Marquez's testimony was not "newly discovered" under the five-factor test of Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993). Marquez's Stand-Your-Ground immunity order was entered in December 2019, which was more than sixteen months before Petitioner filed his post-conviction relief application, and his account at the evidentiary hearing was merely cumulative of the version of events already presented at trial. The post-conviction relief court rejected the claim on multiple independent grounds, each of which is amply supported by the record. This Court should deny certiorari to this issue.

Pursuant to the law-of-the-case doctrine, a ruling becomes the law of the case regardless of whether it is right or wrong when it is not appealed. State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012). In light of that doctrine, a petitioner is necessarily required to appeal *all* the grounds upon which a ruling is based when it is based on multiple independent grounds. State v.

Hicks, 387 S.C. 378, 379, 692 S.E.2d 919, 920 (2010). Significantly, "should the appealing party fail to raise all of the grounds upon which a [circuit court judge]'s decision was based, those unappealed findings—whether correct or not—become the law of the case." Dreher v. S.C. Dep't of Health & Env't Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015). Therefore, when a petitioner only *partially* appeals a circuit court judge's ruling based on more than one ground, the ruling automatically must be affirmed on appeal regardless of its actual correctness. Hicks, 387 S.C. at 379, 692 S.E.2d at 920; see Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.").

In the case *sub judice*, Petitioner contends on appeal that the post-conviction relief judge erred in finding the testimony of Marquez Johnson (Marquez) was not newly or after-discovered evidence.¹ In raising that particular contention, Petitioner asserts the post-conviction relief judge erred in finding that he had failed multiple Clark factors. (PWC p. 12). Petitioner then attacks the propriety of that ruling *exclusively* on the basis that he met all of the Clark factors. (PWC pp. 11–13). Importantly, though, the post-conviction relief judge's ruling on this matter was not based exclusively on a finding that Petitioner's allegation failed multiple Clark factors. Instead, in declining to grant post-conviction relief on this matter as newly or after-discovered evidence, the

¹ Marquez's Stand-Your-Ground immunity order was filed on December 19, 2019, more than sixteen months before Petitioner filed his post-conviction relief application on April 16, 2021. (App'x p. 748). Under the discovery rule, post-conviction relief claims based on newly or after-discovered facts must be filed within one year after the facts "could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C). The post-conviction relief court held that Marquez's testimony "could have been discovered through reasonable diligence in December 2019." Id. Petitioner's brief ignores this deadline entirely and offers no explanation for the delay. This alone defeats the claim. See Clark, 315 S.C. at 387-88.

post-conviction relief judge *also* analyzed the timeliness issue of whether Petitioner had timely asserted this allegation. Indeed, the post-conviction relief judge found that this allegation was not timely raised to the post-conviction relief court.² (App'x p. 748).

Under such circumstances, the ruling denying Petitioner post-conviction relief on the basis of Marquez's testimony as newly or after-discovered evidence unquestionably rests on more than just a finding of whether or not he met the Clark factors. By contrast, Petitioner's appellate challenge to that ruling has been raised solely on the Clark factors. Because Petitioner did not raise the issue of timeliness in this appeal, the post-conviction relief judge's finding that it was untimely is the law of the case and cannot be disturbed on appeal. See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a trial court's decision is based

² The post-conviction relief court expressly assumed *arguendo* that the claim was timely and still found that the evidence failed to satisfy factors (1), (3), (4), and (5) of the Clark test. (App'x p. 749). Under Clark factor 3, the post-conviction relief court found the evidence was not newly or after-discovered and could have been found with due diligence. Under Clark factors 4 and 5, the post-conviction relief court found the evidence merely cumulative and not material. Marquez's post-conviction relief testimony described the exact same sequence of events already presented at trial, only from his perspective. Critically, Marquez testified that he *ducked his head before the shots were fired* and only looked up *after* Sydni Collins was already on the ground. (App'x pp. 18–19; 748). Marquez never saw who fired first and could not corroborate Petitioner's claim that he fired in response to Sydni firing. The post-conviction relief court found this "merely cumulative" and "not material to Applicant's guilt or innocence." (App'x p. 748). Under Clark factor 1, the post-conviction relief court determined that there was no reasonable probability of a different result had the evidence been presented at trial. Marquez's testimony did not change the sequence of events or establish that Petitioner acted in lawful self-defense or defense of another. Petitioner also claims Marquez's testimony would have (a) negated the "hand of one is the hand of all" theory and (b) made Petitioner's version "highly probable." (PWC pp. 11–12). Both assertions are refuted by the record, where 1) the State never relied on accomplice liability for the Sydni Collins count, and no evidence at trial or in the post-conviction relief hearing ever suggested Petitioner and Marquez had a pre-arranged plan regarding Sydni Collins; 2) Marquez never testified that he saw Sydni with a gun in her hand, that he saw her draw before the shots, or that Sydni fired first, and his account actually undercuts Petitioner's self-defense claim because Johnson could not see the critical moment; and 3) the Glock was recovered in Sydni's hand and had been fired (App'x pp. 237, 492), but that fact was already before the jury. Marquez added nothing new.

