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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Greenville County
Honorable Perry H. Gravely, Circuit Court Judge

RONNIE C. SWOFFORD,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2025-002073

BRIEF OF RESPONDENT

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ISSUE PRESENTED

The Court of Appeals correctly determined Respondent was entitled to post-conviction relief where his trial counsel failed to challenge the prosecution's claim that Respondent's blood was splattered on the wall, where SLED found the substance on the wall was not blood, and where the apparent freshness of the "blood" negated Respondent's defense.

STATEMENT OF THE CASE

During the November term of 2009, a Greenville County Grand Jury indicted Respondent, Ronnie Swofford, for first-degree burglary, assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person convicted of a violent crime. During the September term of 2011, a Greenville County Grand Jury indicted Respondent for assault with intent to kill. App. 1147 – 1154. Respondent was tried before the Honorable Edward W. Miller and a jury, from May 14 – 17, 2012. Respondent was represented by Andrew Johnston and Gerald Wilson. Kris Hodge prosecuted the case. App. 1. The State sought a life without parole sentence for two of the offenses pursuant to S.C. Code Ann. § 17-25-45 based on Respondent's prior convictions. App. 728, l. 25 – 729, l. 22.

Respondent was convicted as indicted. App. 725, l. 23 – 726, l. 18. The court sentenced him to life without parole for first-degree burglary, life without parole for assault and battery with intent to kill, ten years for assault with intent to kill, and five years for possession of a pistol by a person convicted of a violent crime. The court did not impose a sentence for possession of a weapon during the commission of a violent crime.[1] App. 731, ll. 5-18.

On July 8, 2014, Respondent filed an application for post-conviction relief (PCR). App. 754 – 761. On January 13, 2015, the State made its return. App. 762 – 768. On October 21, 2015, a hearing was held on the matter before the Honorable Perry H. Gravely. Mills Ariail

[1] Respondent's direct appeal was dismissed by the Court of Appeals at his request on June 28, 2013, and the remittitur was issued on July 24, 2013. App. 733 – 736. Respondent then filed a motion for a new trial based on after-discovered evidence. App. 737 – 740. On December 9, 2013, the circuit court issued an order denying Respondent's motion. App. 741 – 745. Respondent's appeal of the order denying his motion for a new trial based on newly-discovered evidence was dismissed by the Court of Appeals at his request on June 23, 2014. App. 752 – 753.

represented Respondent. Karen Ratigan represented the State. App. 778. On January 7, 2016, the PCR court issued an order of dismissal. App. 858 – 868. On February 2, 2016, PCR counsel served a motion to alter or amend the judgement pursuant to Rule 59(e), SCRCP. App. 869 – 891. On February 8, 2016, the State made a return. App. 892 – 893. On February 19, 2016, the PCR court denied the motion. App. 894 – 895. On March 3, 2016, PCR counsel served an untimely notice of appeal of Respondent's PCR denial. App. 896 – 897. On September 27, 2018, the Court of Appeals issued an order dismissing the appeal based on PCR counsel's failure to timely serve notice of appeal. App. 989.

On November 6, 2018, Respondent filed a second PCR application seeking appellate review of his PCR denial pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 992 – 1004. On December 13, 2019, the State made its return and partial motion to dismiss. App. 1005 – 1011. A hearing was convened via Webex on November 8, 2021, before the Honorable G.D. Morgan, Jr. Susannah Ross represented Respondent and Taylor Smith represented the State. App. 1012 – 1063. By order filed November 23, 2021, Judge Morgan granted Respondent a belated appeal pursuant to *Austin v. State*. App. 1137 – 1142.

Respondent served a petition for writ of certiorari and a petition for certiorari pursuant to *Austin v. State*. App. 1160 – 1189. The State conceded he was entitled to a belated appeal and made an amended return to the petition for certiorari pursuant to *Austin v. State*. App. 1190; App. 1196 – 1221. Respondent served a reply to the return. App. 1191 – 1195. On January 5, 2023, this Court transferred the case to the Court of Appeals pursuant to Rule 243(l), SCACR. On March 21, 2024, the Court of Appeals issued an order in which it voted to grant the petition for writ of certiorari from Judge Morgan's order, dispense with further briefing, and conduct an *Austin* review of Judge Gravely's order. App. 1222 – 1223. Respondent and the State served

their briefs. App. 1224 – 1278. On June 4, 2025, the Court of Appeals heard oral argument. On August 13, 2025, the Court of Appeals issued an opinion reversing the PCR court's order denying post-conviction relief and remanding to the Court of General Sessions for a new trial. *Swofford v. State*, Op. No. 2025-UP-294 (S.C. Ct. App. filed August 13, 2025). App. 1279 – 1285. On August 28, 2025, the State petitioned for rehearing. App. 1286 – 1290. On September 9, 2025, the Court of Appeals denied the petition for rehearing. App. 1291. The State served a Petition for Writ of Certiorari to the Court of Appeals and Respondent made his Return. On March 11, 2026, this Court granted the petition. The State has served its Brief of Petitioner and Appendix. This Brief of Respondent follows.

