RECEIVED
Jun 22 2026
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2025-000602

Nicholas J. McIver,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

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

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S STATEMENT OF THE ISSUES PRESENTED

1. Whether the PCR court erred in finding trial counsel was not ineffective for failing to object to testimony that Petitioner filmed his codefendant and the victim's cousin having sex without consent.

2. Whether the PCR court erred in concluding trial counsel was not ineffective for failing to move to sever the joint trial.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The PCR court correctly found Petitioner failed to prove Counsel was ineffective for not objecting to evidence that Petitioner surreptitiously filmed the victim's cousin having sex with his co-defendant, where Counsel testified that he thought this evidence supported his trial strategy to rebut the State's "hand of one, hand of all" argument by showing that Petitioner and his co-defendant lacked a preexisting plan to rob and murder the victim, and where there was not a reasonable likelihood that objecting to this evidence would have led to a different verdict.

2. The PCR court correctly found that Petitioner failed to prove Counsel was ineffective for failing to move to sever the joint trial for the purpose of presenting his co-defendant's statement, where the co-defendant's statement directly implicated Petitioner as the person who shot the victim.

STATEMENT OF THE CASE

Petitioner is presently incarcerated in the South Carolina Department of Corrections. Petitioner was indicted for grand larceny over $2,000 but less than $10,000, possession of a weapon during the commission of a violent crime, and murder by the Horry County Grand Jury at its December 2016 term. (2016-GS-26-05556; -05557; -05558).[1] Petitioner was represented by Attorney G. Scott Bellamy ("Counsel"). Senior Assistant Solicitor George H. Debusk, Jr., and Assistant Solicitor Seth Oskins, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 23, 2018, Petitioner proceeded to a jury trial before the Honorable Steven H. John.[2] On April 27, 2018, Petitioner was convicted, as indicted, of the grand larceny, murder, and weapons charges. Judge John then sentenced Petitioner to a term of five years' imprisonment for the grand larceny, five years' imprisonment for the weapons charge, and forty-five years' imprisonment for murder.

Petitioner appealed. The South Carolina Court of Appeals affirmed the conviction and dismissed the appeal. *State v. McIver*, Op. No. 2021-UP-353 (S.C. Ct. App. filed October 13, 2021). The remittitur was sent on November 5, 2021.

Petitioner filed an application for PCR on October 17, 2021. A hearing was held on July 30, 2024, before the Honorable Deadra L. Jefferson. On March 17, 2025, Judge Jefferson issued an Order of Dismissal denying the application.

Petitioner has now filed a notice of appeal and a Petition for a Writ of Certiorari. This Return follows.

---

[1] Petitioner was also indicted for kidnapping, which was dismissed upon Petitioner's motion for a directed verdict. (App. 542, 7 – App. 544, 10).

[2] Petitioner was tried jointly with his codefendant, Terrell Freeman.

STATEMENT OF THE FACTS

This case arises out of the murder of Amanda Fisher ("Victim"). On the morning of July 9, 2016, Kenneth Wayne Thompson was sitting in the parking lot of the North Myrtle Beach K&W Cafeteria when he heard a strange popping sound; looking around, he saw two men in a white car dumping a young woman's body "out like a bag of garbage onto the pavement." (App. 86, 9–App. 89, 20). He described one man as a black male with short hair but could not get a good look at the other man through the glass of the vehicle. (App. 91, 1–App. 92, 14). The manager of the restaurant approached the woman and found her bloody and unresponsive. (App. 107, 9–App. 108, 25).

Officers arrived at the scene and identified the woman as Victim by her cellphone, which was found nearby. (App.p.126, line 10–p.128, line 8). It was determined that she drove a white, four-door Malibu, and no purse or wallet was found at the scene. (App. 151, 1-4; App. 169, 15 – App. 172, 2). Dr. Edward Leroy Proctor, Jr. testified that he had performed an autopsy on the victim the day after the shooting and determined that she had died from a single, point-blank gunshot wound to the head. (App. 237, 16 – App. 241, 12).

The victim's cousin, Tabetha Oxendine, told police that she and Victim had spent the night before the murder with Petitioner and his co-defendant, Terrell Freeman. (App.p.390, lines 3-23; pp.486–94). The women had stayed at the Holiday Sands hotel, while the defendants had stayed at the nearby Lancer motel. (App. 396, 15 – App. 397, 5). They all rode to North Carolina together the next morning, and Oxendine was dropped off at her aunt's house while Victim returned to Myrtle Beach with the defendants. (App. 496, 2 – App. 500, 22). Oxendine never saw Victim again after being dropped off. (App. 501, 8-9).

Video showed the group spending significant amounts of time together in the hotel before leaving in the victim's car on the morning of the murder. (App. 412, 11 – App. 425, 13). About a half an hour after the shooting, video captured Petitioner and his co-defendant returning unaccompanied to the hotel in the victim's vehicle before separating and leaving in separate vehicles. (App. 426, 7 – App. 431, 16). Petitioner was caught on camera at a North Carolina gas station using the victim's credit card and driving the victim's vehicle shortly after the shooting. (App. 217, 4 – App. 221, 8). Additional transactions were made on her credit card at a Bennettsville convenience store on the afternoon of the shooting. (App. 227, - App. 231, 22).

Victim's vehicle was ultimately found, burned and abandoned, in Charlotte, North Carolina, less than a mile away from the residence of Petitioner's girlfriend at the time. (App.p.289, line 10–p.290, line 13; p.296, line 11–p.298, line 1). The victim's purse was found inside, but no credit cards were recovered. (App.p.394, line 1–p.395, line 9). An individual who witnessed the burning of the vehicle identified Petitioner as being present at the scene. (App.p.310, line 2–p.312, line 9; p.329, line 12–p.332, line 1).

STANDARD OF REVIEW

The PCR court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support those findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

1. **The PCR court correctly found Petitioner failed to prove Counsel was ineffective for not objecting to evidence that Petitioner surreptitiously filmed the victim's cousin having sex with his co-defendant, where Counsel testified that he thought this evidence supported his trial strategy to rebut the State's "hand of one, hand of all" argument by showing that Petitioner and his co-defendant lacked a preexisting plan to rob and murder the victim, and where there was not a reasonable probability that objecting to this evidence would have led to a different verdict.**

At trial, Victim's cousin, Tabetha Oxendine, testified that she and Victim traveled to Myrtle Beach on July 8, 2016. (App.p.486, lines 13–21). Around 1:00 p.m., Oxendine and Victim looked out from the balcony of their motel and saw two men, with whom they exchanged phone numbers. (App.p.490, line 15–p.491, line 8). Later that afternoon, they met the two men again and took them back to their motel room, where the group began hanging out, drinking and using drugs. (App.p.491, lines 11–18). The two men were Petitioner and his co-defendant, Terrell Freeman. (App.p.492, lines 1–21). Oxendine testified that everyone was "hitting it off" and "having a good time." (App.p.492, lines 22–24).

At some point, Oxendine began having sex with Freeman. (App.p.493, lines 12–14). Later, the group moved to the hotel where the two men were staying, and Oxendine had sex with Freeman again. (App.p.494, lines 14–18). Oxendine later learned that Petitioner had used his phone to film her and Freeman having sex on both occasions, without Oxendine's knowledge or approval. (App.p.493, lines 15–25; p.494, lines 19–22). Counsel did not object to this testimony.

In his application for PCR, Petitioner alleged that Counsel was ineffective for not objecting to this testimony because it was "irrelevant, inflammatory, and prejudicial." The PCR court disagreed, noting that Counsel testified during the PCR hearing that he thought the testimony tended to support the defense's theory that there was no plan between Petitioner and his co-

defendant to murder Victim, which would refute the State's argument that Petitioner was guilty of murder under the "hand of one, hand of all" doctrine. The PCR court found Counsel had articulated a valid strategic reason for not objecting. The PCR court also found that Petitioner had failed to prove the result of the trial likely would have been different but for Counsel's failure to object. Petitioner now argues the PCR court erred in making these findings.

In a PCR action, the applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland.* First, the applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *See Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

The court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117–18, 386 S.E.2d at 625. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

Here, the PCR court correctly found Petitioner had failed to prove either deficiency or prejudice. Regarding deficiency, the PCR court noted that Counsel reasonably believed Oxendine's testimony about her sexual encounters with Freeman—in spite of her disapproval of Petitioner's clandestine recording of those encounters—served to reinforce the defense's theory that there was no plan between Petitioner and his co-defendant to commit murder. Counsel explained that his defense strategy was based on refuting the State's "hand of one, hand of all" argument" by denying that Petitioner and Freeman had a preexisting plan to murder Victim. (App.p.923, lines 6–25). Counsel chose this strategy because there was no conclusive evidence as to which defendant actually fired the fatal shot, so it was imperative for the defense to attack the State's "hand of one" argument. (App.p.924, lines 1–17). As Counsel explained, "there was never

any evidence of an agreement or plan to do anything. This was a random meeting between four people that seemed to be going fine. There was sex between at least two of these people. That nobody seemed upset." (App.p.923, lines 12–18).

Counsel had a valid reason not to object to Oxendine's testimony about her interactions with Petitioner and Freeman, even though her account included some details of Petitioner's bad behavior in surreptitiously filming her and Freeman having sex. Oxendine's testimony supported the defense's position that "these were people who were getting along. . . . All the evidence indicates everybody's getting along up until the point [Oxendine was] dropped off in Shallotte." (App.p.931, lines 8–11). Counsel also reasonably determined that those portions of Oxendine's testimony which reflected unflatteringly on Petitioner were not likely to hurt the defense: "I didn't think it went to the core issue of who did the shooting the following day." (App.p.930, lines 22–23).

This latter point, in addition to supporting the reasonableness of Counsel's strategy, also supports the PCR court's finding that Petitioner was not prejudiced. Even if Counsel had been deficient for failing to object to Oxendine's testimony that Petitioner filmed her having sex without her knowledge, there is simply no "reasonable probability" that, in the absence of such testimony, the jury would have acquitted Petitioner. Petitioner's lack of respect for Oxendine's privacy might have been unsavory, but it had no tendency to suggest he was a thief or a murderer. And the State's case for Petitioner's guilt was very strong: Petitioner and Freeman were unquestionably the last two individuals to see Victim alive, as they were still with Victim in her car after Oxendine was dropped off at her aunt's house in North Carolina the morning of July 9th, 2016; that same morning, around 11:00 a.m., Kenneth Wayne Thompson witnessed two men dumping Victim's body out of a white car in the K&W Cafeteria parking lot; less than an hour later, Petitioner and Freeman were

captured on video returning to their motel in Victim's car; shortly thereafter, Petitioner was caught on video driving Victim's car to a gas station, where he used Victim's credit card to purchase gas and cigarettes; a few hours later, Petitioner was seen burning Victim's car less than a mile away from Petitioner's girlfriend's residence.

Petitioner tries to argue against the strength of this evidence by dismissing most of it as "after-the-fact evidence . . . akin to evidence of flight," which Petitioner contends is "only marginally probative." (Pet.p.18). But the "after-the-fact evidence" in this case—the fact that, within minutes of Victim's murder, Petitioner was on video driving her car back to his motel; that he used her credit cards to buy gas and cigarettes; and that he later set her car on fire—are far more probative than mere flight from law enforcement. And Petitioner does not even attempt to dispute the probative force of the evidence that Petitioner and Freeman were with Victim in her car the last time she was seen alive, as well as the evidence that less than two hours later Thompson heard a "popping sound" and saw two men, one of whom matched Petitioner's description, dumping Victim's body out of her car. Even if Counsel had successfully kept Oxendine from mentioning Petitioner's misbehavior at the hotel party, it would not have softened the damning impact of this evidence. There is no reason to believe Oxendine's testimony about Petitioner's filming her made any difference at all in the jury's verdict, compared with the legitimate probative value of all the rest of the State's evidence.

Therefore, the PCR court did not err in concluding Petitioner failed to prove Counsel was ineffective on this ground. This Court, accordingly, should deny the petition for a writ of certiorari as to this issue.

2. The PCR court correctly found that Petitioner failed to prove Counsel was ineffective for failing to move to sever the joint trial for the purpose of presenting his co-defendant's statement, where the co-defendant's statement directly implicated Petitioner as the person who shot the

victim.

Petitioner also alleged in his PCR application that Counsel was ineffective for failing to move to sever his trial from the trial of his co-defendant, Terrell Freeman. Petitioner claims the joint trial of both defendants constrained Counsel's strategic options, specifically by preventing him from using details of Freeman's statement to cast doubt on certain aspects of the State's theory of the case.

At the PCR hearing, Counsel explained that Freeman gave a statement to Detective Lynam in which he admitted to throwing away the gun after the murder. (App.p.901, line 6–902, line 9). Freeman's statement was not introduced at the joint trial, pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). Petitioner now claims he was prejudiced by Counsel's failure to seek severance so that this statement could come in, arguing that the statement tied Freeman to the gun and would have refuted the State's claim that Petitioner could be seen in surveillance footage taking the gun out of his waistband when the two defendants returned to their motel after the murder.

However, Counsel went on to say that he did *not* believe Freeman's statement would be helpful to Petitioner because Freeman expressly identified Petitioner as the person who shot Victim. (App.p.902, lines 10–20). The PCR court found Counsel had articulated a valid strategic reason for not wanting Freeman's statement to come in. The PCR court also found that Petitioner had not met his burden of proving that a motion for severance would likely have been granted had Counsel requested it. For these reasons, the PCR court found Petitioner had failed to prove Counsel was ineffective for failing to move to sever the joint trial.

The PCR court correctly determined that Counsel had a valid strategic reason for not wanting to rely on Freeman's statement. Since the State could not introduce Freeman's statement at the joint trial, it had no direct evidence that Petitioner was the individual who actually shot the

Victim. The State was forced to rely on circumstantial evidence, such as the fact Petitioner can be seen on surveillance footage taking a gun-like object out of his waistband and putting it in his truck after the murder. Petitioner's argument focuses on the inconsistency between Freeman's statement and the State's characterization of the surveillance footage, but this is missing the forest for the trees. If Freeman's statement had come in, the State would not have had to rely on circumstantial evidence *at all* to implicate Petitioner as the shooter; Freeman's statement itself would have been direct evidence of Petitioner's guilt. It should go without saying that an attorney who represents a defendant in a murder case is acting "within the wide range of reasonable professional assistance" when he chooses *not* to present the jury with direct evidence implicating his own client as the triggerman. *Strickland*, 466 U.S. at 689.

Furthermore, Petitioner has failed to prove that he would have been entitled to severance of the joint trial if Counsel had made the motion. "Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." *State v. Dennis*, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). Petitioner admits that "severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001). Petitioner then argues that Freeman's statement was necessary for the jury to make "reliable judgment" about his guilt—again, ignoring the fact that Freeman's statement clearly *supports* the jury's finding of Petitioner's guilt by *expressly identifying* Petitioner as the shooter. The PCR court correctly determined that Petitioner had failed to prove he was prejudiced by Counsel's failure to make a likely futile motion for severance, especially where the effect of severing the joint trial would be to present the jury with direct evidence of Petitioner's guilt. Therefore, this Court should deny the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DON J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

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

By: _____
Zachary W. Jones

ATTORNEYS FOR RESPONDENT

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

June 22, 2026