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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001037

Randall Price, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Does the record contain evidence of probative value to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving trial counsel was ineffective where Counsel had a valid strategic reason for not seeking to introduce a SLED report showing the existence of DNA from an unidentified third person on the knife?

STATEMENT OF THE CASE

Trial

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the June 2007 term of the Spartanburg County Grand Jury for two counts of assault and battery with intent to kill (2007-GS-42-2836, -2837). Petitioner was represented by Richard H. Whelchel, Esquire. Former Assistant Solicitor Ryan F. McCarty prosecuted the case. On June 10, 2011, Petitioner proceeded to trial before the Honorable J. Derham Cole and a jury.

Facts adduced at trial

After an evening of partying with alcohol and crack cocaine, Petitioner attacked two women with a knife, slicing their necks and other parts of their bodies. The night of January 13, 2007 began when Petitioner went to the home of his married friends, Jennifer Dawn ("Dawn") and Dewayne Henson, bringing Pam Massey and Rodney[1] with him. (App. p. 65, ll. 5-7; p. 96, l. 24 – p. 97, l. 13). Pam did not know Dawn or Dewayne prior to January 13, 2007. (App. p. 65, ll. 21-22; p. 96, ll. 15-23; App. p. 111, ll. 1-8). The homeowners and guests proceeded to use crack cocaine and drink alcohol. (App. p. 98, ll. 4-5; p. 103, ll. 7-25). When the group ran out of drugs, Dewayne and Rodney left to buy more drugs. (App. p. 67, ll. 2-11; p. 99, ll. 14-23). Dawn, Pam and Petitioner continued to play cards, party and talk. (App. p. 66, ll. 22-24; p. 68, l. 22 – p. 69, l. 3; p. 71, ll. 2-21; p. 100, ll. 5-8; p. 100, ll. 18-19). At one point, Petitioner stood up and walked behind Pam (App. p. 72, ll. 6-13; p. 101, l. 16 – p. 102, l. 6). After Petitioner walked behind Pam, Dawn testified "the next thing [she knew] he cut Pam in (indicating throat)." (App. p. 72, l. 12).

[1] Rodney's last name is unknown.

Pam admitted her recollection was slightly different than that of Dawn's and testified that as Petitioner moved behind her she moved so Petitioner could not see her cards and then Petitioner cut her throat. (App. p. 101, l. 1 – p. 102, l. 14). Pam had a scar at the time of trial and photos of the two inch throat wound taken the night of the incident were admitted into evidence. (App. p. 102, ll. 15-17; p. 104, ll. 5-22; p. 105, ll. 6-11). Pam then rushed out the door and across the street to Mr. Brewington's property where he let her into an outbuilding after he was awakened by her knocking on the trailer located in front of the outbuilding. (App. p. 106, l. 11 – p. 107, l. 7; p. 108, ll. 7-9). Dawn followed behind shortly. (App. p. 107, l. 14 – p. 108, l. 4).

Dawn testified Petitioner was holding the knife and smiling as Pam ran out the front door[2] and Dawn tried to get away. (App. p. 73, l. 19 – p. 74, l. 4; p. 74, l. 20 – p. 75, l. 19). Dawn ran to the back door[3] to escape, but Petitioner caught her before she could get out and cut the back of her neck. Petitioner tried to stab her in her rib, but she grabbed the knife, causing her two fingers to be cut. Petitioner also stabbed her left lung. (App. p. 75, l. 20 – p. 76, l. 6). Photos of the injuries to Dawn's neck, taken the night of the incident, were admitted into evidence. (App. p. 19, ll. 9-11; ll. 15-23). Dawn managed to escape the house through the back door and went to Mr. Brewington's outbuilding across the street where Pam was hollering for help. (App. p. 79, l. 24 – p. 80 l. 18). When Dawn got to Mr. Brewington's house, she and Pam went inside. (App. p. 80, ll. 19-24). They saw Petitioner coming after them so Pam pushed a small refrigerator in front of the door to prevent him from entering, but Petitioner broke through a window. (App. p. 81, ll. 2-17; p. 109, ll. 11-19). Mr. Brewington revealed a gun which scared Petitioner off and Dawn called 911. (App. p. 81, ll. 18-25; p. 109, ll. 20-24).

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[2] The DNA from blood found on the front, glass storm door and front door steps matched the DNA profile of Pam. (App. p. 364).

[3] The DNA from the blood that was found at the back door, on the steps at the back door, and the light switch at the back door, all matched the DNA profile of Dawn. (App. p. 364).