STANDARD OF REVIEW

On appeal from PCR, the reviewing court will uphold a PCR court's findings of fact if there is evidence in the record to support them, and it will review questions of law de novo. *Smalls v. State*, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The Court of Appeals correctly determined Respondent was entitled to post-conviction relief where his trial counsel failed to challenge the prosecution's claim that Respondent's blood was splattered on the wall, where SLED found the substance on the wall was not blood, and where the apparent freshness of the "blood" negated Respondent's defense.

A. Introduction

Complainant was shot by a masked assailant, and he shot back. Complainant initially told law enforcement he did not know who shot him, although he claimed at trial it was Respondent. App. 70, l. 17 – 71, l. 25; App. 132, l. 25 – 133, l. 8; App. 142, l. 18 – 144, l. 11. Respondent's DNA was found at the scene. App. 311, ll. 3-23; App. 316, l. 15 – 317, l. 22. Respondent testified at trial and denied committing the offense. Respondent admitted he was shot by Complainant, but explained he was shot accidentally by an "over medicated" Complainant a week before this incident. App. 569, ll. 19-21; App. 531, l. 20 – 542, l. 6. Therefore, Respondent's DNA was at the scene because it was left during the prior shooting. Respondent presented an alibi defense. App. 412, l. 14 – 417, l. 12; App. 450, l. 13 – 453, l. 23; App. 463, l. 25 – 469, l. 12; App. 476, l. 10 – 479, l. 19.

After the defense rested, the prosecution put up a rebuttal case to try to discredit the strong defense case. App. 625, l. 14 – 645, l. 19. Although the State's own expert from the South Carolina Law Enforcement Division (SLED) had found the red substance on the wall of the dirty house was not blood, in its rebuttal case, the State recalled the lead investigator from the Sheriff's Department and elicited from him that the "fresh" "blood" on the wall was "red." App. 252, l. 5 – 253, l. 9; App. 642, ll. 7-15. *See also* App. 1125; App. 1127. The solicitor then argued in closing the forensic evidence at the scene could not have been from a prior shooting as

Respondent claimed, because Respondent's blood, which was on the wall, was red and fresh. App. 691, ll. 10-21.

Defense counsel missed that the substance on the wall was not blood and therefore could not be Respondent's fresh, red blood. Counsel instead conceded in his opening statement the "blood" was Respondent's, and in closing argument, counsel argued the "blood" on the wall was not fresh or it would have been "dripping." App. 49, ll. 15-20; App. 654, l. 19 – 655, l. 11. Counsel would admit at the PCR hearing the forensic evidence in the case was "quite complicated." App. 838, ll. 12-13.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. amend. VI. A two-pronged test for determining effective assistance of counsel was set forth in *Strickland*. The first prong requires an applicant to show counsel's performance was deficient; the second prong requires a showing the deficient performance prejudiced the applicant. *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The standard for determining deficient performance is whether counsel's representation was reasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. at 688. The standard for determining prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, 466 U.S. at 694.

There was no blood on the wall. App. 252, l. 5 – 253, l. 9. The PCR court erroneously concluded there was no deficiency and no prejudice. App. 864; App. 866. The Court of Appeals correctly held "the evidence does not support the PCR court's finding that trial counsel was not

ineffective for failing to object to the 'blood' evidence;" "trial counsel was deficient by failing to object to misstatements of evidence that invalidated [Respondent's] defense." *Swofford v. State*, Op. No. 2025-UP-294 at 5. App. 1283. The Court of Appeals accurately found Respondent "was prejudiced by trial counsel's failure to object because the misstatement of fact directly undermined" Respondent's defense. *Id.* at 6. App. 1284. Respondent established deficiency and prejudice and was entitled to PCR.

B. Relevant facts: Respondent explained the presence of his DNA in Complainant's house and presented an alibi defense. A red substance on the wall of Complainant's house looked very fresh but forensic testing determined the substance was not blood. Nevertheless, the prosecutor presented evidence the substance was in fact fresh, red blood, and argued to the jury accordingly.

Curtis Wooten, Complainant, alleged that at approximately 2:30 a.m. on July 27, 2009, a gunman wearing a ski mask entered his home in Greer just after Complainant walked into the house with groceries. Complainant alleged the gunman called his name and when Complainant turned, the gunman fired two shots, striking Complainant in the abdomen. Complainant returned fire, allegedly striking the masked gunman. Rikki Edwards, Complainant's girlfriend, was home during the shooting but she was not hit by gunfire. Complainant and Edwards called 911 and drove to the hospital. App. 63, ll. 12-22; App. 69, l. 15 – 77, l. 8; App. 82, l. 20 – 83, l. 15. The 911 operator asked if Complainant knew who had shot him and Complainant did not answer. App. 108, ll. 11-20. Law enforcement initially suspected Edwards was the one who shot Complainant. App. 304, ll. 14-24; App. 340, l. 4 – 341, l. 19; App. 958 – 961.

