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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable George M. McFaddin, Circuit Court Judge

ADRIAN V. SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002248

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether the PCR court erred in finding trial counsel provided effective assistance where trial counsel failed to object to the state pitting the victim against the defendant's brother?

II. Whether the PCR court erred in reversing its initial decision to grant post-conviction relief where Petitioner rejected a plea deal because trial counsel did not adequately explain that the state did not have to prove the use of a weapon to convict him of ABHAN?

STANDARD OF REVIEW

"To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) (citing Strickland v Washington, 466 U.S. 668 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Strickland 466 U.S. at 695 (1984). A PCR applicant is entitled to relief based on ineffective assistance of trial counsel if he can establish that counsel's performance was deficient and that this deficiency prejudiced him. Id.; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

STATEMENT OF THE CASE

In July of 2014, Lamont Washington agreed to repair Petitioner's cell phone. App. 272, ll. 5-20. At trial, Petitioner testified that Courtney McDaniel, the mother of Petitioner's child, told Washington in August that they did not want the phone at that time due to some family problems. App. 273, ll. 3-16. Petitioner testified that he told Washington in September that he did not have the money to pay for the repairs to the phone. App. 274, ll. 13-17. However, on September 24, 2014, Washington drove to Petitioner's house and confronted him about the phone. App. 275, l. 14 – 276, l. 5. Petitioner testified that when he told Washington he did not have the money to pay for the repairs, Washington asked why it was taking so long to pay. Petitioner then testified, "So I don't know if the first hand was a punch or was a grab, but he tried to grab or punch me with this hand. He threw this hand. I ducked down. I hit him. And he dropped down. And he hit his head on the concrete right here. Like, you could still, like, see the blood stain from like where he had landed." App. 276, ll. 6-11. Petitioner further testified, "I didn't know, like, I had that strength to hit him. But in back of my mind, he must be like was on some type of medication or something, but he just dropped down and hit his head." App. 277, ll. 4-7. Appellant's twin brother, Andre Simmons, also testified that there was a scuffle between the two men. App. 238, ll. 1-22.

In contrast, Washington testified that he had attempted to arrange to meet Petitioner a few different times and had been waiting at the Juice Joint to complete the business transaction when he was re-directed to Petitioner's home. He arrived, got out of the car, and spoke with Petitioner. After shaking hands with Petitioner, he turned around to retrieve the phone from the car and then woke up in the hospital. App. 75, l. 4 – 76, l. 9.

Washington's cousin, Joslin "J.R." Washington, testified that he was in the vehicle during the incident. After Washington got out of the car and shook hands with Petitioner, J.R. looked down at this phone to view Facebook. He heard conversation about the phone and payment while looking down before "all I hear is bam. And I look up. And Red jumped back from hitting Lamont. And Lamont just turned around to look at him. Threw his hands up and he was already knocked out." App. 125, ll. 5-14; App. 127, l. 15-129, l. 5. Washington was treated at the hospital for a fractured skull which caused an epidural hematoma. App. 174, 11. 2-25.

In August of 2015, the Charleston County grand jury indicted Petitioner for assault and battery of a high and aggravated nature (ABHAN). App. 511-512. On August 8, 2016, Petitioner proceeded to jury trial before the Honorable Brian M. Gibbons. J. Seth Whipper represented Appellant at trial. Charles Molony Condon, Jr. and Marian Askins prosecuted the case. The jury found Petitioner guilty as charged, and Judge Gibbons sentenced him to twelve (12) years in prison. Petitioner timely filed a notice of appeal. The Court of Appeals affirmed his conviction in an unpublished opinion. State v. Adrian Vashard Simmons, Op. No. 2019-UP-109 (Ct. App. filed March 20, 2019).

On October 3, 2019, Petitioner timely filed an application for post-conviction relief raising four issues of ineffective assistance of counsel, to include the failure to object to the state pitting witnesses. App. 397-412. On February 10, 2020, The state filed a return and motion for a more definite statement. App. 413-422. On February 6, 2023, an evidentiary hearing was convened before the Honorable George M. McFaddin, Jr. Petitioner was represented by the late James Falk. The state was represented by D. Russell Barlow, II. Petitioner and trial counsel Whipper testified at the hearing. App. 423-424.

Based on the testimony presented during the hearing, the PCR court added the allegation that counsel was ineffective for failing to explain the elements of ABHAN which resulted in Petitioner rejecting a plea deal. The PCR court initially granted relief on the failure to explain the elements allegation and ordered that Petitioner receive a new trial. App. 467-477. The state filed a timely Rule 59(e) motion requesting the court reconsider its findings. App. 478-488. On November 4, 2025, the PCR court entered an amended order denying all claims and dismissing Petitioner's PCR application. App. 489-510.