on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."), abrogated on other grounds by Repko v. County of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018).

Accordingly, Petitioner has failed to raise the issue of timeliness that was expressly ruled on by the post-conviction relief court, and this becomes the law of the case. For all the foregoing reasons, the Court should deny the petition for writ of certiorari as to Question I.

II. The post-conviction relief court properly denied relief and found that the affidavit of Natasha Coad was not newly or after-discovered evidence, nor suppressed, and Trial Counsel extensively cross-examined her, and there was no reasonable probability of a different result should the affidavit have been available at trial.

Next, Petitioner avers that the post-conviction relief court erred in failing to rule that the affidavit of Natasha Coad, which offered a version of the facts different from her trial testimony, constituted after-discovered evidence that entitled Petitioner to a new trial. Notably, Petitioner concedes that Coad's affidavit does not meet the requirement to be considered after-discovered evidence, but contends this Court should still consider it "in conjunction with the other after-discovered evidence." Respondent agrees with Petitioner to the extent that Coad's statement does not meet the standard for newly or after-discovered evidence as it is merely impeaching; however, as argued in Issue #I, the other newly or after-discovered evidence of Marquez's testimony is newly available, and not newly or after-discovered evidence. Because Coad's affidavit fails the test for newly or after-discovered evidence, the post-conviction relief court properly found Petitioner was not entitled to a new trial on this basis. Furthermore, the post-conviction relief court found Trial Counsel extensively cross-examined Coad to impeach her, and there was no reasonable probability of a different outcome at trial had the affidavit been available. Accordingly, this Court should uphold the post-conviction relief court's findings and deny certiorari on this issue.

See Clark, Hayden, Caskey, supra.

As an initial matter, Petitioner concedes that Coad's affidavit does not constitute newly or after-discovered evidence, and Respondent agrees that, based on the factors necessary to be considered such evidence, at the very least, the Coad affidavit fails the Clark factor five as it was merely impeaching.³ Our jurisprudence is clear that the test for newly or after-discovered evidence is guided by the five Clark factors, and failing one of them ends the inquiry.

Nevertheless, Coad's civil affidavit was filed and became a public record on April 22, 2020—more than seven months after Petitioner's August 19-22, 2019, trial. (App'x pp. 710, n.3; 85). Petitioner himself testified he first learned of it only after conviction, when served in the civil suit. (App'x pp. 37–39). The post-conviction relief court found that Trial Counsel credibly testified he had no knowledge of, and no access to, the document. (App'x p. 85). The post-conviction relief court correctly held it could not qualify as newly or after-discovered evidence for that reason alone. (App'x p. 710).

Additionally, the post-conviction relief court expressly found that Trial Counsel impeached Coad with three separate prior statements she gave to law enforcement. (App'x pp. 334–344; 708). Trial Counsel highlighted those inconsistencies in both opening and closing arguments. (App'x pp. 60–61; 223–227; 614). The post-conviction relief court credited this testimony and found Petitioner failed to overcome the "strong presumption" of competent representation. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 582 (2007); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Critically, the civil affidavit is largely consistent with Coad's trial testimony. (App'x pp. 710, n.3).

³ In her affidavit, Coad stated she witnessed a shooting, that one of the shooters exited the vehicle, the shooter pistol-whipped Montgomery, and Montgomery fell to the ground, and the motorcycle fell on top of him. (App'x pp. 752–753). This is consistent with Coad's trial testimony (App'x pp. 325–331). However, in her affidavit, she stated that the car door struck Montgomery's motorbike, causing it to fall. (App'x pp. 752–753).