Complainant was badly injured and ultimately had to be put on a ventilator for some time and have his spleen and a kidney removed, and he suffered other serious medical problems. App. 137, l. 18 – 139, l. 23. The State argues in its Brief of Petitioner that Complainant at the hospital identified Respondent as his attacker to law enforcement. Brief of Petitioner at 6. That was Complainant's testimony at trial. App. 84, l. 16 – 85, l. 5. However, it was not law

enforcement's testimony at trial. Sergeant Hayes immediately went to the hospital, and at 2:45 a.m., he was able to talk to Complainant briefly as treatment was being started. Complainant told Hayes an "unknown assailant" in a ski mask shot him. App. 142, l. 5 – 143, l. 11; App. 144, ll. 5-6. Sergeant Hayes then asked Complainant if he knew anyone who would want to do this to him. Complainant replied he thought Respondent would do this to him because Respondent owed him money. Sergeant Hayes asked if Complainant was certain that Respondent was the person who shot him, and Complainant stated he was not. App. 143, l. 12 – 144, l. 7; App. 147, l. 15 – 148, l. 2. Nevertheless, Complainant claimed at trial he was 99.9 percent sure Respondent was the gunman because he saw Respondent's face through the opening of the ski mask and because he recognized Respondent's voice. App. 131, l. 5 – 133, l. 11.

Law enforcement found in Complainant's home three shell casings and a bullet jacket on the floor. They saw a hole in the kitchen wall. A red substance was splattered on the wall around the hole, and they thought it was blood. App. 156, l. 17 – 165, l. 23. It was not blood. Respondent would later explain Complainant's home was very dirty. App. 793, l. 24. Officers collected the casings and the bullet jacket, and they cut out the section of the wall that had the bullet hole and splattered red substance. App. 165, l. 24 – 166, l. 5; App. 177, l. 24 – 179, l. 18; App. 189, l. 9 – 196, l. 13. Officers sent evidence to SLED and asked for a rush on the DNA analysis. Respondent's DNA was already in the system and was quickly matched to an unspecified piece of evidence from the scene (possibly the bullet jacket). App. 311, l. 1 – 312, l. 9; App. 316, ll. 15-23. A warrant was sought for Respondent's arrest, and he was apprehended a few weeks later with round, scabbed wounds on his arm. App. 319, l. 15 – 321, l. 10; App. 334, ll. 19-22.

Respondent testified at his trial, and he denied shooting Complainant. App. 569, ll. 19-21. However, Respondent explained he had been shot by Complainant about a week prior to this incident when Complainant accidentally shot him in the arm while Complainant was impaired. App. 531, l. 20 – 540, l. 18. Respondent presented the testimony of five witnesses who had seen the wound or had seen his arm bandaged days prior to the incident date. App. 369, l. 7 – 370, l. 21; App. 377, l. 2 – 380, l. 5; App. 391, l. 15 – 394, l. 6; App. 408, l. 21 – 409, l. 23; App. 498, l. 14 – 499, l. 22.

Respondent's defense was alibi. Respondent presented the testimony of four witnesses to establish his alibi: a friend who had seen him driving home the night of the incident, a neighbor who saw him arrive home that night, and the testimony of Respondent's fiancée and her daughter who were home with him at the time Complainant was shot. App. 415, l. 9 – 417, l. 12; App. 450, l. 13 – 453, l. 9; App. 463, l. 25 – 469, l. 1; App. 473, l. 10 – 479, l. 14. Respondent admittedly had prior criminal convictions and he was cross-examined on his failure to tell his side of the story to the police prior to trial. App. 501, l. 21 – 502, l. 1; App. 615, l. 8 – 617, l. 12. Several of the defense witnesses had prior criminal convictions. App. 388, l. 22 – 389, l. 2; App. 394, l. 20 – 395, l. 9; App. 419, ll. 4-6. Respondent's fiancée, Shannon Lawter, was also impeached.[2]

SLED analyzed the forensic evidence in this case, and the evidence presented by the State during its case in chief was as follows. An unspecified type of hair from the cut-out section of the wall was found to match Respondent's DNA. The hair had tissue attached to the root. A