Mr. Brewington testified he lived across the street from Dawn and Dewayne. (App. p. 116, ll. 12-19). On January 13, 2007, Mr. Brewington was awakened when he heard Pam "screamin', hollerin' and goin' on" and trying to get in the back door of his trailer (App. p. 119, ll. 2-9; p. 122, l. 25 – p. 123, l. 10). Mr. Brewington opened the door to his outbuilding where he was sleeping and asked Pam what was wrong.[4] (App. p. 119, ll. 10-13). Mr. Brewington testified Pam was "cut all to pieces" and there was blood all over the place. (App. p. 119, ll. 18-22). Mr. Brewington testified Dawn came later and the two women entered his building as Petitioner was headed toward them. (App. p. 123, ll. 11-17). Mr. Brewington testified Pam pushed his small refrigerator against the door. (App. p. 124, ll. 6-17). Mr. Brewington testified Petitioner then knocked out the window to his outbuilding with his fists. (App. p. 124, l. 18 – p. 125, l. 14). Photos of Mr. Brewington's property, outbuilding, and broken window were admitted into evidence. (App. p. 121, ll. 10-11). Mr. Brewington then got his gun, pointed it at Petitioner, and Petitioner fled. (App. p. 125, ll. 15-25; p. 126, l. 25 – p. 127, l. 5). Mr. Brewington testified one of the women called 911 and he also called 911 on his landline. (App. p. 127, ll. 8-13).

Investigator Robert Talanges of Spartanburg County Sheriff's Office testified he responded to and processed the crime scene. Several photos Investigator Talanges had taken from the crime scene were admitted as State's exhibits 13-17. (App. p. 136, ll. 19-20). The photos consisted of two pocket knives, a pair of shoes, a mail envelope and a hammer. (App. pp. 136-139). The actual pocket knives, shoes, and hammer were also admitted into evidence as State's exhibits 18-21. (App. p. 141; p. 143).

[4] Mr. Brewington's cross examination testimony corroborated that of Pam and Dawn, in that he knew both Pam and Dawn, but he had never seen Pam with Dawn before that night and that night was the first time Pam had ever been to Dawn's house. (App. p. 129, l. 3 – p. 130, l. 11).

On cross examination, Investigator Talanges testified he observed a cut on Petitioner's hand. (App. p. 144, ll. 19-22). Trial counsel admitted photos of Petitioner in custody from the night of the incident as defense exhibits 1-3. (App. p. 146, ll. 2-3). Investigator Talanges testified he observed and photographed blood drops on the back door step, the back door, a light switch at the back door, a stereo, the front door, and the front door step. (App. p. 147, ll. 8-20) Photos of the blood drops were admitted as defense exhibits. Investigator Talanges testified he did not find *any* money, or ripped pieces of money, at the crime scene except one silver dollar coin. (App. p. 147, l. 24 – p. 148, l. 16).

On redirect examination, Investigator Talanges testified he did not observe any other wounds on Petitioner other than a "small cut to the right wrist area [and a] small amount of blood." (App. p. 152, ll. 11-20). Investigator Talanges confirmed the wound he observed on Petitioner's wrist was depicted in defense exhibit 1. (App. p. 152, l. 25 – p. 153, l. 10).

Petitioner testified that after Dawn and Dewayne came to his dad's house[5] and invited him to their house, the three walked back to Dawn and Dewayne's house. (App. p. 162, ll. 11-17, ll. 24-25). The day before, Petitioner had collected a settlement check for about $9,000. (App. p. 163, ll. 6-23). Petitioner deposited some of the check in his bank account and cashed $3,000 and had "30 $100 bills." (App. p. 163, l. 24 – p. 164, l. 8). Petitioner claimed Dawn and Dewayne "might have known" Petitioner had obtained this money. (App. p. 164, ll. 16-18). However, Petitioner testified it was not unusual for Dawn and Dewayne to come talk to Petitioner. (App. p. 164, ll. 19-21). Petitioner testified Dawn and Dewayne had shown up at his dad's house and invited Petitioner over in the past. (App. p. 164, l. 24 – p. 165, l. 2).

[5] At the time, Petitioner lived with his dad and had been living with him since he had been in an automobile accident. (App. p. 161, ll. 18-19).

Petitioner testified the three of them did drugs when they got to Dawn and Dewayne's house and when they ran out, he and Dewayne left to buy more. (App. p. 166, ll. 2-6; ll. 18-25). At the buy location, Petitioner met Pam and Rodney for the first time. (App. p. 167, ll. 4-10). Petitioner testified Dewayne then drove them back to Dewayne's house, in a car that belonged to another individual not present. (App. p. 167, l. 12 – p. 168, l. 1). Earlier, Dawn, Dewayne and Petitioner had walked to a Texaco store, where Petitioner bought some items and claims Dawn and Dewayne saw the money Petitioner had. (App. p. 168, l. 13 – p. 169, l. 4).