The only minor difference (how Ricky Montgomery's motorcycle fell) does not alter the core facts: Petitioner exited a vehicle and opened fire. Trial Counsel cannot be deemed deficient for failing to use a document that (a) did not exist at the time of trial and (b) would not have materially changed the cross-examination.

Petitioner cites Riddle v. Ozment, 369 S.C. 39, 631 S.E.2d 70 (2006) and Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999) for the proposition that withheld impeaching evidence can require a new trial. Those cases are inapposite. Both involved Brady⁴ material that the State possessed *before* trial. Here, the affidavit did not exist and was not publicly available until *after* the trial. Petitioner expressly concedes: "No evidence exists that the State knew of this affidavit." (PWC p. 13, n.4), and Solicitor Fyall testified that the State had no involvement in the civil suit. Simply put, there is no suppression. See Strickler v. Greene, 527 U.S. 263 (1999) (no Brady violation absent possession by the State).

Turning to Petitioner's fallback argument—that the Coad affidavit should be considered "in conjunction with" Marquez's testimony (PWC p. 14)—fails for the reasons set forth in the response to Question I. Marquez's testimony was properly rejected as cumulative and non-material. Adding an additional impeachment tool that (a) post-dates the trial and (b) is largely consistent with Coad's account does not create a "reasonable probability" of a different outcome. While Trial Counsel described the case as "close," the post-conviction relief court correctly found that neither the Coad affidavit nor its combination with Marquez's testimony undermines confidence in the verdict. The PCR judge, who presided over the full evidentiary hearing, made explicit credibility findings and detailed factual conclusions. Those findings are entitled to deference. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

⁴ Brady v. Maryland, 373 U.S. 83 (1963).

For the foregoing reasons, the Court should deny the petition for writ of certiorari as to Question II.

III. The post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's failure to object to the references to the motorcycle clubs as gangs where it was admissible to prove motive, and Trial Counsel's strategic decision was reasonable, and no reasonable probability of a different result exists.

In his third issue, Petitioner avers that the post-conviction relief court erred in finding that Trial Counsel's representation was not constitutionally ineffective for failing to object to references to the motorcycle clubs as gangs or outlaw clubs, because there was no evidence to establish such facts. However, the post-conviction relief court properly found that the evidence was admissible to prove motive under Rule 404(b) and 403, SCRE, and any objection would likely not have been successful. Accordingly, this Court should uphold the post-conviction relief court's findings and deny certiorari on this issue.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d

1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

In general, character evidence is not admissible to prove that a defendant acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. However, such evidence can be admissible if it serves a legitimate purpose, such as proving "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

If . . . the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct . . . then the evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Johnson v. State, 433 S.C. 550, 556, 860 S.E.2d 696, 699 (2021) (citing Rule 403, SCRE).

"Logically relevant gang evidence" can be admitted to prove motive and intent. Johnson v. State, 433 S.C. at 557 ("The trial court was well within its discretion in finding this evidence was logically relevant to prove criminal conspiracy and accessory before the fact of murder."); See Armstrong v. State, 310 Ga. 598, 852 S.E.2d 824 (2020) ("As we concluded in Worthen, here 'the

prosecutorial need for the other acts evidence showing gang membership was high' because, without it, it is unclear what motive Armstrong would have had to shoot Parrish in a crowded park merely because Parrish was in a dispute with Worthen."").

Here, the post-conviction relief court correctly held gang-related evidence is admissible when it proves "motive, identity, ... or intent." Rule 404(b), SCRE; Johnson v. State, *supra*. The State's theory was that the shooting arose from a dispute between the Thunderguards (Petitioner's "One Percent" club) and the Outcast club (the Collinses). The post-conviction relief court found Solicitor Fyall credibly testified this motive explained an otherwise "inexplicable and random shooting." (App'x p. 101; pp. 723–724). Notably, the post-conviction relief court explicitly found that a pretrial motion to suppress "likely would not have been successful, as gang testimony was necessary to prove motive." (App'x p. 723). Petitioner's own witnesses, including Marquez, described the clubs as "One Percent" clubs—terms the clubs themselves use. (App'x pp. 20–21; pp. 52–53).