This petition for writ of certiorari follows.

ARGUMENTS

I.

The PCR court erred in finding trial counsel provided effective assistance of counsel where trial counsel failed to object to the state pitting the victim's testimony against the testimony of the defendant's brother.

Relevant Facts

During the defense case in chief, Petitioner's twin brother Andre Simmons testified that he was at the incident location on the day in question. He noticed a car come into the driveway and heard noises from people talking, so he went outside to "see what was going on." Once outside, he saw Petitioner and Washington in "a little argument and a quick scuffle." He maintained that Petitioner and Washington were "throwing hands at each other." He confirmed that no one had a weapon during the altercation. App. 236, l. 1 – 238, l. 11.

Defense counsel then re-called Washington to the stand to question him about the number of phone calls he made to Petitioner in the days leading up to the incident, his ownership of a dirt bike/ATV, and an alleged police report regarding Petitioner that was purportedly made after the incident. App. 246, l. 5 – 251, l. 11. The state then cross-examined Washington and asked:

> Q. Do you agree or disagree with his brother's testimony, Andre Simmons?
>
> A. I disagree so much I can't even believe he sat up here and said I was fighting and he hit me in my face.
>
> Q. You disagree?
>
> A. I disagree, totally.

App. 251, ll. 17-22.

Counsel Whipper did not lodge an objection to these questions. During the PCR hearing, Counsel Whipper testified that he was not familiar with the testimony from Washington that was pitting stating:

> I'm -- no, not that line. It was -- you know, it was a hotly contested case. I felt like, at that time, credibility was the most important thing. I did not object to it because I didn't think it was in any way damaging so much as it was just more of a -- sort of a cat fight.

App. 454, ll. 11-19. He agreed with the states characterization of the testimony as "one witness saying one thing, another witness saying one thing, and that witness saying they disagreed with those events and here's why." App. 454, ll. 20-23. Counsel Whipper did not think the testimony was harmful to the case nor did he think the outcome would have been different had he objected. App. 454, l. 24 – 455, l. 5.

In the order granting post-conviction relief, the court disposed of the pitting allegation finding:

> Simmons contends that Counsel was ineffective because he did not object to the State's alleged pitting of witnesses. Counsel credibly testified that the case hinged on the credibility of the witnesses and whose version of the story the jury accepted. Counsel acknowledged that the "pitting" described by Simmons was not harmful to the defense. Simmons has failed to prove that this "pitting" prejudiced him. Accordingly, Simmons has failed to satisfy his burden to prove ineffective assistance of counsel with regard to this allegation and relief is denied.

App. 473. The final order of dismissal expanded upon the original order to find:

> Trial Counsel testified at the PCR evidentiary hearing that the question and the response were not harmful to Applicant's case. Applicant's brother's version of events was in direct contradiction to the Victim's version of events. This Court agrees with Trial Counsel. The Solicitor's question, while potentially objectionable, had negligible prejudicial value. Applicant's brother's version of events was obviously in direct contradiction with the Victim's account. The Solicitor's question merely permitted the Victim to directly contradict Applicant's brother's testimony. Therefore, this Court finds Trial

> Counsel's decision not to object was not deficient nor was it prejudicial to Applicant's case.

App. 502.

Discussion

The PCR court incorrectly found that Counsel Whipper was not ineffective when he failed to object to the blatant and improper pitting of Washington against Andre Simmons. As everyone at both the PCR hearing and trial recognized, this case came down to credibility – whether the jury believed Washington and his cousin or Petitioner and his brother. When a case is a credibility contest, pitting can rarely be harmless. This Court should reverse the PCR court's determination, as the finding is not supported by probative evidence in the record. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624. See also Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) ("In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision.")

"'It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness. This error is reversible if the accused is unfairly prejudiced thereby.'" State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (quoting State v. Sapps, 295 S.C. 484, 369 S.E.2d 145 (1988)).

In Bryant, the solicitor improperly pitted witnesses by asking the defendant why the officer who made a failed attempt to stop the defendant with blue lights was giving differing testimony about the incident:

> [Solicitor]: You were perfectly sober and you didn't see that police car parked in the Jamestown Baptist Church parking lot and you had to go right by it?
>
> [Bryant]: There wasn't no policeman in the Jamestown parking lot.
>
> [Solicitor]: He couldn't be telling the truth about that, could he?