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[2] Lawter stated during cross-examination that she did not tell her acquaintance Deborah Martinez Ruiz that Respondent told Lawter he shot Complainant accidentally. App. 439, l. 13 – 442, l. 17. Martinez Ruiz was called as a rebuttal witness and she claimed that Lawter did tell her Respondent confessed to shooting Complainant in self-defense. App. 629, l. 25 – 631, l. 13. Martinez Ruiz was admittedly mentally ill and heavily medicated. App. 626, l. 18 – 627, l. 20.

bullet jacket found on the floor which contained "suspected blood tissue" was swabbed for analysis. The swab was not tested for the presence of blood, but it was tested for DNA. It was not tested for blood because Adrian Hefney, an expert in DNA analysis and serology from SLED, did not see any "appreciable stains" of blood on the swab so she "went straight to DNA." The swab was found to match Respondent's DNA. As to both the swab from the bullet jacket and the hair, there was a 1 in 24 quadrillion probability of randomly selecting an unrelated individual having a DNA profile matching that on these items. App. 167, ll. 5-7; App. 172, l. 17 – 173, l. 2; App. 226, ll. 7-9; App. 265, ll. 7-9; App. 267, ll. 17-21; App. 269, l. 2 – 274, l. 20. There were also fibers of black fabric stuck to the wall. App. 260, l. 17 – 261, l. 8.

Importantly, SLED found the substance splattered on the wall was **not** blood. State's Exhibit #53 was the cut-away section from the wall, which had been sent to SLED. App. 178, l. 3 – 179, l. 13. Verona Gibson, who was an evidence processing technician at SLED and who was qualified as an expert in forensics processing, testified she swabbed State's Exhibit #53 and tested it for blood, but the test was negative. App. 246, l. 14 – 247, l. 16; App. 252, l. 6 – 253, l. 9. The following exchange took place between the prosecutor and Gibson.

> Q. All right. I think what has now been marked State's No. 53; see if you can identify this.
>
> A. Yes, ma'am. This is a section of the wall that I processed.
>
> . . .
>
> Q. Okay. **And your presumptive test on this one**?
>
> A. **Was negative.**
>
> Q. **Was negative for blood**. Okay.

App. 252, l. 5 – 253, l. 9 (emphasis added). To be clear, the red splatter on the wall was not blood and it was therefore not Respondent's blood. The test used by SLED to determine the

presence of blood was straightforward. According to Gibson, "We do a visual examination in the areas that appear . . . to be blood. We test it with a solution called phenolphthalein. There's a color change if it is a positive presumptive test for . . . blood[.]" App. 249, ll. 1-6. Prior to trial, both the prosecution and the defense received the SLED report which showed forensic analysis found no blood on the wall. App. 984 – 986. Gibson's testimony the substance on the wall was not blood came out in an understated way—directly after testimony about items upon which she had found the complainant's blood, such as cloth and a blanket. App. 247, l. 18 – 254, l. 9. Notably, counsel asked no questions of Gibson: "I have no questions for this lady." App. 254, l. 12.

In her opening statement, the prosecutor claimed Respondent's DNA was splattered on the wall at the crime scene. "[T]he person that was the shooter, the person that was shot by Mr. Wooten left behind his DNA. A splatter on the kitchen wall and body tissue and hair, is the DNA of the Defendant, Ronnie Swofford." App. 48, ll. 5-9. However, splatter implies blood, which was not found on the wall. In fact, only Respondent's hair was found on the wall and his DNA was found on a bullet jacket on the floor. In his opening statement, defense counsel did not correct this critical misstatement of fact. Instead, defense counsel stated, "The blood and tissue that was found in the home of Curtis Wooten belongs to my client, Ronnie Swofford." App. 49, ll. 18-19.

During the State's case-in-chief, Sergeant David Weiner, an experienced investigator with the Greenville County Sheriff's Office testified the kitchen wall had what "looked to me like blood" on it. App. 233, ll. 5-18; App. 235, ll. 11-15. Defense counsel did not ask Weiner any questions about the "blood." App. 240, l. 14 – 244, l. 22.

After the defense had rested its case, which included Respondent's alibi witnesses and his explanation about being shot a week prior to the incident (which would account for the actual evidence found), the prosecution recalled the lead investigator, Chris Miller, in rebuttal to testify about the freshness of the (nonexistent) blood on the wall. Investigator Miller had been a police officer for 18 years and a homicide investigator for five years. App. 637, ll. 2-5. The prosecutor attempted to qualify Miller as an expert in gunshot and crime scene reconstruction and she asked Miller whether the substance on the wall would still appear red if it had been deposited several days earlier. App. 637, l. 12 – 638, l. 6. While questioning Miller during voir dire, defense counsel stated that one would not need to be an expert to tell if blood was fresh. App. 639, ll. 18-24. Also while questioning Miller during voir dire before the jury, counsel elicited from Miller that Miller believed the substance on the wall was blood. App. 640, l. 22 – 641, l. 9. Given counsel's concession, the trial court did not rule on Miller's qualification and instead ruled that since defense counsel had conceded one need not be an expert to determine whether blood was fresh, the detective could testify to that. App. 642, ll. 2-4. The prosecutor elicited the following testimony from Investigator Miller.