Additionally, the post-conviction relief court highlighted that the word "club" was used 147 times versus only 14 references to "gang" (only 9 referring to "biker gang"). (App'x p. 724). This further underscores the post-conviction relief court's finding that the limited, contextual use was far more probative than prejudicial. Cf. State v. Robinson, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023) (distinguishable where the gang evidence had no relevance to motive; here it directly explained the confrontation). Also, the post-conviction relief court found that Trial Counsel strategically addressed the issue as "the elephant in the room" rather than ignoring it. (App'x p. 62; pp. 87–88; p. 723). Trial Counsel testified that he discussed it in opening to confront the obvious context and used the term sparingly. (App'x p. 70). While Trial Counsel testified to hindsight regret, that does not control; performance is judged without the "benefit of hindsight."

Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). Thus, the post-conviction relief court correctly refused to second-guess this classic tactical choice. Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005).

Turning to Petitioner's misplaced reliance on Vail v. State,⁵ there, the Vail court was dealing with inadmissible testimony. Here, the complained-of evidence was correctly found to be admissible by the post-conviction relief court. Because the evidence was admissible, counsel's failure to object cannot constitute deficient performance or prejudice. See State v. Hutchinson, 215 W. Va. 313, 323, 599 S.E.2d 736, 746 (2004) (citing Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite.")).

For the foregoing reasons, the Court should deny the petition for writ of certiorari as to Question III.

IV. The post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's failure to object to the testimony of Investigator Jordan as it was permissible lay witness testimony of which he had personal knowledge as an undercover member of the Gang Task Force.

In his fourth issue, Petitioner argues that the post-conviction relief court erred in finding Trial Counsel's representation was not constitutionally ineffective where he failed to object to the testimony of Investigator Jordan (Jordan) as it was lay opinion testimony and not admissible under Rule 701, SCRE. However, the post-conviction relief court properly rejected Petitioner's claim that Trial Counsel was ineffective for failing to object to Jordan's brief testimony about "One Percent biker culture" and witnesses' reluctance to cooperate with police. The post-conviction

⁵ 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013)

relief court correctly held the testimony was admissible lay opinion under Rule 701, SCRE, where the lay opinion testimony is (a) rationally based on the witness's perception, (b) helpful to understanding the witness's testimony or a fact in issue, and (c) does not require specialized knowledge. The post-conviction relief court correctly found Jordan's statements satisfied all three requirements. This Court should deny certiorari to this issue.

"If the witness is not testifying as an expert, the witness' testimony in the form of opinions or influences is limited to those opinions or influences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Rule 701, SCRE. A lay witness's testimony based on perceptions and interactions is admissible, as it does not require specialized knowledge, skill, experience, or training. See Huffman v. Sunshine Recycling, LLC, 426 S.C. 262, 826 S.E.2d 609 (2019) (Officer's testimony regarding employee's communications with law enforcement concerning his sense of urgency about a criminal investigation into stolen property from the electric utility company, could not be excluded on basis it constituted expert testimony, as the testimony was based on officer's perceptions of their interactions with employee, and did not require special knowledge, skill, experience, or training.).

Here, Jordan testified from his personal investigative experience: he attended the Thunderguard anniversary party in a covert capacity (as part of the Gang Unit) for officer safety and retaliation prevention; he explained that "One Percent biker culture" frowns on cooperating with police; and Ronnie Scott (Scott) eventually admitted seeing Petitioner⁶ fire. (App'x pp. 544–

⁶ Jordan's testimony was that Scott admitted that he saw "Tiptoe" shoot. Tiptoe is Petitioner's nickname. (App'x pp. 546–547). Petitioner initially denied that his nickname was Tiptoe, but later confirmed it. (App'x p. 431).

546). This directly explained Jordan's investigative steps and why Scott initially minimized his account. The post-conviction relief court found it was based on "his personal knowledge ... and how his investigation progressed" and "did not stray into the realm of expert testimony." (Court's Findings, p. 4). The same rationale applies to the brief follow-up question about witnesses appearing in court. This was not "vouching" for Scott's credibility (*cf. Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016), which involved prosecutorial vouching), nor was it expert opinion. It was a contextual narrative explaining the witness's reluctance—identical to the testimony already given by Ricky Montgomery (Montgomery). (App'x pp. 745–746).