Petitioner testified he told Dawn and Pam earlier in the evening that he would have to leave because he had a "prior engagement" to go with his brother to a friend's in Greenville. (App. p. 170, ll. 1-11). Petitioner testified he attempted to leave Dawn and Dewayne's house around 9:00 p.m., but Rodney grabbed his arm and Dewayne told him he was "not leaving with that GD money." (App. p. 170, ll. 1-17). Petitioner testified that as he fought those two off, Petitioner grabbed his money and amidst the struggle, most of the money was "ripped... in half." (App. p. 170, ll. 15-25). Petitioner testified he thought to himself, "how can I get rid of 'em[,]" and then threw the money across the room as hard as he could and "pieces [went] everywhere." (App. p. 170, ll. 22-25). Petitioner claimed three of the people went after the ripped money, but Pam attacked him with a knife claiming, "I'm gonna kill you MF." (App. p. 171, ll. 11-18). Petitioner then blocked her advance with his arm and took the knife away from her. (App. p. 171, ll. 18-19). Petitioner testified all four of them came back after him so he "started just cutting every which way [he] could to try to get outta that house because they just stole [his] money and they were gonna kill [him]." (App. p. 171, ll. 20-22). Petitioner testified he had exactly twenty-eight $100 bills at the time of the struggle. (App. p. 172, ll. 1-3; 181, ll. 16-25).

Petitioner testified that after Pam attacked him, he got the knife from her, he cut her, she took off running and "hollerin" and Dewayne followed her out the door. (App. p. 172, l. 20 – p. 173, l. 2). Then, Dawn and Rodney attacked Petitioner while Petitioner had two knives. (App. p. 173, ll. 2-6). The three struggled more in the kitchen and Petitioner fell over a trash can. The struggle caused the three of them to fall out the back door. (App. p. 173, ll. 10-14). Petitioner testified Dawn ran one way, Rodney ran another way and Petitioner ran toward the light across the street at Mr. Brewington's house. (App. p. 173, l. 10 – p. 174, l. 2). Petitioner testified he knocked on the window and the blade of his knife broke the window. (App. p. 174, ll. 1-3). Then, Petitioner saw Dewayne, Pam, and Mr. Brewington inside so he took off running as fast as he could. (App. p. 174, ll. 3-14). While running, Petitioner hit a "little stump" and fell forward dropping both knives. (App. p. 174, ll. 18-22). Petitioner next remembered police waking him and arresting him. Petitioner testified the police told him they would take his statement later and never did. (App. p. 174, l. 21 – p. 175, l. 1).

Trial counsel called Elizabeth Vaughn, a records custodian from Spartanburg Regional Hospital, to testify. (App. p. 203, l. 7-17). Vaughn brought with her Dawn's medical records from her hospitalization after the stabbing. (App. p. 203, ll. 18-25). Vaughn testified the records indicated Dawn had seven $100 bills in her possession when she came to the hospital. (App. p. 204, ll. 9-17). Vaughn also testified that the records indicated the $100 bills were "cut up." (App. p. 205, ll. 20-25). On cross examination, Vaughn testified one of the $100 bills was burnt in half. (App. p. 206, ll. 13-17).

After the defense rested, the State recalled Dawn to testify. Dawn testified that at some point in the evening, Petitioner was in her kitchen ripping and burning up his money in front of

everyone.[6] (App. p. 208, ll. 7-8). On cross examination, Dawn testified she was taping up the bills and telling Petitioner not to rip his money. (App. p. 209, ll. 9-11). When trial counsel asked Dawn about the $700, she explained she was taping up the money as Petitioner was ripping it. (App. p. 211, l. 20 – p. 212, l. 5). Dawn explained she did not recall having $700 of ripped and burnt bills at the hospital because she was traumatized from all that had happened that night. (App. p. 212, ll. 6-11). Trial counsel asked Dawn what one fourth of $2800 was, to which Dawn responded she did not know. (App. p. 212, ll. 12-17).

After closing arguments and the jury instructions, the jury began to deliberate. A question was sent to the judge from the jury asking if they could rehear the testimony of Dawn, Mr. Brewington and Petitioner. (App. p. 267, ll. 17-21). The testimony was played back for the jury. (App. p. 268, ll. 6-7, ll. 13-14). Additional notes from the jury were admitted as court's exhibits for the record. (App. p. 6). The jury rendered its verdicts of guilty as charged on both counts of assault and battery with intent to kill. (App. p. 270, ll. 1-10).

Judge Cole sentenced Petitioner to twenty years, suspended upon the service of twelve years with three years of probation (2007-2836) and a consecutive sentence of twelve years suspended to three years of probation (2007-2837).

Direct Appeal

A timely notice of appeal and Anders brief were filed on the Petitioner's behalf. The South Carolina Court of Appeals dismissed the appeal. State v. Price, Op. No. 2013-UP-141 (filed April 10, 2013). The Remittitur was returned on June 4, 2013.

[6] Dawn testified this occurred when all five people were present. (App. p. 208, ll. 11-17).

PCR

Petitioner filed an application for post-conviction relief ("PCR") on May 9, 2013. An evidentiary hearing into the matter was convened on January 13, 2015, at the Spartanburg County Courthouse before the Honorable Deadra L. Jefferson. Petitioner was present at the hearing and was represented by Christopher D. Brough, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Pastor Kevin Smith, Timothy Powell, and Juanita Price also testified on his behalf. Richard H. Whelchel, Esquire, ("trial counsel") also testified.