> Q. In State's No. 39, the matter that you see as suspected or possible blood, tissue, hair, **does that appear to be fresh blood**, tissue, hair in your experience?
>
> A. **That would be fresh blood, the red**.
>
> Q. I need you to say that in the microphone?
>
> A. **The blood is red**.
>
> Q. And what does that tell you?
>
> A. **That it is still fresh**.

App. 642, ll. 7-15 (emphasis added). State's Exhibits #37 – 39 were photographs of the red substance splattered on the wall. App. 6; App. 164, l. 6 – 165, l. 23; App. 178, l. 3 – 180, l. 1.

See also App. 1132. As seen, Verona Gibson of SLED, who tested the wall for blood, had already testified the substance on the wall was not blood.

On cross-examination, defense counsel only asked Miller one question.

> Q. Your testimony is that this is fresh because it's still in a liquid state? I'm holding No. 39 in my hand. That's your testimony?
>
> A. Yes, sir.

App. 645, ll. 10-16.

Investigator Miller's testimony was the last thing the jury heard from the witness stand. Defense counsel did not address the fact that there was no blood on the wall with any witness. Counsel did not argue to the jury that SLED had found there was *no* blood on the wall. Counsel never acknowledged there was no blood on the wall. Instead, in closing, counsel argued Investigator Miller was wrong about the "blood evidence" because fresh blood would be "dripping" off the wall. App. 654, l. 19 – 655, l. 6. The freshness of the nonexistent blood on the wall was used by the prosecution, to devastating effect, to discredit Respondent's alibi and his alternative explanation for the actual forensic evidence found—that he was shot the week before by Complainant. The importance of this "evidence" cannot be overstated. The prosecution put up a rebuttal case and got Investigator Miller's testimony the "blood" on the wall was "red" and "fresh."

In her closing argument, the prosecutor argued the evidence could not have been from a days-old shooting like Respondent claimed since the "blood" was still red and fresh: "*That's body tissue and hair and suspected blood would just be on his kitchen wall for six days? And he wants you to say that this is six days old. I don't think it takes an expert to testify to you that that stuff is fresh, that is fresh body tissue and blood. When blood dries, it turns brown, doesn't it? It*

turns a brownish color." App. 691, ll. 11-17. The jury convicted Respondent of all charges. App. 725, l. 5 – 736, l. 18.

At his PCR hearing, Respondent testified that defense counsel failed to address the prosecutor's incorrect claim Respondent's blood was on the wall when it was not.

> [The solicitor] knew that the actual results of this same blood test, and they knew that my blood didn't exist. And I felt like that since **[counsel] pretty much conceded me being there with this blood** in the beginning, **never questioning the experts to refute that 'hey, this is not his blood.' And continuing to get in debates with Detective Miller about how fresh the blood is** and . . . how red the blood is. **The solicitor expounded on the same thing** . . . she knew it wasn't blood . . She expounded about how fresh the blood was, How red it was . . . **the jury should not have [been told] those things.**

App. 812, l. 21 – 814, l. 4 (emphasis added).

Counsel still appeared unaware the "blood" was not blood at the PCR hearing. Counsel testified he did not remember "exactly what all was involved with" the matter of the purported blood splatter. Counsel did recall the prosecution used a photograph of purported fresh blood splatter on the wall to "refute Mr. Swofford's claim that he had been shot in the home roughly a week prior." App. 842, l. 16 – 843, l. 19. Counsel testified his trial strategy was to use Respondent's "explanation of having been shot there the week before." Counsel admitted he found the "scientific evidence" in the case to be "complicated." App. 854, l. 24 – 855, l. 10.

In its order of dismissal, the PCR court found counsel's representation was not ineffective regarding the purported blood evidence. "Applicant has failed to meet his burden of proving trial counsel should have challenged the blood and hair evidence. While the Applicant argued the blood evidence was not actually blood and the type and location of the hair should have been challenged, this Court does not find these arguments persuasive." App. 864. "The SLED expert witness testified a swab of tissue from the victim's kitchen floor and a hair taken from the

victim's wall both matched the Applicant." App. 864. "Trial counsel's defense theory was that this genetic material was from a prior accidental shooting (of the Applicant) at the victim's house and that he had an alibi for the time when the victim was shot." App. 864. "In presenting this defense at trial, this Court finds trial counsel properly questioned the State's expert witnesses and then argued to the jury in closing argument that the State's forensic evidence was not dispositive. The Applicant has failed to prove trial counsel was deficient." App. 864. The PCR court further found Respondent had failed to prove prejudice. App. 866.

C. Discussion

i. Deficiency: Counsel missed that the substance was not blood and therefore could not be Respondent's fresh red blood. Counsel did not correct this material inaccuracy and even conceded the "blood" was Respondent's.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 687–88. The court must determine whether, in light of all the circumstances, the acts or omissions of counsel were outside the wide range of professionally competent assistance. The court should keep in mind that "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.*, 466 U.S. at 690.

Respondent met his burden under *Strickland*. The State's forensic expert from SLED concluded there was no blood on the wall. App. 252, l. 5 – 253, l. 9. Prior to trial both the prosecution and the defense received the SLED report which stated there was no blood on the wall. App. 984 – 986. Nevertheless, the prosecutor argued Respondent's fresh blood was splattered on the wall, and she elicited from Investigator Miller there was "fresh," "red," "blood" on the wall. Counsel never corrected these misstatements, and, in fact, during opening statements, he conceded the blood in the house was Respondent's although there was no blood

on the wall. During closing argument, counsel posited the "blood" on the wall was not fresh since it was not dripping. As the Court of Appeals recognized, counsel "did not articulate any reason for allowing the State and its witnesses to incorrectly characterize the nature of the evidence." *Swofford v. State*, Op. No. 2025-UP-294 at 6. App. 1284. Counsel's "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 687–88.

The Court of Appeals correctly held the PCR court erred in finding effective representation. The PCR court found: "*While the Applicant argued the blood evidence was not actually blood . . . this Court does not find these arguments persuasive*." App. 864 (emphasis added). There was no evidence to support this finding. *See Smalls v. State*, 422 S.C. at 180, 810 S.E.2d at 839 (We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them.). The red substance on the wall was not blood, according to the State's expert. Similarly, there was no evidence to support the PCR court's finding in its order of dismissal: "*this Court finds trial counsel properly questioned the State's expert witnesses . . .*" App. 864 (emphasis added). Counsel did not cross-examine expert witness Gibson: "I have no questions for this lady." App. 254, l. 12. The State argued Respondent's fresh blood was splattered on the wall, an argument that negated Respondent's defense. The nonexistence of blood on the wall was a critical point counsel needed to clarify for the jury.[3] Counsel's failure to catch the prosecution's factually incorrect claims about the "blood" on the

[3] There was an inference Respondent's blood could have been on the bullet jacket (which was on the floor and was not tested for blood) since his DNA was on the bullet jacket and the DNA profile was developed from a swab of what was described as "suspected blood tissue." However, expert witness Adrian Hefney from SLED testified she saw no "appreciable [blood] stains" on the swab so she only tested for DNA. This evidence was compatible with Respondent's explanation about the prior shooting and his alibi defense. It did not negate his defense like the fresh, red "blood" on the wall did, since fresh, red blood could not be from a week earlier.

wall fell below the level of competence required in this case. The constitutionally minimal level of competence in this case required counsel to review the discovery, including the SLED forensic report which stated there was no blood on the wall, or listen to the testimony of State's witness Gibson at trial where she stated the same. *See Strickland*, 466 U.S. at 688 (counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007) (trial counsel should have thoroughly challenged crucial gunshot residue evidence). The evidence was there for counsel to see but he missed it.

Counsel should have objected to factually incorrect testimony from the two law enforcement witnesses. Counsel had numerous potential objections he could have made and actions he could have taken in response to the prosecutor's elicitation from Investigator Miller there was "fresh," "red" "blood" on the wall; and to her elicitation from Sergeant Weiner there appeared to be blood on the wall. Counsel could have objected on due process grounds since the prosecution may not present known false evidence. *E.g.*, *Giglio v. United States*, 405 U.S. 150, 153 (1972) ("the presentation of known false evidence is incompatible with rudimentary demands of justice"); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (State may not use known false evidence to obtain a tainted conviction); *Riddle v. Ozmint*, 369 S.C. 39, 47–48, 631 S.E.2d 70, 75 (2006) ("The failure to correct false evidence is as reprehensible as its presentation.").

Counsel could have objected under Rule 403, SCRE, since the testimony was likely to mislead the jury. *See* Rule 403, SCRE ("evidence may be excluded if its probative value is substantially outweighed by the danger of . . . misleading the jury . . ."). Counsel could have objected to facts not in evidence. *E.g.*, *State v. Tyner*, 273 S.C. 646, 654–55, 258 S.E.2d 559, 564 (1979) (trial court properly sustained objection to question that assumed facts not in

evidence). Counsel could have then moved to strike the testimony and asked for a curative instruction. Counsel could have moved for a mistrial. *E.g.*, *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 480 (1997) (instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced); *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021) (trial court has discretion to grant a mistrial when prejudice can be removed in no other way). Counsel could have cross-examined the expert, Gibson, to clarify there was no blood on the wall. Counsel instead waived cross-examination of this witness. While attorneys providing minimally effective representation might disagree on what objections to make or routes to pursue, they would all take some action to ensure the jury knew the fresh, red substance on the wall was not blood. However, instead of clarifying that Respondent's blood was not on the wall, counsel conceded Respondent's blood was at the scene and quibbled with Investigator Miller over the freshness of the "blood."