> [Bryant]: Who?
>
> [Solicitor]: The police officer. Where do you think it came from?
>
> [Bryant]: He must be lying because I didn't see no police car at no Jamestown Church. If he want to stop-

Id. at 219-20, 447 S.E.2d at 854. The Court of Appeals found that Bryant had not suffered prejudice because there was not repeated pitting of the witness as there had been in State v. Stapps, *supra*. This Court reversed that holding, finding:

> Here, the improper questioning pitted the officer's testimony against Bryant. Credibility was a critical issue in this case as Bryant and the officer were the only two witnesses present during the entire incident. We find that Bryant was unfairly prejudiced by the improper cross-examination.

Bryant at 221, 447 S.E.2d at 855.

At trial, the solicitor had an opportunity to cross-examine Washington when the defense called him to testify. The solicitor started that cross-examination by going outside the scope of direct to immediately pit Washington against Simmons, the previous witness. The solicitor twice asked Washington to opine on the testimony of Simmons, and Counsel Whipper did not object. There was no reason given for the failure to object, other than Counsel Whipper did not think the questions and answers were harmful. This was neither strategic nor valid. Counsel's failure to object to the blatant pitting of witnesses was deficient performance. Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d (1998) (No matter how a question is worded, anytime a solicitor asks a [witness] to comment on the truthfulness or explain the testimony of an adverse witness, the [witness] is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper.)

Petitioner was prejudiced by counsel's deficient performance. During the PCR hearing, the state recognized that the "case came down to a credibility issue." App. 445, ll. 12-13. The state

further recognized that the relevant testimonies were those of Petitioner, Simmons, Washington, and J.R., as it was that testimony alone upon which the jury would determine what had occurred on the date in question. App. 445, ll. 8-21. At trial, the issue was whether Petitioner was acting in self-defense from an attacker (Petitioner and Simmons' version of events) or whether Petitioner was an ambushing attacker (Washington, J.R., and the state's version of events) – the pitting of the alleged victim Washington against Petitioner's only other fact witness to the incident was highly prejudicial. See State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 146 (1988) (Because credibility was the crucial issue in this case, we hold appellant was unfairly prejudiced by the solicitor's improper cross-examination.) Petitioner has shown both deficient performance and prejudice. The finding of the PCR court is not supported by the probative evidence in the record. See Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 284 (2002) (the Court will not uphold the findings of a PCR court if no probative evidence supports those findings.) This Court should reverse the PCR court and remand the case for a new trial.

II.

The PCR court erred in reversing its initial decision to grant post-conviction relief where Petitioner rejected a plea deal because trial counsel did not adequately explain that the state did not have to prove the use of a weapon to convict him of ABHAN.

Relevant facts

During the evidentiary hearing, Petitioner testified that Counsel Whipper had left him with the impression that the state had to prove a weapon was involved to convict him of ABHAN. App. 430, l. 2-11. He testified that there were not any plea negotiations as he had asked Counsel Whipper about a plea and was told the state was not offering anything. He stated that when he brought up a plea agreement, Counsel Whipper "was always negative." App. 431, l. 21 – 432, l. 21; App. 435, ll. 2-3. On cross-examination, he confirmed that he wanted to proceed with his PCR because he could "prove my case because there wasn't a weapon involved." App. 440, l. 23 – 441, l. 1. He clarified that a plea offer was made "right before sentencing." He turned down the plea offer because he believed an element of ABHAN was that a weapon was used during the incident, and no weapon was used in his case. App. 446, ll. 3-23. On redirect examination, Petitioner agreed that based on the representation of Counsel Whipper, he believed the state had to prove the use of a weapon. Had he understood that the use of a weapon was *not* an element of ABHAN, he would have accepted the plea offer. App. 448, ll. 4-25.

Counsel Whipper testified that he reviewed discovery with Petitioner in "a conversational way" but did not think he printed it out for Petitioner. App. 450, ll. 18-23. Counsel clarified that the state approached him with a plea offer on the day of trial and offered a cap of seven years if Petitioner pled to ABHAN. He confirmed he presented that plea to Petitioner who declined to accept the terms. App. 455, l. 20 – 456, l. 15. Counsel Whipper conceded that he did not

plainly explain that a person could be convicted of ABHAN without a weapon but stated "I explained it to him that, you know, if – if his – if he wasn't – if he wasn't the victor in terms of what story these people believed – he's going to – he's going to be exposed to a lot of time in jail." App. 456, l. 24 – 457, l. 6. Counsel could *not* recall if he had reviewed the elements of ABHAN with Petitioner but stated it was his general practice to review elements. App. 457, ll. 7-14. Counsel Whipper maintained he did not tell Petitioner explicitly that the state had to prove he had a weapon to convict him of ABHAN. App. 460, ll. 4-6.