Testimony from PCR

Petitioner testified that at the time of the incident, he was friends with Dawn and Dewayne, but had just met Pam and Rodney that night. (App. p. 300, l. 16 – p. 301, l. 2). Petitioner testified he received a settlement check of $9,000 the date of the incident. (App. p. 302, ll. 11-14). (App. p. 302, ll. 22-24). Petitioner testified he believed Dawn and Dewayne knew he had a substantial amount of cash on him.[7] (App. p. 302, l. 25 – p. 303, l. 2). Petitioner testified he had "about $3,600 in one hundred dollar bills."[8] (App. p. 303, ll. 4-5).

Petitioner testified, 30-45 minutes after he got the money and returned to his dad's house, Dawn and Dewayne came over to ask to use the phone.[9] (App. p. 302, ll. 15-20). Dawn and Dewayne also invited Petitioner to their house to party. (App. p. 302, ll. 21-22). Petitioner refused the invite and informed them he planned to shop for an automobile that day.[10] Petitioner testified Dawn and Dewayne had come over and invited Petitioner over to their house two other

[7] In contrast, at trial, Petitioner testified Dawn and Dewayne "might have known" he had obtained money, but that it was not unusual for them to come over to his dad's house or invite him over. (App. p. 164, ll. 16-21).
[8] In contrast, at trial, Petitioner testified he cashed $3,000 of the check and had "30 $100 bills." (App. p. 164, ll. 1-5).
[9] Petitioner never mentioned this at trial.
[10] Petitioner never mentioned this at trial.

times that day and both times Petitioner refused.[11] (App. p. 303, ll. 8-11). On the third visit and invite, Petitioner agreed to go and walked with them back to their house. (App. p. 303, ll. 11-20). However, Petitioner testified he told Dawn and Dewayne he would only go for a "little while" because he was going to shop for an automobile.[12] At Dawn and Dewayne's home, they began using cocaine and drinking alcohol for three or four hours until they ran out and decided to go buy more. (App. p. 303, l. 21 – p. 304, l. 5). Petitioner testified he and Dewayne left to go buy more drugs and he gave Dewayne $300 to buy the drugs.[13] (App. p. 304, l. 4-11). Petitioner testified when Dewayne came out of the house from which he purchased drugs, he had two other people with him, which Dewayne introduced to Petitioner as Pam and Rodney. (App. p. 304, ll. 12-17). Petitioner testified the four returned to Dawn and Dewayne's house and began doing more drugs. (App. p. 305, ll. 1-2).

Petitioner testified he later tried to leave and Rodney told Petitioner to give him the money. (App. p. 305, ll. 7-10). Petitioner testified he laughed thinking it was a joke and Rodney "real stern[ly]" said again to "give him the money."[14] (App. p. 305, ll. 7-12). Petitioner testified Rodney "punched [him] upside his face and [his] eye."[15] (App. p. 305, ll. 12-13). Petitioner testified he was up against a wall and all four people began to attack and assault him and during

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[11] Petitioner never mentioned this at trial.

[12] In contrast, at trial, Petitioner testified he told Dawn and Dewayne earlier in the night that he would need to leave later because he had a "prior engagement" to go with his brother to a friend's in Greenville. (App. p. 170, ll. 1-11).

[13] Petitioner never mentioned giving Dewayne $300 at trial. **Interestingly, at trial, Petitioner testified he cashed $3,000 and had thirty $100 bills on him, of which he spent some undisclosed amount on drugs and items at a Texaco convenient store. At trial, Petitioner testified he was left with exactly $2,800, twenty-eight $100 bills – conveniently the exact amount trial counsel pointed out would have been *four* times what was found on Dawn when she went to the hospital, $700 in ripped *and* burnt $100 bills. However, at the PCR hearing, Petitioner testified he had $3,600 on him and gave $300 to Dewayne to buy drugs. Logically, Petitioner would have had approximately $3,300 on him at the time of the alleged attack – an amount that does not as perfectly fit trial counsel's theory at trial that all four people robbed Petitioner and split the money four ways. (App. p. 217, ll. 8-18; p. 335, l. 22 – p. 336, l. 7).**

[14] In contrast, at trial, Petitioner testified Rodney grabbed his arm and *Dewayne* said, "you're not leaving with that GD money." (App. p. 170, ll. 15-17).

