STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2011-191687

Shanna Kranchick, ... Respondent,

v.

State of South Carolina, ... Petitioner.

BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUES ON APPEAL

I. Did the post-conviction relief Court err in its determination that Counsel was ineffective for failing to object to a portion of the toxicologist's testimony at trial, where Counsel's performance was not deficient and Respondent was not prejudiced by this alleged deficiency?

A. Counsel was not deficient for not objecting to the toxicologist's testimony based on valid trial strategy.

B. Respondent suffered no prejudice from Counsel's alleged deficiency, as there was overwhelming evidence of guilt and the testimony had no reasonable impact on the outcome of the case.

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Respondent was indicted during the March 2002 term of the Richland County Grand Jury for Felony DUI – Death Resulting (2002-GS-40-00894) and Felony DUI – Great Bodily Injury (2001-GS-40-0895). Respondent was represented by Richland County Public Defenders Douglas Strickler, Esquire, Deborah Ahrens, Esquire, and Lauren Mobley, Esquire. On July 11-14, 2005, Respondent proceeded to a jury trial before the Honorable Reginald I. Lloyd, where she was convicted as indicted.[1] Following her conviction, Judge Lloyd ordered a presentencing investigation and deferred sentencing until a report was completed. On September 21, 2005, Judge Lloyd sentenced Respondent to thirteen years imprisonment for Felony DUI – Death Resulting and to a consecutive fifteen years imprisonment suspended upon the service of five years probation for Felony DUI – Great Bodily Injury. Both sentences were to be served consecutively to Respondent's twelve year sentence for an unrelated Armed Robbery.[2]

Respondent filed a timely notice of appeal. Following the submission of an Anders[3] brief and Respondent's *pro se* brief, the South Carolina Court of Appeals dismissed Respondent's appeal by unpublished opinion. State v. Shanna M. Kranchick, 2008-UP-599 (Ct. App. file October 17, 2008). The Remittitur was sent on November 4, 2008.

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[1] Respondent's first jury trial resulted in a mistrial.
[2] (2001-GS-40-6280).
[3] Anders v. California, 386 U.S. 738 (1967).

Thereafter, Respondent filed an application for post-conviction relief on January 14, 2009. Petitioner filed its Return on June 29, 2009, requesting an evidentiary hearing be held. An evidentiary hearing was convened before the Honorable L. Casey Manning, on January 14, 2010. Petitioner was represented by Assistant Attorney General Brian T. Petrano. Respondent was present and represented by Charlie J. Johnson, Jr., Esquire. Following the submission of proposed Orders from both parties, the post-conviction relief court granted Respondent's application by written Order filed April 25, 2011, finding that counsel was ineffective for failing to object to testimony from the State's toxicologist regarding the effects of marijuana and cold medicine.

Petitioner filed its Notice of Appeal on May 2, 2011. Petitioner filed its Petition for Writ of Certiorari on August 19, 2011. Respondent made its Return to Petition for Writ of Certiorari on January 17, 2012. By written Order filed December 30, 2013, this Court granted certiorari and requested briefing. This Brief follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'*any* evidence' of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, Id.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. An applicant must overcome this presumption in order to receive relief. Cherry, supra.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Did the post-conviction relief Court err in its determination that Counsel was ineffective for failing to object to the toxicologist's testimony at trial, where Counsel's performance was not deficient and Respondent was not prejudiced by this alleged deficiency?

During Respondent's trial, the State presented testimony from Gregory L. Rock, who was qualified as an expert in forensic toxicology without objection. App. p. 249-278. Rock, who previously testified as a forensic toxicology expert nine times, testified that he was previously employed by the South Carolina Law Enforcement Division (SLED) as a forensic toxicologist in SLED's certified laboratory after undergoing a year of training and examination. App. p. 249-252. Rock testified that it was in this capacity that he tested blood and urine samples taken from Respondent within hours of the wreck. App. p. 253-54. Overall, Rock's testimony contained three components: first, what substances were in Respondent's system when the fluids were drawn; second, when did Respondent ingest these substances and what amount of these substances were present; and third, the effects of these substances on Respondent. Rock testified that Respondent's blood and urine testified positive for marijuana metabolite, antihistamines, and cough suppressant. App. p. 258-260.