In addition to objecting to the testimony, counsel should have objected to the prosecutor's mischaracterizations of the "blood." Perhaps the solicitor did not listen to her expert witness from SLED when the expert said the substance was not blood. App. 252, l. 6 – 253, l. 9. Perhaps she did not read the SLED report received by the solicitor's office prior to trial which stated the evidence was not blood. App. 984 – 986. Regardless, the prosecutor's argument: "*I don't think it takes an expert to testify to you that that stuff is fresh, that is fresh body tissue and blood. When blood dries it turns brown, doesn't it? It turns a brownish color*," should have drawn an objection. App. 691, ll. 11-17. *See, e.g.*, *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (solicitor's closing argument should stay within the record and reasonable inferences from it); *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477

(2016) (solicitor's statements which misrepresented the evidence adduced at trial were clearly improper and objectionable); *Fortune v. State*, 428 S.C. 545, 561, 837 S.E.2d 37, 46 (2019) (solicitor's misconduct in closing argument amounted to due process violation requiring new trial).

Counsel's failure to challenge the incorrect assertion there was blood on the wall was not strategic. Counsel presented a defense that Respondent had an alibi and any of his DNA (or old blood if there was any) left at the scene was left when Respondent was shot by Complainant a week earlier. Given this defense strategy, counsel was required to clarify for the jury that the red substance of the wall was not blood and therefore its freshness was irrelevant. Counsel's performance was unreasonable under prevailing professional norms. *Strickland v. Washington*, 466 U.S. at 688.

ii. Prejudice: Counsel's error altered the entire evidentiary picture. The "blood" evidence inaccurately invalidated Respondent's defense.

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 695-96). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* "[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v. Washington*, 466 U.S. at 695. A "court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.*, 466 U.S. at 695–96.

This error by counsel altered the entire evidentiary picture. The State argues in Brief of Petitioner that counsel's reference to "blood" being on the wall "d[id] not harm the defense," and counsel's "lack of objection to the solicitor's reference to the blood stain on the wall did not affect Swofford's alibi[.]" Brief of Petitioner at 26; 31. Tellingly, the State does not address the impact of the testimony that the substance was blood, only focusing on the arguments of the parties. Brief of Petitioner at 25 – 31. The testimony of Investigator Miller and Sergent Weiner that the substance on the wall was "blood" annihilated the defense. The "blood" was devastating because the substance appeared to Miller, an experienced law enforcement investigator, to be fresh, red blood. Respondent's fresh, red blood being on the wall meant he was not shot the week earlier and did not have an alibi. The prosecution used the "blood" evidence in its closing argument. Counsel's deficiency left him forced to make an absurd argument to the jury—that red blood was a week old. If counsel had known, as he should have known, that the substance was not blood, the State would have been foreclosed from arguing it was Respondent's blood.

In its Brief of Petitioner, the State focuses on the credibility of the defense witnesses. Respondent put up five witnesses who testified they saw him with the wounded arm before the night Complainant was shot. One of those witnesses was also an alibi witness. Three other alibi witnesses testified. The State argues two of Respondent's witnesses were not credible. Brief of Petitioner at 28 – 29. That still leaves the other six. The defense witnesses were all inaccurately shown to be de facto liars since their testimony was not true if Respondent's fresh, red blood was on the wall. *See Strickland*, 466 U.S. at 695-96 (some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture). Additionally, the complainant's credibility was suspect—Complainant had prior convictions for forgeries and obtaining prescription drugs by fraud. App. 60, ll. 19-25. Moreover, the

credibility of the witnesses was for the jury to determine. That the State prefers not to believe some of the witnesses is not part of the prejudice equation. *See, e.g.*, *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) ("The assessment of witness credibility is within the exclusive province of the jury.").

This Court has previously addressed the import of misstatements of fact regarding forensic evidence on the outcome of a trial. "DNA evidence is well known as a powerful and accurate evidentiary tool for the State to solve crimes and obtain convictions. Nevertheless, DNA evidence has also come to be known for its potential to confuse and mislead jurors." *State v. Phillips*, 430 S.C. 319, 329, 844 S.E.2d 651, 656 (2020). In *Phillips*, this Court concluded misstatements and wrong statements by the solicitor and SLED analyst about complicated DNA concepts required a new trial, especially where solicitor's incorrect statements in closing argument all but guaranteed the jury was confused and misled. *Phillips*, 430 S.C. at 342, 844 S.E.2d at 663. In this case, the prosecutor elicited incorrect testimony from Detective Miller and Sergeant Weiner that there was blood on the wall. Detective Miller was a highly experienced police officer and homicide investigator, and he said the "blood" looked "fresh," which surely would have been compelling to the jury. Sergeant Weiner was also an experienced investigator and he said the substance appeared to be blood. In contrast, Gibson's testimony there was *no* blood on the wall came out in an understated way—on the heels of her testimony there *was* blood (the complainant's) found on other items. It (Gibson's testimony) was also sandwiched between the testimony of two witnesses who indicated the substance was blood (Miller and Weiner). App. 3.