Turning to Petitioner's misplaced reliance on *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010) in support of his claim. That case involved an agent interpreting recorded calls based on specialized training, not a lead investigator explaining his own case-specific interactions. However, assuming *arguendo* Jordan's testimony was inadmissible, Jordan's testimony was cumulative to that which Montgomery had already testified. (App'x pp. 390–403).

Furthermore, the post-conviction relief court credited Trial Counsel's testimony that he strategically chose not to object: the "gang"/"One Percent" culture issue was the "elephant in the room," Montgomery had already covered it, and objecting would have made Trial Counsel "look like a jerk" to the jury. (App'x pp. 77–79; pp. 87–88; pp. 744–745). Trial Counsel's on-the-spot tactical decisions are "quintessential" strategy and "very seldom" deficient. *United States v. Nguyen*, 379 Fed.Appx 177, 181 (3rd Cir. 2010). Hindsight regret does not control. *Mazzell v. Evatt*, *supra*. Here, the post-conviction relief court properly refused to second-guess this judgment.

For the foregoing reasons, the Court should deny the petition for writ of certiorari as to Question IV.

V. The post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's closing statement regarding the failure to testify in England, which is held against a defendant where Trial Counsel provided a strategic reason for that comment.

In his fifth issue, Petitioner asserts that the post-conviction relief court erred in finding that Trial Counsel's representation was not constitutionally ineffective, where, in closing argument, Trial Counsel stated that, in England, failure to testify is held against a defendant. However, the post-conviction relief court properly rejected Petitioner's claim for the single, brief reference in closing argument contrasting the U.S. right to silence with the practice in the U.K. The post-conviction relief court correctly found that the comment was a reasonable strategic attempt to emphasize the strength of the U.S. constitutional protections and determined that Petitioner failed both Strickland prongs. The ruling is supported by the trial transcript, the standard jury instruction given, and Trial Counsel's credible post-conviction relief testimony. This Court should deny certiorari to this issue.

In closing, Trial Counsel stated:

"You'll hear a jury instruction: you don't take it against him that he doesn't testify. Anybody who's seen—and speaking of TV, one thing that is like TV, you do have the right to remain silent. You do not have to talk to police officers, and you'll receive an instruction on that. And speaking of our system being the worst except for all the others, in the United Kingdom, the country that we had the revolution from and broke away from, if you remain silent, they hold it against you in court."

(App'x pp. 608–609).

At the evidentiary hearing, Trial Counsel explained that this was intentional: he wanted to highlight the "distinction between the way we treat each other and the way other countries treat each other" as an "elevated thing," using a Winston Churchill quote to frame the U.S. system favorably and underscore the constitutional right to silence. (App'x pp. 81–82). The comment directly previewed and reinforced the trial court's standard instruction, which emphatically told

the jury not to consider Petitioner's decision not to testify "in any manner whatsoever." (App'x p. 627). The post-conviction relief court credited this testimony and found Trial Counsel was "preemptively explain[ing] this to the jury to paint Applicant's decision not to testify in the best light possible." (App'x p. 716). Strategic choices in closing argument—especially contextual references to constitutional rights—are "quintessential" trial strategy entitled to deference. See Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003) (per curiam) (counsel's tactical decisions in closing are "virtually unchallengeable"). Trial Counsel's hindsight acknowledgment that it "could have been a bad idea" does not establish a deficiency. Mazzell v. Evatt, *supra*.

Petitioner cites no South Carolina authority holding such a comparative remark improper. The out-of-state cases he relies on People v. Wilson, 392 Ill. App. 3d 189 (2009) and Mitchell v. State, 300 Or. App. 504 (2019) are distinguishable: one involved the complete absence of any closing argument, the other a wholly deficient overall summation. Here, Trial Counsel delivered a full, vigorous closing that attacked the State's evidence and emphasized their defense theory of misidentification. The post-conviction relief court properly found that Trial Counsel's decision to open closing by contrasting our legal system with less-protective foreign systems was a reasonable tactical choice. The post-conviction relief court correctly held that even if it was not "the best way," it did not fall below prevailing professional norms. (App'x p. 717).

Furthermore, the comment was a few sentences in a lengthy closing, immediately followed by the court's clear, emphatic instruction that the jury must not consider the decision not to testify "in any manner whatsoever" and "should not even be discussed in the jury room." (App'x p. 627). Thus, there is no reasonable probability that the outcome would have differed. Strickland, 466 U.S. at 694. Petitioner's speculation that the jury might have viewed the U.K. comparison negatively is unsupported; the remark actually reinforced the superiority of U.S. protections. The

post-conviction relief court correctly found no deficiency and no prejudice, and the record supports that conclusion. (App'x p. 717).