Rock testified that he found a "significant" amount of marijuana metabolite in Respondent's system, which he classified as "more than the normal amount that we typically see" and "a lot of marijuana." App. p. 262 ln. 16- p. 263 ln. 1. He testified that based on the amount of marijuana metabolite present in Respondent's blood, she had likely ingested marijuana within eight hours of the sample being taken. App. p. 264. On cross-examination, he conceded that if Respondent was a "chronic user" of marijuana,[4]

[4] Based on the questioning of Rock, it appears that the term "chronic user" would refer to "somebody who

the amount of marijuana metabolite in her system could be from ingesting marijuana as far as twenty-four hours prior to the sample being drawn. App. p. 276-77. Rock testified that smoking the quantity of marijuana necessary to have the amount of metabolite in Respondent's blood would be enough by itself to impair one's ability to drive. App. p. 265 ln. 6-20.

In addition to the marijuana metabolite, Rock testified that he found "very significant" amounts of over-the-counter antihistamine and cough suppressant in Respondent's system, both which were twenty to thirty times higher than a therapeutic dosage. He testified that based on his experience, anyone taking such high dosages would be doing so to get high as recreational drugs. App. p. 267-268. He elaborated that such extreme doses would have hallucinogenic and sedative effects, as well as a "very, muscle relaxing effect" that would impair a person's ability to drive. App. p. 267-268.

Respondent argues that trial counsel was ineffective for allowing Rock to testify to the third component – the effects of the marijuana, cough suppressant, and antihistamine, as Rock was not qualified to render such testimony. The post-conviction relief court agreed and granted Respondent relief, finding that trial counsel was ineffective for failing to object to testimony from the forensic toxicologist regarding the effects of the various substances found in Respondent's system shortly after the accident. This ruling is in error, as trial counsel was not deficient for not objecting to this testimony and Respondent was not prejudiced by this alleged deficiency.

A. Counsel was not deficient for not objecting to the toxicologist's testimony based on valid trial strategy.

In its Order of Dismissal, the post-conviction relief court found that Rock's

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may smoke everyday [sic] or a couple of times a day." App. p. 276 ln. 24-25.

"testimony about the effects or marijuana or cold medicine on a person was beyond the scope of his expert qualifications" and that trial counsel's failure to object amounted to deficient performance. App. p. 809. However, the post-conviction relief court erred in its ruling, as the record clearly demonstrates that trial counsel made a strategic decision not to object to his testimony and his lacking qualification, but rather use it to exploit weaknesses in the State's case.

When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). Such a strategy must be reasonably objective. See Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006) (finding trial counsel articulated a valid strategy for not objecting to the corroborative and impermissible hearsay where counsel reasonably believed that objecting to the corroborative testimony could lead to the introduction of more damaging evidence). In the present case, while trial counsels from Respondent's second trial were not available to testify,[5] the strategic decision to not object to this testimony is apparent from the record.

From a review of the trial transcript, it is clear that trial counsel employed a trial strategy of challenging the State's evidence as to whether Respondent was intoxicated to a point of impairment at the time of the collision. During an in-camera discussion with the court and opposing counsel, trial counsel stated that the time the various substances were ingested was "going to make a big difference" and was a significant part of her defense. App. p. 217-18. It is clear that this impacted her handling of the State's forensic

[5] At the post-conviction relief hearing, trial counsels from Respondent's second trial were not called to testify, as both live out of state. However, Chief Public Defender Douglas Strickler, who represented Respondent at her first trial (which resulted in a mistrial) and which portions of the transcript were read into the record at the second trial, testified.

toxicologist, evidenced in trial counsel's cross-examination of Rock. App. p. 276-278. Counsel was able to elicit testimony that Rock could not testify to a degree of medical certainty when the marijuana was smoked and also forced Rock to concede that the marijuana could have been smoked as much as twenty-four hours before the samples were collected from Respondent. This strategy is also evident in trial counsel's closing argument, where she once again highlighted to the jury that the State's forensic toxicologist could not be sure when the substances were ingested and whether they were active in her system at the time of the collision. App. p. 585-86.

This strategy allowed counsel to exploit Rock's complete inability to testify accurately as to *when* Respondent had ingested drugs, helping to discredit him before the jury. In response, Respondent notes repeatedly that there is no evidence or testimony to support any strategy by trial counsel. Respondent also asserts that because "the Court does not have the benefit of trial counsels' testimony as to why they failed to object to the testimony, the Court should focus on the prejudice prong." RPWC p. 6. However, this is without merit. The simple lack of testimony from trial counsels, both of whom live out-of-state and were unavailable to testify at the post-conviction relief hearing, does not negate the apparent defense strategy employed at trial that is evident from a review of the trial transcript. Furthermore, the lack of testimony from trial counsel does not relieve Respondent of her burden of establishing deficiency pursuant to Strickland. The post-conviction relief court erred in finding counsel deficient in this regard, as the record reveals a sound trial strategy behind this decision, allowing counsel to discredit Rock before the jury and elicit favorable testimony for Respondent.