Miller's testimony the substance was fresh blood was the last thing the jury heard from the witness stand. *Cf. Tappeiner v. State*, 416 S.C. at 254 n. 8, 785 S.E.2d at 478 n. 8 (the last

thing the jury heard before beginning its deliberations was likely at the forefront of the jurors' minds when beginning their deliberations). The testimony that the presumptive test was negative for State's Exhibit #53 (i.e., there was no blood on the wall) was subtle enough trial counsel and, presumably, the two testifying investigators did not catch it. If defense counsel and Miller and Weiner did not catch Gibson's testimony on this point, it is unreasonable to expect the jury could have done so. In this case, like in *Phillips*, the prosecutor's misstatements during closing argument all but assured the jury was confused and misled. *Phillips*, 430 S.C. at 342, 844 S.E.2d at 663.

The State also argues the complainant's identification of Respondent as the assailant and the forensic evidence should preclude a finding of prejudice. Brief of Petitioner at 26 – 28. The forensic evidence minus the "blood" was inconclusive as to guilt. It supported a jury finding Respondent was shot by Complainant the night of the incident, as Complainant claimed, or a jury finding Respondent was shot by Complainant a week earlier, as Respondent claimed. As to Complainant's supposedly iron-clad identification, Complainant initially told law enforcement (Sergeant Hayes) he was shot by an unknown assailant. Complainant did not answer who shot him when asked by the 911 operator. The complainant's identification was unreliable. The Court of Appeals correctly reasoned Complainant's subsequent identification of Respondent and the DNA evidence which did not demonstrate guilt were not conclusive of guilt. *Swofford v. State*, Op. No. 2025-UP-294 at 7. App. 1285.

The failure to object to the solicitor's improper argument and to the improper "blood" testimony prejudiced Respondent. The impact of counsel's errors was to allow the jury to believe Respondent's defense was invalid because if he were really at home when Complainant was shot as he claimed, his fresh, red blood would not have been on Complainant's wall when

law enforcement arrived. *See Smalls v. State*, 422 S.C. at 188, 810 S.E.2d at 843 (in evaluating prejudice, the PCR court should "consider the specific impact counsel's error had on the outcome of the trial"). The fresh blood impugned Respondent's alibi, which was testified to by two witnesses who were home with him, and corroborated by two others who saw him heading home and arriving home. Respondent provided an exculpatory explanation for the actual forensic evidence found. The defense's case was strong enough the solicitor put up a rebuttal case because she wanted the "blood" evidence to overcome it. The solicitor relied on the "blood" evidence in closing argument to refute Respondent's defense. App. 691, ll. 10-21. *See Ard v. Catoe*, 372 S.C. at 335, 642 S.E.2d at 598 ("The State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice."). Because no objections were made to the factually incorrect evidence and improper argument, the testimony was not stricken. No curative instructions were given. The jury was not instructed to disregard the improper argument. Additionally, the judge did not instruct the jury that the attorneys' arguments were not evidence. Respondent was prejudiced. *See Strickland v. Washington*, 466 U.S. at 695 (in determining prejudice, the court must consider the totality of the evidence before the jury).

The Court of Appeals observed "both the State and trial counsel subsequently and repeatedly referred to the substance as blood—most notably, in the State's closing argument, when it alleged 'fresh body tissue and blood' was found on the wall and in Miller's rebuttal testimony that the blood was 'fresh.'" *Swofford v. State*, Op. No. 2025-UP-294 at 7. App. 1285. The Court of Appeals correctly held "the continuous, inaccurate references to 'blood' on the wall and the arguments regarding the 'fresh[ness]' of the 'blood' significantly undermined [Respondent's] defense." *Swofford v. State*, Op. No. 2025-UP-294 at 7. App. 1285. There was

a reasonable likelihood the result of the trial would have been different absent counsel's deficient performance. The Court of Appeals correctly held Respondent proved deficiency and prejudice. *Strickland*, 466 U.S. at 686; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

CONCLUSION

Respondent respectfully requests that this Court dismiss the writ of certiorari as improvidently granted or affirm the Court of Appeals.

Respectfully Submitted,

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This 21st day of May, 2026.