Petitioner testified in rebuttal that he recalled talking about the elements of ABHAN and another assault and battery but maintained "that was the main reason why I took it to trial, because he stated that the State had to prove that a weapon was involved." App. 463, ll. 19-25. PCR counsel asked:

> Q: And so your testimony earlier was that, when this plea negotiation came up, your lawyer told you they still had to prove that a weapon was used?
>
> A: He had to prove that a weapon was used. I asked him again if he coulda get it dropped to a lesser charge, and he was like, no. He told me that they're offering eight, and I asked him if it was non-violent or violent. He told me that it was violent.
>
> So, under my knowledge, I still was under the impression that they have to prove that a weapon was involved. So I told him that I wasn't going to take the eight years because he -- I was under the impression that they have to prove that a weapon was involved from Mr. Whipper.
>
> Q: And where did you get that impression? Did you do your own studying?
>
> A: No, that came from out his mouth. I asked – I specifically asked Mr. Whipper about the charges in the case, and that's what he stated.

App. 464, ll. 1-18.

In the initial order granting post-conviction relief, on this ground the court wrote that Petitioner *credibly* testified that he rejected a plea offer and went to trial because counsel had advised him that the state had to prove a weapon was used in order from him to be convicted of ABHAN. App. 474. The court continued that trial counsel had implied that the use of a weapon was an important factor in Petitioner's decision to proceed to trial and admitted he did not explain to Petitioner that he could be convicted of ABHAN regardless of whether a weapon was used, and counsel did not recall explaining the elements of ABHAN to Petitioner. In finding ineffective assistance of counsel, the court wrote:

> Relying upon Counsel's representation that the State had to prove a weapon was used, Simmons rejected the favorable offer and proceeded to trial with the understanding that the State had to prove a weapon was used in order to be convicted. Simmons was prejudiced because of Counsel's failure to fully advise Simmons of the elements of the offense, Simmons was sentenced to a prison term of twelve years - an additional four or five years on top of the plea offer.

App. 474-475. The court found both deficiency and prejudice under Strickland and remanded the case for a new trial. App. 476.

The state timely filed a motion to reconsider, alter or amend the ruling. No response to the state's motion was filed. The court issued a new order granting the state's Rule 59(e) motion, finding Petitioner's testimony not credible and denying relief. The court wrote:

> After a review of the relevant testimony in the PCR evidentiary transcript, this Court finds that when Trial Counsel's testimony is viewed holistically, it does not support this Court's previous findings that Trial Counsel "implied" that the use of a weapon was a factor Applicant relied on in choosing to go to trial and that Trial Counsel "admitted" to not explaining the elements of ABHAN to Applicant. Notably, Trial Counsel testified that whether or not Applicant used a weapon was important to his defense in order to obtain a reduced charge, as the charges against Applicant were very serious. However, Trial Counsel never implied in his testimony that he had knowledge Applicant rejected

> his plea offer based on the erroneous belief that the State had to prove Applicant used a weapon. Thus, Trial Counsel cannot be deficient where the testimony from Applicant and Trial Counsel does not indicate Trial Counsel had actual knowledge of Applicant's reliance on his belief of the law. This is especially true considering Applicant elicited testimony that he was advised or the specific elements of ABHAN.
>
> ***
>
> While it may be true that Applicant understood the use of a weapon was important based on Trial Counsel's trial strategy, the only evidence before this Court that Trial Counsel told Applicant a weapon was necessary to convict of Al31-IAN is Applicant's testimony, which this Court does not find credible. This Court further finds Trial Counsel's testimony credible that he did not tell Applicant a weapon was required to sustain an ABHAN conviction. Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test-that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland - that he was prejudiced by Trial Counsel's performance.

Discussion

The PCR court's initial order granting relief in this matter was correct – Petitioner rejected a favorable plea offer and received a harsher sentence after going to trial based on the unclear advice of counsel. In reversing course, the PCR court focused on Counsel Whipper's knowledge, writing Petitioner "testified that his belief that the state had to prove he used a weapon to convict him was the main reason he decided to proceed to trial, but Applicant did not testify that he communicated his reliance on this factor to Trial Counsel." However, Counsel Whipper's knowledge as to why Petitioner rejected his plea is not relevant. The probative evidence in the record shows that Counsel Whipper never clearly explained that the state did not have to prove the use of a weapon to convict Petitioner of ABHAN and that Petitioner rejected a favorable plea offer based on the misapprehension of the law.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea-bargaining process, even if the plea offer is ultimately rejected. Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012); Hill v. Lockhart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

In 2010, the United States Supreme Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 599 U.S. 356, 373 (2010). Two years later, the Court decided two companion cases concerning a defendant's right to effective assistance of counsel during the plea-bargaining process. In Frye and Lafler, *supra*, the Supreme Court held that failure of counsel to communicate a plea offer and properly advise a defendant as to the acceptance or rejection of that plea offer constituted deficient performance under the standards set forth in Strickland and Hill, *supra*.

In Lafler, the defendant had initially expressed a willingness to accept a plea offer in court, but later rejected the offer based upon the erroneous advice of counsel. 566 U.S. at 161. Thereafter, the defendant was tried, found guilty, and sentenced to substantially more time[1] than the plea offer would have provided. Id. On appeal to the United States Supreme Court, the parties agreed trial counsel's advice with respect to the rejection of the plea offer constituted deficient performance. Id. Thus, the sole issue before the Court was how to apply Strickland's

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[1] In analyzing the specific prejudice suffered by the defendant, the Court noted that the defendant received a minimum sentence three-and-a-half times greater than the sentence he would have received under the plea offer. 566 U.S. at 174.

prejudice test where ineffective assistance resulted in rejection of a plea offer, and the defendant was convicted after the resultant trial. Id. at 163.

The Court held that when having to stand trial due to the deficient performance of counsel is the prejudice alleged, a defendant must show that there is a reasonable probability (1) that the defendant would have accepted the plea offer, (2) that the prosecution would not have withdrawn the plea offer in light of intervening circumstances, (3) that the court would have accepted the terms of the plea offer, and (4) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence were imposed. Id. at 164. Importantly, the Court stated that subsequently receiving a fair trial did not necessarily cure the errors of counsel that occurred during the pretrial stages. Id. at 166. This is because the question was "not the fairness or reliability of the trial, but *the fairness and regularity of the process that preceded [the trial], which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.*" Id. at 169 (emphasis added).

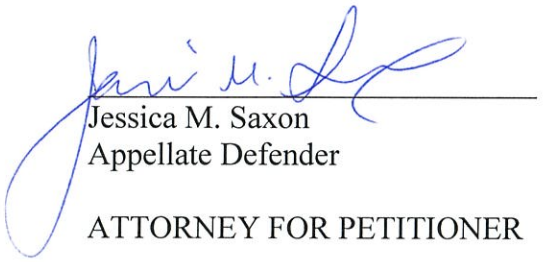
Counsel Whipper admitted that he never explained that the state did not have to prove the use of a weapon in order to convict Petitioner of ABHAN but instead told Petitioner that if the jury did not believe him, he would be convicted. More importantly, Petitioner testified that he was always under the impression that the use of a weapon had to be used based on his conversations with Counsel Whipper. He even testified that he wanted to proceed with PCR because he could "prove my case because there wasn't a weapon involved." App. 440, l. 23 – 441, l. 1. The probative evidence in the record supports the initial order granting PCR relief, as it was patent that Counsel Whipper never advised Petitioner that the use of a weapon had no bearing on an ABHAN conviction, and this was the driving factor in Petitioner going to trial.

The failure to explicitly advise that a weapon was not a necessary element of ABHAN was deficient performance. Rodriguez v. State, 444 S.C. 431, 907 S.E.2d 153 (Ct. App. 2024), reh'g denied (Oct. 22, 2024), cert. denied (Mar. 12, 2025) (Counsel's failure to explicitly advise that plea would result in mandatory detention and permanent ban on reentry amounted to deficient performance).

Petitioner has established prejudiced due to Counsel Whipper's deficient performance. He testified he would have accepted the plea offer for seven years if Counsel Whipper had actually explained that the use of a weapon was not an element of ABHAN. Petitioner would have accepted the plea offer, the state would not have withdrawn the plea offer it made on the day of trial, the court would have accepted the terms of the plea, and Petitioner's sentence under the plea would have been less severe than the sentence he received after trial. See Lafler v. Cooper, 566 U.S. 156 (2012). Petitioner has shown both deficiency and prejudice. The findings of the PCR court are not supported by the probative evidence in the record. Accordingly, this Court should reverse the PCR court. See Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 284 (2002) (the Court will not uphold the findings of a PCR court if no probative evidence supports those findings.)

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of the issues.



Jessica M. Saxon
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ATTORNEY FOR PETITIONER

This 6th day of May, 2026.