B. Respondent suffered no prejudice from Counsel's alleged deficiency, as there was overwhelming evidence of guilt and the testimony had no reasonable impact on the outcome of the case.

Additionally, the post-conviction relief court erred in its determination that Respondent was prejudiced by trial counsels' decision not to object to Rock's testimony regarding the effects of the various substances in Respondent's system when the samples were collected. There is not a reasonable probability that the outcome of Respondent's trial would have been different had trial counsels objected to the toxicologist's testimony. There is no evidence to support the post-conviction relief court's findings of prejudice.

Where there is overwhelming admissible evidence on an element the State must prove, the failure of defense counsel to object to inadmissible evidence on the element is not ineffective assistance of counsel. See Huggler v. State, 360 S.C. 627, 634-35, 602 S.E.2d 753, 757 (2004). To prevail on a claim for felony driving under the influence, one element the State must prove is that a defendant drove a vehicle under the influence of alcohol or drugs. S.C. Code Ann. § 56-5-2946 (2009). The State may prove this element by presenting evidence such that a reasonable jury could conclude that a defendant was intoxicated. State v. Goode is directly on point in this regard. 305 S.C. 176, 179-80, 406 S.E. 2d 391, 393-94 (Ct. App. 1991). Expert testimony that a defendant was intoxicated or would be intoxicated after ingesting a certain amount of alcohol or drugs is not necessary for a jury to find that a defendant was intoxicated. Id.

Overwhelming evidence on Respondent's apparent intoxication, independent from the testimony in question from Rock, was presented at Respondent's trial that the exclusion of the challenged testimony on the effects of the drugs would not create a reasonable probability that a jury would have found that Respondent was not intoxicated. Rock testified that testing performed on Respondent's urine and blood samples showed

she had ingested a large quantity of marijuana and abnormally large dosage of both cough suppressant and antihistamine. App. p. 258 – 267. This portion of the Rock's testimony was completely within his expert qualifications.[6] Highway Patrol Officer J.B. Baker testified: that at the scene of the accident Respondent was confused about the direction she was traveling at the time of the accident (App. p. 174 lns. 15 – 24); Respondent appeared "disoriented" and "confused" (App. p. 175 lns. 6 – 7); Respondent smelled of marijuana smoke (App. p. 175 lns. 19 – 21, p. 180 lns. 6 – 7); Officer Baker believed that Respondent was under the influence due to her reactions to his questions, her appearance, her demeanor, her swaying, and her unsteadiness on her feet (App. p. 177 lns. 18 - 21); Respondent was unable to pass the horizontal gaze nistagmus test or the vertical gaze test (App. p. 179 ln. 13 –p. 180 ln. 2); and that Respondent had glassy and bloodshot eyes (App. p. 181, L. 1 - 2). Officer Baker testified that he did not attribute Respondent's behavior to her having been in an accident because her behavior remained unchanged thirty minutes after the accident. (App. p. 178 lns. 3 - 6). Finally, Officer Baker testified that it was his opinion, based on his interaction with Respondent at the scene of the accident, that Respondent's ability to drive was impaired. (App. p. 196 lns. 18 - 20). Apart from Officer Baker's extensive training, background, and education, a layperson may testify "whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him and that the weight of such testimony is for the jury." State v. Ramey, 221 S.C. 10, 68 S.E.2d 634 (1952). Officer Baker observed the Respondent for an extended period of time at the scene of the accident.

The combination of the urine/blood test results and Officer Baker's testimony

[6] Rock was an expert on the testing of urine and blood for the presence of alcohol or drugs due to his extensive training and experience and testified that he had previously been declared an expert on the very subject nine times prior to Respondent's trial. App. p. 250-52.

concerning Respondent's behavior at the scene of the accident provide sufficient evidence for a reasonable jury to find that Respondent was intoxicated at the time of the accident. See State v. Martin, 391 S.C. 508, 515, 706 S.E.2d 40, 43 (2011) (finding that intoxication can be demonstrated from the record and evidence other than the toxicologist that the State presents). Even so far as limiting the toxicologist's testimony only to the *presence* of the drugs would not create a reasonable probability of a different result. Com. v. Dunne, 456 Pa.Super. 523, 690 A.2d 1233 (Pa.Super.,1997) (driving under the influence of controlled substance conviction affirmed despite no medical testimony when urine tested positive for methamphetamines and officer testified that defendant appeared intoxicated). Therefore, Respondent has not shown the prejudice necessary to establish ineffective assistance of counsel.