[15] Petitioner never mentioned this at trial. Rather, he testified that after Rodney grabbed his arm, he fought Rodney and Dewayne off as they grabbed Petitioner's money that he was holding and tore it. (App. p. 170, ll. 15-25).

the attack he held onto his money which was ripped in the struggle.[16] (App. p. 305, ll. 14-20). Petitioner testified the four of them were physically beating him with fists.[17] (App. p. 305, l. 24 – p. 306, l. 1). Petitioner testified he threw the rest of the money he had in his hands in an effort to distract his assailants so he could get away. (App. p. 306, ll. 7-10). Three of them went for the money, but Pam attacked Petitioner with a knife and said, "now you're gonna die [MF]." (App. p. 306, ll. 4-13). Petitioner blocked the knife with his arm and received a cut. (App. p. 306, ll. 12-14). Petitioner then took the knife from Pam and "the knife jabs her in her clavicle area of her neck." (App. p. 306, ll. 14-16). Pam ran back to the group and the four were away from Petitioner, so Petitioner took off towards the back door.[18] (App. p. 306, ll. 17-19). Petitioner testified he was knocked onto his face by two people who jumped on his back, knocking over a trash can. (App. p. 306, ll. 20-22). Petitioner testified he began attacking whoever was on his back with the knife as the three burst out of the back door falling to the ground. (App. p. 307, ll. 1-8). Petitioner testified he saw Rodney run to the left, Dawn run to the right and he ran across the street to a light he saw. (App. p. 307, ll. 8-12).

At that point, the PCR judge reminded Petitioner she had read Petitioner's testimony in the trial transcript. (App. p. 307, ll. 14-15). Petitioner continued and testified he was not aware of any forensic testing done on the knife located at the scene. (App. p. 308, ll. 6-9). Petitioner offered the SLED forensic testing report into evidence as Applicant's exhibit 1, without objection. (App. p. 309, ll. 1-3). Petitioner claimed trial counsel should have called a witness to the stand to testify about the DNA testing, because the results from the swab of one of the knives

[16] In contrast, at trial, Petitioner testified his money was ripped when only Rodney and Dewayne were attacking him. (App. p. 170, ll. 15-25).

[17] At trial, Petitioner never mentioned being beaten with fists.

[18] In contrast, at trial, Petitioner testified Pam ran out the door and Dewayne followed her. *Then*, a struggle ensued between Petitioner and the two remaining occupants of the house, Dawn and Rodney, before they all fell out of the back door. (App. p. 172, l. 20 – p. 173, l. 14).

indicated Petitioner could not be excluded as having contributed to the blood on the knife. (App. p. 310, ll. 3-10). Petitioner believes it would have supported his testimony that Pam attacked him with a knife and cut his wrist. (App. p. 310, ll. 7-20). Petitioner then admitted exhibits 2-6, without objection, which were notes from the jury – the same that had been admitted during trial. (App. p. 311, ll. 3-16).

The State called trial counsel to testify. With regard to the SLED report, trial counsel testified he reviewed and discussed Petitioner's entire discovery with Petitioner. (App. p. 336, l. 24). Trial counsel affirmed he presented evidence by way of Investigator Talanges testimony and photographs to corroborate Petitioner's testimony that he received a cut to his wrist during the attack. (App. p. 337, ll. 10 – 12). Although the SLED testing of blood from one of the knives revealed there was blood from three individuals, Dawn and Petitioner could not be excluded as contributors and Pam was excluded as a contributor, trial counsel testified it was unknown if it belonged to Dewayne or Rodney because they could not be found for comparison. (App. p. 343, ll. 10-14). When asked why he did not present evidence of a third person's blood on the knife to the jury, trial counsel explained that he would have to call the SLED chemist who was a regular State's witness. (App. p. 343, l. 16 – p. 344. l. 3). Trial counsel's concern with that was the chemist's testimony would be tailored in favor of the State and not the defense. (App.p. 344, ll. 3-4). Trial counsel opined the chemist could testify there was no way of knowing when the blood came to be on the knife or from whom. (App. p. 344, ll. 6-9).

The PCR judge, the Honorable Deadra L. Jefferson, made her findings on the record immediately after the presentation of the case. Judge Jefferson specifically stated, "hindsight is always 20/20 when it comes to trial. A – an attorney is not required and is not held to the standard of perfection. They're held to a standard of professional competence, which is

presumed in most instances." (App. p. 347, ll. 16-20). Judge Jefferson further opined that in cases hinging on credibility, it is not unusual for juries to be conflicted and take longer than usual during deliberations. But, the extended amount of time for collective thought and reasoning in reaching their verdict gave Judge Jefferson more confidence in their verdict and the criminal justice system, rather than the suggestion that it was merely a close call. (App. p. 347-348). With regard to the DNA evidence, Judge Jefferson found "it is not the court's posture or prerogative to substitute its judgment for a well-reasoned strategic decision" not to present such evidence. (App. p. 349, ll. 20-23). Judge Jefferson further found that trial counsel's strategic decision not to present DNA evidence was "not sufficient to undermine [the] court's confidence in the verdict." (App. p. 349, l. 25 – p. 350, l. 1). Judge Jefferson found trial counsel's testimony credible and correct that the SLED chemist would have testified more favorably for the State. (App. p. 350, ll. 3-7). Judge Jefferson explained in her ruling,

> [...] it's a knife that cuts both ways. It could have been perceived as exculpatory, but by the time the State would have neutralized that testimony, that being the inability to determine the origin of when it was there, coupled with the fact that you could not find these other individuals, and even if you could, there's no law, there's nothing that would have compelled them to submit themselves for testing.
>
> So you would have been left with a void that could not have been answered, and, in my perception, would not have been exculpatory to the Applicant in this case. And, again, in hindsight, it looks and sounds compelling, but when you delve into it a little more deeply, you find that it's something that, that could have been raised, but it really does not necessarily support self-defense because you have another sample that you can't confirm who it belongs to.
> [...]
> And while it may again – sound again, in hindsight, as a really viable argument, I am inclined, in the heat of the battle, to rely on the strategic decision making of an attorney who's seasoned and experienced in these type matters who made a strategic decision that he didn't feel it would inure to his client's benefit cause he believed the State would have tailored the testimony again to confirm that they don't know when the – what the origin of it was or when it was left because they would not have been able to corroborate that it was left there during some attack.