For the foregoing reasons, the Court should deny the petition for writ of certiorari as to Question V.

VI. The post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective based on Trial Counsel's failure to request a self-defense charge where Petitioner's defense was that it was not him, and he was not present at the shooting.

In his sixth issue, Petitioner contends that the post-conviction relief court erred in finding Trial Counsel's representation was not constitutionally ineffective where Trial Counsel did not request a self-defense jury charge. However, the post-conviction relief court properly found that Petitioner failed to meet his burden of proving both Strickland prongs, as a request for self-defense was inconsistent with Petitioner's own statements and with his discussions with Trial Counsel. This Court should deny certiorari to this issue.

A defendant must establish four things in asserting self-defense:

- (1) First, the defendant must be without fault in bringing on the difficulty.
- (2) Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger.
- (3) Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and
- (4) Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (providing suggested self-defense jury instructions where the case calls for a self-defense charge).

The post-conviction relief court found that Trial Counsel credibly testified that Petitioner never claimed he was at the shooting or acted in self-defense. (App'x p. 57; p. 60; p. 66; p. 82; pp. 736–737). Instead, Petitioner consistently maintained he was not the shooter (misidentification) and, in his post-conviction sentencing statement, explicitly denied being present. (App'x pp. 671–672). Notably, Trial Counsel testified that he first heard the self-defense version at the post-conviction relief hearing, which the post-conviction relief court found credible. (App'x p. 82).

In contrast, the post-conviction relief court found Petitioner's testimony *not credible*. (App'x pp. 736–738). Under Strickland, counsel's actions are judged based on "information supplied by the defendant." 466 U.S. at 691. Trial Counsel cannot be deficient for failing to request a charge based on facts the client never disclosed and that directly contradicted the chosen defense, which was misidentification. See State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984) (self-defense requires specific factual predicates that were absent here). The post-conviction relief court correctly held that Trial Counsel's misidentification strategy was reasonable and that he had no basis to request a conflicting charge. (App'x p. 736).

Assuming *arguendo* that Trial Counsel should have requested a self-defense charge, the post-conviction relief court exhaustively reviewed the evidence in this case and made specific findings according to Davis, *supra*, and found Petitioner failed to meet any of them. Specifically, the post-conviction relief court found Petitioner could not be without fault where Petitioner exited his vehicle at a red light and inserted himself into the confrontation (App'x p. 738; pp. 28–30; pp. 46–48); Petitioner could not establish there was a reasonable belief that he was in imminent danger where Marquiz testified he saw *no* gun in Sydni Collins' hand before shots, heard shots only after he thinks she raised her hand, never saw Petitioner fire, and forensic and video evidence contradicted Petitioner's version (App'x pp. 17–18; pp. 21–22); Petitioner could not establish that

there were no other means of avoiding the danger where Petitioner was sitting at a red light in his running car two lanes away and chose to approach and insert himself. Lastly, the post-conviction relief court determined that Petitioner was not credible where his account conflicted with Marquez, Coad, Montgomery, Scott, the video, forensics, and his own prior statements. (App'x pp. 736–738). Importantly, the post-conviction relief court found "no semblance of a possibility that the trial court would have granted" the charge. (App'x p. 737).

Turning to Petitioner's out-of-state authority, State v. Hawthorne, 101 N.E.3d 701 (Ohio Ct. App. 2018), and in-state authority, State v. Rogers, 320 S.C. 520, 466 S.E.2d 360 (1996), both are inapposite: inconsistent defenses are allowed only when evidence supports them. Here it did not. Notably, the post-conviction relief court found that Petitioner presented no credible or corroborated evidence to support a self-defense jury charge.

Because the charge would not have been given and because Trial Counsel's misidentification defense was consistent with Petitioner's own statements, the post-conviction relief court found there is no reasonable probability of a different result. Strickland, 466 U.S. at 694. The jury convicted only on the Sydni Collins count after hearing video, forensic evidence, and eyewitness testimony. A self-defense charge based on Petitioner's uncorroborated post-conviction relief version would not have altered the outcome.