Trial 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." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. As Respondent has failed to establish any resulting prejudice from this alleged deficiency, this Court should reverse the post-conviction relief court's grant of relief.

CONCLUSION

For the reasons stated above, this Court should reverse the post-conviction relief court's finding that Respondent is entitled to a new trial based.

Respectfully submitted,

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By: Megan E. Harrigan
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April 28, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
The Honorable L. Casey Manning, Circuit Court Judge
Case No. 2009-CP-40-0235
Appellate Case No. 2011-191687

SHANNA KRANCHICK RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

PROOF OF SERVICE

I, Megan E. Harrigan, certify that I have served the within **Brief of Petitioner** on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
South Carolina Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

This 28th day of April, 2014.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

L. Casey Manning, Circuit Court Judge

SHANNA KRANCHICK,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-191687

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

In this felony DUI case the PCR judge correctly found trial counsel ineffective and granted relief because counsel failed to object when the forensic toxicologist testified beyond the scope of his expert qualification as to what effects the ingestion of marijuana and cold medicine would have upon a person?

STATEMENT OF THE CASE

In March of 2002, the Richland County Grand Jury indicted Kranchick for two counts of felony DUI, one resulting in death the other resulting in great bodily injury, indictments #02-GS-40-894, 895. A first trial ended in a mistrial. On July 11, 2005, Kranchick proceeded to a second jury trial before the Honorable Reginald I. Lloyd. Attorneys Deborah Ahrens and Lauren Mobley represented Kranchick during the second trial. The jury found Kranchick guilty on both counts. Judge Lloyd sentenced Kranchick to 13 years for the count resulting in death, consecutive to a 12 year unrelated sentence she was already serving and 15 years consecutive suspended upon the service of 5 years probation for the count resulting in great bodily injury. A timely notice of intent to appeal was filed and the direct appeal perfected on Kranchick's behalf. On October 17, 2008, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Kranchick, Op. No. UP-599 (S.C. Ct.App. filed October 17, 2008).

On January 14, 2009, Kranchick filed an application for post conviction relief. The State filed a return on June 29, 2009. On June 14, 2010, an evidentiary hearing was held before the Honorable L. Casey Manning. Attorney Charlie J. Johnson represented Kranchick at the PCR hearing. In an order dated April 25, 2011, Judge Manning granted post conviction relief. The State filed a timely notice of intent to appeal and on August 15, 2011, filed a petition for writ of certiorari. The return to the petition for writ of certiorari was filed on January 17, 2012. On December 30, 2013, this Court granted the State's petition for writ of certiorari and requested briefing. On April 28, 2014, the state filed the brief of petitioner. This brief of respondent follows.

ARGUMENT

I. In this felony DUI case, the PCR judge correctly found trial counsel ineffective and granted relief because counsel failed to object when the forensic toxicologist testified beyond the scope of his expert qualification as to what effects the ingestion of marijuana and cold medicine would have upon a person.

In this felony DUI case the State called as an expert witness in the field of forensic toxicology, Gregory Rock. Rock testified that he tested urine and blood samples from Kranchick and detected the presence of marijuana metabolite, antihistamines and cough suppressant. (App. pp. 257-260). The State then asked and the toxicologist testified about the effects the ingestion of marijuana and cold medicine would have upon a person. (App. pp. 267-270). The toxicologist testified that the amount of marijuana detected would impair someone's ability to drive. (App. p. 265, lines 9-20). In regard to the antihistamine the toxicologist testified, "You would tend to have possibly hallucinogenic effects. You would have a sedative effect. You would have a very, muscle relaxing effect. Just a wide range of effects." (App. p. 267, lines 21-24). The toxicologist testified that the antihistamine detected would have impaired anybody's ability to drive. (App. p. 268, lines 10-13). The toxicologist gave similar testimony in regard to the cough suppressant. (App. p. 268, lines 18- p. 269, 270, lines 1-8). Finally, in regard to the combination of substances, the toxicologist testified, "Yes, she would have definitely been impaired." (App. p. 270, line 23). Trial counsel failed to object to the effects testimony.