(App. p. 350-353).

On May 7, 2015, Judge Jefferson filed an order of dismissal, denying Petitioner PCR. Petitioner filed a timely notice of appeal. On November, 13, 2015, Petitioner filed a petition for writ of certiorari. On March 30, 2016, the State filed its return. By order dated April 13, 2017, this Court granted Petitioner's petition for writ of certiorari and dispensed with further briefing. On June 16, 2017, Petitioner filed his brief of petitioner. This brief follows in return.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

I. The record contains evidence of probative value to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving counsel was ineffective where Counsel gave a valid strategic reason for not seeking to introduce a SLED report showing the existence of DNA from an unidentified third person on the knife.

In a PCR action, the 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, 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, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). 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 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). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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.

Furthermore, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

A. The record contains ample evidence of probative value to support the PCR judge's finding that Petitioner failed to show Counsel's performance was deficient.

This Court should affirm the PCR judge's ruling because there is ample evidence of probative value in the record to support the PCR judge's finding that Petitioner failed to show Counsel's performance fell below an objective standard of reasonableness. The PCR judge found "Counsel was not ineffective for failing to introduce DNA evidence and exercised his discretion by making tactical, strategic decisions for [Petitioner's] defense." (App. p. 393).

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317, S.C. 292, 294, 454 S.E.2d 312, 313 (1996). "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) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)). In making a

fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the "[applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

Petitioner testified at trial. (App. pp. 161-203). At the PCR hearing, Petitioner testified the testimony he was giving at the PCR hearing "was the same testimony [he] provided at the trial." (App. p. 315, ll. 19-21). However, as noted above, Petitioner's testimony was substantially different than that given at trial. Petitioner testified it was his contention that the DNA report "would definitely show that [he] was injured with that particular knife and that [his] blood was on the knife." (App. p. 310, ll. 7-9). Petitioner claimed that had the jury seen the DNA results not excluding him as a possible match to the blood on one of the knives, the jury "couldn't say that [Petitioner] was not injured. They couldn't say that [Petitioner] was not hurt inside the home, that they didn't attack [Petitioner]." (App. p. 310, ll. 7-20). While the testimony elicited from Investigator Talanges by trial counsel that he observed a cut on Petitioner's wrist and the photographs of the cut trial counsel admitted into evidence precluded the jury from believing Petitioner was not injured that night, neither this evidence nor the DNA evidence would prove Petitioner was injured **in the home and by the victims**, as Petitioner claims.

At the PCR hearing, PCR counsel argued the DNA of the unidentified, third contributor on the knife was potentially exculpatory evidence that would have supported Petitioner's claim he was attacked by four people. While a compelling argument in hindsight, trial counsel explained why he did not present the DNA evidence. Counsel testified that in order to elicit testimony regarding the DNA evidence, he would have to call "the SLED chemist [who] does the blood analysis." (App. p. 343, ll. 20-23). Counsel further stated, "[b]ut my problem is when you bring in what I consider to be professional normal State's witnesses, they tend to tailor their testimony towards the State and not the defense." (App. p. 344, ll. 1-4). Counsel added that "[t]hey could testify that they have no way of knowing when or where that blood was on the knife, whether it was on there, . . . from before, had not related to the incident at all." (App. p. 344, ll. 6-9). Counsel further testified that to his knowledge, there was no testing done of the other individuals that Petitioner testified were there, but that they also could not find those individuals. (App. p. 343, ll. 10-14). Counsel articulated a valid reason for employing this strategy, the PCR judge found it was reasonable, and this Court should not substitute its judgment in hindsight for that of a seasoned trial attorney in the heat of battle.

Although the DNA evidence could have potentially supported Petitioner's theory of being attacked by four people, the exculpatory value was minimal. First, the third contributor to the DNA on the knife was unknown. Rodney and Dewayne could not be found and therefore, no comparison could be made. Second, there was no evidence of when the DNA came to be on the knife. Therefore, not knowing from whom the DNA came or when it came to be there, the jury would be left with a great void.

Additionally, although trial counsel did not specifically testify his strategy for not presenting DNA evidence was due to the overwhelming DNA evidence in support of the State,

such evidence should be considering when assessing trial counsel's performance. All articulable arguments, which can be inferred from the record as trial strategy, can be argued in favor of competence. A strategic or tactical decision does not have to be articulated by counsel on the record, as the passage of time can often wear on the memories of well-reasoned decisions made in the heat of battle of avenues not pursued, objections withheld, or evidence not presented. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. See Wood v. Allen, 558 U.S. 290 (2010). (affirming state PCR court's finding that counsel made a strategic decision not to inquire further into a the petitioner's report about his mental deficiencies where the record supported that finding, despite Counsel not articulating the strategy).

In this case, swabs of blood were taken from the front, glass storm door and the steps at the front door. The DNA from this blood matched that of Pam. (App. p. 364). Swabs of blood were also taken from the back door, back door steps, and a light switch at the back door. The DNA of this blood matched that of Dawn. (App. p. 364). These findings corroborated both Pam and Dawn's testimony that Petitioner first attacked Pam who then ran out of the front door while Petitioner focused his attack on Dawn who ran out of the opposing, back door. This evidence does not tend to support Petitioner's testimony at trial or at the PCR hearing that all four people attacked him and ran out the door. Petitioner did not specify which door Pam and Dewayne exited. Petitioner claimed Dawn and Rodney fell out of the back door with him during the knife struggle in which he was attacking whoever was on him with the knife. However, no blood found in or around the home matched anyone other than the two females Petitioner attacked.

The State did not present any DNA evidence in its case in chief. However, had trial counsel opened the door to present minimally exculpatory DNA evidence in support of

Petitioner's version of the facts, the State would have certainly poked holes in the evidence that had any exculpatory value to Petitioner and focused on the ample DNA evidence favorable to the State. Based on the record and the testimony at the PCR hearing, the DNA evidence would have potentially undermined Petitioner's testimony more than it would have helped. The record clearly demonstrates a valid strategy in trial counsel's decision not to open the door on the DNA evidence.

Petitioner's reliance on Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014), is misplaced. First, Bagwell was decided in 2014 and Petitioner was tried in 2011. Second, in Bagwell, trial counsel was found ineffective for failing to investigate, to wit, trial counsel failed to request DNA testing of blood found at the crime scene. At trial, there was testimony that Bagwell had blood or a scratch on his face and the State argued Bagwell could have received the cut from exiting through a broken glass door in the victim's apartment. At Bagwell's PCR hearing, Bagwell introduced DNA test results indicating the blood found on three pieces of glass from that same door did not match Bagwell. Bagwell's trial counsel admitted she knew there were blood samples, but did not request DNA testing. Trial counsel offered no justification for her omission, other than she believed the State would perform DNA testing. The Court of Appeals found Counsel's decision not to request DNA testing was objectively unreasonable because the results of such test would have supported Bagwell's claim that he was sleeping during the burglary.

Bagwell's trial counsel failed to conduct an independent investigation of the facts and circumstances of the case. In contrast, Petitioner's trial counsel reviewed the DNA test results prior to trial and made a strategic decision not to present the DNA results during trial. Bagwell's trial counsel could not offer a reasonable justification for not requesting DNA **testing.**

Contrarily, Petitioner's trial counsel enunciated two reasons he did not present the DNA **results** and the record clearly demonstrates a third.

Petitioner also argues trial counsel's strategic decision in not presenting the DNA report because he would have to call the SLED chemist – a regular witness for the State – was unreasonable because trial counsel could have introduced the DNA report under Rules 801(d)(2) and 902(1), SCRE. Rule 801(d)(2) addresses non-hearsay admissions by party-opponents and Rule 902(1) addresses self-authentication of domestic public documents under seal. Petitioner offers no legal support from these conclusory statements because there is none. SLED DNA testing reports are investigative reports, not admissions by a party-opponent, and therefore Rule 801(d)(2) cannot be used to introduce them. Likewise, SLED DNA testing reports are not domestic public documents under seal as required by Rule 902(1). Rather, the admission of scientific evidence is governed by Rule 702, SCRE. Trial counsel's testimony that he would have to call the SLED chemist is in fact correct. Before scientific evidence can be admitted under Rule 702, SCRE, "the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). (affirming trial judge's finding that the results of mitochondrial DNA analysis were admissible under Jones[19] factors and Rule 702, SCRE). See also State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990) (finding "DNA analysis may be admitted in judicial proceeding in this state **in the same manner as other scientific evidence** which is routinely used in trial court proceedings [...]" subject to attack, such as impeaching the procedures used in a scientific test or the reliability of the results obtained, contamination of the sample, or chain of custody issues). (Emphasis added).

[19] State v. Jones, 273, S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

Petitioner next argues nothing in the record supports the PCR judge's ruling "that trial counsel's decision not to adduce the blood evidence was reasonable because if the blood belonged to Dewayne or Rodney, the SLED analysis would have revealed it." (BOP p. 8). This was merely one consideration based on the PCR judge's experience and knowledge, rather than a finding of fact or judicially noticed fact, in arriving at her conclusion that DNA evidence from an unknown source and from an unknown time, without more, would not necessarily have been beneficial to Petitioner's case.

Accordingly, the record contains ample evidence of probative value to support the PCR judge's finding that Counsel had valid strategic reasons for not introducing the DNA report, and that, therefore, Petitioner failed to satisfy his burden of proving Counsel's performance fell below an objective standard of reasonableness.

B. The record contains ample evidence of probative value to support the PCR judge's finding that Petitioner failed to show prejudice.

The record supports the PCR judge's finding that Petitioner failed to satisfy his burden of proving that any alleged deficiency in Counsel's performance prejudiced him. To satisfy the second prong of Strickland, Petitioner must show "that 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." Strickland, 466 U.S. at 694.

Petitioner failed to introduce evidence at the PCR hearing to show to whom the DNA belonged or when the DNA came to be on the knife. (App. p. 344, ll. 6-9). No evidence was presented to show whether the DNA even belonged to a male or female. No evidence was presented to support the theory that the third, unknown DNA was from Rodney or Dewayne or if

it came to be on the knife the same night of the incident. So, while in theory, evidence of a third, unknown DNA on the knife would support Petitioner's version of events of being attacked by four people, the support is weak and the connection tenuous. Accordingly, the PCR judge could only speculate as to whether the evidence would have affected the outcome.

Furthermore, the other DNA evidence included in the full report substantially undermined Petitioner's version of events and directly corroborated the testimony of the two victims, Pam and Dawn. Petitioner contends the third unknown DNA belonged to one of the other four attackers. However, no blood from the home or around the home matched that of a third person. Blood was found on the back door, on the back door steps, on a light switch by the back door, on a stereo, on the front, glass storm door, and on the front door steps. The DNA from all the blood found at the home matched Pam and Dawn. Furthermore, the State did not offer any DNA evidence in its case in chief, so Petitioner was spared from having the jury presented with significant forensic evidence in support of the State's witnesses' testimony. Had trial counsel opened the door on the DNA report to simply let in questionably exculpatory evidence, the State most certainly would have also presented the surely inculpatory DNA evidence.

Finally, there was overwhelming evidence of guilt in this case, such that the DNA evidence would be negligible in the overall consideration of Petitioner's guilt. Petitioner's story contradicted that of three other independent witnesses. Pam and Dawn's version of events were essentially identical even though Pam and Dawn had only met that night. Mr. Brewington, a disassociated third party, gave testimony that corroborated that of Pam and Dawn and contradicted that of Petitioner. Despite Petitioner's claim he had been repeatedly physically attacked with fists by four people, Petitioner escaped with nothing more than a small,

insignificant cut to his wrist – which was more likely from his fall while holding two pocket knives. On the other hand, the two female victims sustained serious, life-threatening stab wounds.

Petitioner explained the torn money by alleging his attackers ripped most of the twenty-eight $100 bills during the struggle. However, this did not explain the burnt $100 bill in Dawn's possession. Dawn testified that during the party, Petitioner was ripping and burning his money – which would explain Dawn having ripped and burnt $100 bills in her possession.

Mr. Brewington testified he, Pam and Dawn retreated to his outbuilding and as Petitioner tried to get to them, Petitioner broke the window with his fist.[20] Petitioner's less believable story was that while knocking on the window of Mr. Brewington's outbuilding, Petitioner inadvertently broke the glass with his knife. Interestingly, Petitioner testified that after he, Dawn, and Rodney burst through the door and fell to the ground, he saw Dawn get up and run in one direction and Rodney run in the opposite direction while he ran directly across the street to Mr. Brewington's outbuilding. There, Petitioner testified he knocked first in an attempt to seek refuge and **then** saw Pam, Dawn, and Dewayne all inside with Mr. Brewington. The jury surely questioned how Dawn beat Petitioner to (and into) the building Petitioner ran straight for without him even seeing her enter.

The jury was also presented with testimony from Investigator Talanges that Petitioner never gave him a statement that Petitioner was the one robbed that night. Nor did Petitioner ever try to report the alleged robbery committed against him. Petitioner's credibility was questionable at best and this is well illustrated by the differences in his trial testimony and PCR testimony. Ultimately, even if the jury was presented with evidence of the DNA test results, it would not

[20] The breaking of the window could have been another possible cause of the small cut to Petitioner's wrist.

have affected the outcome of the trial. Accordingly, the record supports the PCR judge's finding that there is no reasonable probability that, but for the alleged errors of Counsel, the outcome of the proceeding would have been different.

CONCLUSION

The record fully supports the PCR judge's finding that Petitioner failed to show that Counsel's performance was deficient or that he was prejudiced by any alleged deficient conduct. For the foregoing reasons, Respondent respectfully requests that this Court affirm the PCR judge's ruling.

Respectfully submitted,

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August 31, 2017.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001037

Randall Price, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE OF SERVICE

I, Valerie Garcia Giovanoli, certify that I have today served the within **Brief of Respondent** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served. This 31st day of August, 2017.

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