For the foregoing reasons, the Court should deny the petition for writ of certiorari as to Question VI.

VII. The post-conviction relief court properly found Petitioner failed to establish Trial Counsel's representation was constitutionally ineffective, where the post-conviction relief court found Trial Counsel's testimony credible that Petitioner did not want to testify, and the record reflects that Trial Counsel presented a defense, and Jayrell Johnson would not have been helpful to Petitioner's case.

In his seventh and last issue, Petitioner contends that the post-conviction relief court erred in finding Trial Counsel's representation was not constitutionally ineffective where Trial Counsel did not prepare him to testify, did not develop a theory of defense, and failed to subpoena an important witness. However, the post-conviction relief court properly determined that Petitioner knowingly waived his right to testify after a full colloquy with the trial court, that Trial Counsel presented a defense of misidentification born from Petitioner's own statements and discussions with Trial Counsel, and the omitted witness was neither important nor outcome-determinative. This Court should deny certiorari to this issue.

The trial transcript contains a thorough, on-the-record colloquy (App'x pp. 582–585) in which the trial judge explained Petitioner's Fifth Amendment rights, the consequences of testifying or not testifying, and the right to consult further with counsel. Petitioner affirmed under oath that he had discussed the decision with Trial Counsel, had enough time, and *chose not to testify*. Trial Counsel cannot be deficient for failing to "prepare" a client who, after full consultation, elected not to take the stand. See Florida v. Nixon, 543 U.S. 175, 187 (2004) (cited by Petitioner); Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012).

Furthermore, the post-conviction relief court found that Trial Counsel credibly testified that Petitioner consistently maintained he was *not present* at the shooting. (App'x p. 57; p. 60; p. 66; pp. 82–84). There was therefore no reason to prepare him for a self-defense narrative he never advanced until the post-conviction relief hearing. Notably, the post-conviction relief court found Petitioner's contrary testimony *not credible*. (App'x pp. 741–742). Furthermore, Trial Counsel's

strategic decision not to put an unprepared, contradictory client on the stand was reasonable. Strickland, 466 U.S. at 691 ("[C]ounsel's actions are usually based ... on information supplied by the defendant.").

Additionally, Trial Counsel's theory of misidentification was consistent with Petitioner's own statements and the available evidence. Trial Counsel explained that he had no alibi notes because Petitioner simply denied being there; the burden remained on the State to prove identity. (App'x pp. 66–68; p. 82). The post-conviction relief court found this strategy reasonable and rejected Petitioner's claim that Trial Counsel "had no real theory." (App'x pp. 741–742). Petitioner's reliance on Kimmelman v. Morrison, 477 U.S. 365 (1986), and Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978), is misplaced where those cases involved no investigation at all. Here, Trial Counsel reviewed discovery, thoroughly cross-examined witnesses, and presented a coherent misidentification defense.

Also, to the extent Petitioner raised this in his PWC, the August 5, 2019, letter about discovery does not show prejudice; Petitioner confirmed on the record that he had discussed the case with Trial Counsel and chose not to testify.

Turning to Jayrell Johnson's affidavit, which was in discovery, Trial Counsel testified to tactical reasons for not using it: the document contained mixed information (including a later confrontation), Jayrell could not be located or subpoenaed, and his testimony would have required authentication and cross-examination. (App'x p. 80). The post-conviction relief court properly found the affidavit would have been "more problematic than helpful" and that Trial Counsel's decision was reasonable. (App'x pp. 710 – 711). Petitioner's citation to Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), is inapposite where that case involved clear exculpatory notes; here, the affidavit was already disclosed and of marginal value.

Even assuming any deficiency, Petitioner failed to show a reasonable probability of a different result. Strickland, 466 U.S. at 694. His self-serving post-conviction-relief version was uncorroborated and contradicted by video, forensic evidence, eyewitnesses, and his own prior statements.

For the foregoing reasons, the Court should deny the petition for writ of certiorari as to Question VII.

CONCLUSION

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

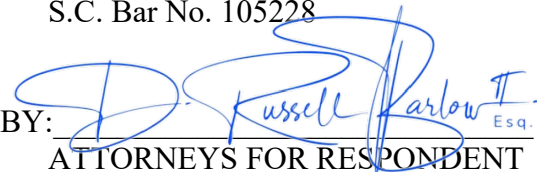
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March 23, 2026