A. Trial counsel was ineffective in failing to object when the forensic toxicologist testified beyond the scope of his expert qualification as to what effects the ingestion of marijuana and cold medicine would have upon a person. The record does not support the State's argument that the failure to object was valid trial strategy.

In the order granting relief the PCR judge wrote, "The toxicologist did not testify as to any education, experience, or knowledge related to the physical or mental effects of drugs on the human body. **Based on the record, the State presented insufficient qualifications for the toxicologist to testify concerning the mental or physical effects of drugs upon a person."** (App. pp 808-809) (emphasis in original). The PCR judge also wrote, "The toxicologist's testimony about the effects of marijuana or cold medicine on a person was beyond the scope of his expert qualifications, trial counsel's failure to object was ineffective assistance of counsel. The State did not present any additional evidence as to the effects of the marijuana or cold medicine. Trial counsel was deficient because trial counsel [sic] failure to object to this portion of the testimony clearly had prejudice effects on the out come of the trial." (App. p. 809).

The toxicologist was not qualified to testify about the effects of marijuana and cold medicine on a person because such testimony was beyond the scope of his stated expert qualifications. In State v. Priester, 301 S.C. 165, 391 S.E.2d 227 (1990), the South Carolina Supreme Court found that a lab technologist who admitted that he did not have any training in determining the effect of alcohol on the human system was not qualified to testify as to intoxication. While Rock was qualified as a forensic toxicologist, there is no evidence that he had training in determining the effect of marijuana and cold medicine on the human system.

In the petition for writ of certiorari filed with this Court on August 15, 2011, the State concedes that the toxicologist's testimony about the effects of marijuana and cold medicine on a person was beyond the scope of his stated expert qualifications. (State's petition for writ of certiorari, p. 6). The State, however, in both the petition for writ of

certiorari and the brief of petitioner, argue that trial counsel was not ineffective for failing to object to the toxicologist's testimony because the decision not to object was part of a valid trial strategy. (Brief of petitioner pp. 5-8; State's petition for writ of certiorari, Argument 1, pp. 6-8). The State's argument is not supported by the record.

First, the argument made by the State that the failure to object when the forensic toxicologist testified beyond the scope of his expert qualification as to what effects the ingestion of marijuana and cold medicine would have upon a person was part of some trial strategy was not argued to the PCR judge and not addressed in the order of dismissal. The State did not file a Rule 59(e) asking the PCR judge to address the issue[1]. The issue is not preserved for appellate review. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007).

Second, the trial strategy argument, argued for the first time on appeal, is wholly unsupported by the record. There is, however, ample evidence in the record to support the PCR judge's grant of relief. In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court gives great deference to the PCR court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995)). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Under the any evidence standard, the petition for writ of certiorari should be

[1] The Appendix includes what appears to be a proposed order of dismissal which addresses the trial strategy argument but does not include a Rule 59(e) motion. (App. pp. 784-798).

dismissed as improvidently granted, the finding of the PCR judge affirmed and the case remanded for a new trial.

Attorneys Deborah Ahrens and Lauren Mobley represented Kranchick at trial. Neither attorney testified at the PCR hearing. Instead, the State called Chief Public Defender Douglas Strickler who represented Kranchick in her first trial that resulted in a mistrial based on a deadlocked jury. (App. pp. 755 – 764; p. 717, lines 18-25). Attorney Strickler did not testify that the trial attorneys failed to object to the toxicologist's testimony as part of some trial strategy. During the PCR hearing attorney Strickler testified, "I didn't hear anything in that testimony that qualified him [the toxicologist who testified at trial] in regard to the psychopharmacological effects of marijuana or the other cough medicine in this case." (App. p. 763, lines 5-8). The judge asked attorney Strickler, "Is it beyond the scope of expertise, based on your observations as a trial lawyer over the years?" (App. p. 764, lines 1-3). Attorney Strickler responded, "From what I've heard here today, yes, sir." (App. p. 764, lines 4-5). There is no testimony in the record that trial counsel's failure to object to the toxicologist's testimony as to effects was part of some valid trial strategy.

Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992); Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Despite the fact that counsel did not articulate a strategy as counsel did not testify at the PCR hearing, the State argues that the record supports a trial strategy of challenging the State's evidence as to whether Respondent was intoxicated at the time of the collision. (brief of petitioner p. 7). The State asserts that trial counsel's strategy was to challenge the toxicologist's ability to accurately testify as to when Kranchick took the marijuana and cold

medicine found in her urine and blood. The State then asserts that trial counsel chose not to object to the improper testimony about effects in order to exploit the toxicologist's inability to testify when the drugs were taken. (State's petition for writ of certiorari, pp. 7-8). Objecting to the effects testimony would not have prevented counsel from exploiting the toxicologist's inability to accurately testify as to when Respondent ingested drugs. As noted by the State, the toxicologist testified to three separate matters: 1. the substances he detected; 2. time frame and amounts; and 3. effects. (Brief of Petitioner p. 5). Objecting to the effects portion of the testimony would not have prevented trial counsel from challenging the toxicologist in regard to time frame, consistent with the State's presumption of trial counsel's strategy. The record fails to support that trial counsel failed to object to the effects testimony based upon purported trial strategy. Trial counsel was ineffective in failing to object to the effects testimony by the toxicologist.

B. Respondent was prejudiced by trial counsel's deficient performance.

In the order granting relief the PCR judge wrote:

> Where there is limited admissible evidence on an element the State must prove, the failure of defense counsel to object to inadmissible evidence on that element is ineffective assistance of counsel. See Huggler v. State, 360 S.C. 627, 634-635, 602 S.E.2d 753, 757 (2004). To prevail on a claim for felony driving under the influence, one element the State must prove is that a defendant drove a vehicle while under the influence of alcohol or drugs. S.C. Code §56-5-2945 (2009). The State may prove this element by presenting evidence such that a reasonable jury could conclude that a defendant was intoxicated. In this case the State relied heavily on expert testimony that a defendant was intoxicated or would be intoxicated after ingesting a certain amount of alcohol or drugs. Therefore, Applicant has shown prejudice necessary to establish ineffective assistance of counsel.

(App. pp. 809-810). The PCR judge correctly found prejudice.

Kranchick was prejudiced by trial counsel's failure to object to the toxicologist's testimony about the effects of marijuana and cold medicine. Kranchick went to trial for felony DUI. The South Carolina felony DUI statute, S.C. Code §56-5-2945 provides, "A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence . . ."

In order to prove felony DUI the State must prove that Kranchick was under the influence. A critical issue for the jury to determine was if the presence of marijuana and cold medicine rendered Kranchick under the influence. The State had to prove and the jury had to determine whether, at the time of the accident, Kranchick was under the influence of marijuana and/ or cold medicine. Importantly, the State was not entitled to an inference of driving under the influence based on a blood alcohol level as Kranchick tested negative for alcohol. See State v. Martin, 391 S.C. 508, 515, 706 S.E.2d 40, 43 (Ct.App. 2011) ("Finally, even if the trial court erred in allowing Landrum's testimony regarding the effects of drugs and alcohol, Martin was not prejudiced. The State was entitled to an inference Martin was under the influence of alcohol because his BAC was 0.167 percent. *See* S.C.Code Ann. § 56–5–2950(G)(3) (Supp.2009) (providing that in a criminal prosecution for felony DUI, a blood alcohol concentration of greater than 0.08 gives rise to an inference the defendant was under the influence of alcohol))." The toxicologist's improper testimony that the marijuana and cold medicine detected in

Kranchick's system would have impaired her ability to drive was strong evidence in the State proving that she was under the influence at the time of the accident.

The other evidence presented by the State as to whether Kranchick was under the influence at the time of the accident was not overwhelming. The toxicologist testified about detecting the presence of marijuana metabolite and cold medicine but admitted that the marijuana could have been smoked up to 24 hours prior to testing. (App. p. 277, lines 11-21). S.C. Highway Patrol Officer Baker testified that based on his observations of Kranchick, he believed she was under the influence. (App. p. 177, lines 18 – p. 178, lines 1-6; p. 196, lines 18-20). The State's evidence, however, does not constitute overwhelming evidence rendering counsel's failure to object to the toxicologist's improper testimony non-prejudicial. The toxicologist's effects testimony was critical and Respondent was prejudiced by trial counsel's failure to object to the improper testimony.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be dismissed as improvidently granted, the grant of relief by the PCR judge affirmed and the case remanded for a new trial.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 18th day of July, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

L. Casey Manning, Judge

SHANNA KRANCHICK,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2011-191687

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of July, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 18th day of July, 2014.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .