STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BERKELEY COUNTY
G. Thomas Cooper, Jr., PCR Judge
Kristi L. Harrington, Trial Judge

Appellate Case No. 2017-000547

DOUGLAS THOMPSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. **The post-conviction relief court properly determined Petitioner failed to establish trial counsel was constitutionally ineffective for failing to move for a severance because there was no reasonable likelihood a severance would have been granted and Petitioner cannot establish any resulting prejudice.**

III. **The post-conviction relief court properly determined Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to challenge the sufficiency of the evidence on appeal because appellate counsel properly briefed a meritorious issue on Petitioner's behalf.**

STATEMENT OF THE CASE

Procedural History

In August of 2010, Petitioner Douglas Monray Thompson and his accomplice, Clarence J. Fishburne, were arrested following an investigation into a home invasion and robbery. In October of 2010, the Berkeley County grand jury indicted Petitioner and Fishburne for two counts each of armed robbery, two counts each of kidnapping, and one count each of first-degree burglary. In November of 2011, the Berkeley County grand jury re-indicted Petitioner and Fishburne for the same offenses. On November 7, 2011, a jury trial was commenced in the Berkeley County court of general sessions with the Honorable Kristi Lea Harrington, circuit court judge, presiding. David Aylor, Esquire, and Peter McCoy, Esquire, represented Petitioner, and Chad Shelton, Esquire, and David Schwake, Esquire, represented Fishburne. Assistant Solicitors Ashley Cornwell and Bryan Alfaro of the Ninth Circuit Solicitor's Office prosecuted the case. At the conclusion of trial, the jury convicted Petitioner and Fishburne as indicted.

Following the verdict, the trial judge sentenced Petitioner to concurrent terms of imprisonment of fifteen years for each of his convictions and sentenced Fishburne to concurrent terms of imprisonment of twenty years for each of his convictions.

Subsequently, Petitioner filed a timely notice of appeal and an appeal was perfected by Appellate Defender LaNelle C. DuRant of the Office of Indigent Defense - Division of Appellate Defense. On appeal, Petitioner raised the following issue, "Did the trial judge err in refusing to suppress the identification evidence when the show-up identification procedure used was unduly suggestive, inherently unreliable, and conducive to irreparable mistaken identification?" Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences by unpublished opinion. State v. Douglas M. Thompson, 2014-UP-136 (Ct. App. filed April 2, 2014). The remittitur was returned to the circuit court on April 18, 2014.

Thereafter, on July 9, 2014, Petitioner filed a *pro se* application for post-conviction relief, which he amended on February 11, 2015. On November 11, 2015, and July 18, 2016, Petitioner's counsel, Lance S. Boozer, filed amendments to the application. The State (Respondent) served its return on September 4, 2015, requesting an evidentiary hearing. An evidentiary hearing was convened on December 9, 2016, before the Honorable G. Thomas Cooper, Jr., circuit court judge. Petitioner was present and represented by Lance S, Boozer. Respondent was represented by Assistant Attorney General Ruston Neely of the South Carolina Attorney General's Office. At the hearing, Petitioner testified and presented testimony from trial counsel David Aylor. By written order filed on February 21, 2017, the court denied and dismissed all of Petitioner's allegations. Petitioner filed a timely notice of appeal challenging the denial of post-conviction relief.

Summary of Facts Adduced at Trial

Around 10:30 p.m. or 11:00 p.m. on the evening of August 6, 2010, Adao Olivera went out onto the back porch of the apartment he shared in Goose Creek, South Carolina, with his pregnant niece, Paulino Silva ("Paulino"), Paulino's husband, Paulo Silva ("Paulo"), and Paulino and Paulo's young daughter, Carrie, to smoke a cigarette. (App. p. 171; pp. 286-287; p. 298; pp. 472-473; pp. 535-536). A little while later, Paulo joined Olivera on the back porch and began speaking with him. (App. p. 287; p. 321; pp. 472-473; pp. 535-536). A few minutes after that, three black males approached them, displayed a gun, demanded they give them money, took Paulo's wallet, grabbed Olivera, and began choking him. (App. p. 287; p. 321; pp. 472-474; pp. 535-536). The man with the gun then insisted Paulo open the back door to the apartment, and Paulo reluctantly did so. (App. p. 289; p. 474; p. 542). When he opened the back door, Paulo saw Paulino, told her they were being robbed, and asked her to go for help in Portuguese. (App. p. 289; p. 536). Paulino then fled from the apartment through the front door before Paulo, Olivera, and the robbers entered the apartment. (App. p. 289; p. 474; p. 536).

After entering the apartment, the gunman demanded to know where Paulo's wife was, and Paulo told him she was in the front room. (App. p. 289). The men then went to the front room and did not find Paulino. (App. p. 289). In response, the gunman ordered Paulo and Olivera to go upstairs, and Paulo, Olivera, the gunman, and another of the robbers went upstairs and entered one of the bedrooms while the other robber remained downstairs. (App. pp. 289-290; p. 291; p. 474; p. 486). The gunman then forced Paulo and Olivera to kneel down, and the other robber struck Paulo in the head. (App. p. 290; pp. 474-475). After that, the gunman demanded to know where Paulino was, threatened to kill Paulo, and began counting down while the other

robbers began taking the victims' belongings, including a laptop computer, approximately $600 in cash, and several cellphones. (App. pp. 290-291; p. 313; p. 317).

Meanwhile, after fleeing from the apartment, Paulino ran to the apartment of her neighbor, Lucineia Rodriguez, and knocked on the door until Rodriguez answered. (App. pp. 536-537; p. 545). When Rodriguez opened the door, Paulino told her what had happened, and Rodriguez responded by quickly heading to the Silvas' apartment to rescue Carrie. (App. p. 545). At the Silvas' apartment, Rodriguez encountered a man with a gun, and he told her to come inside. (App. p. 545). She then entered the apartment, headed upstairs, saw a man holding Olivera and Paulo in one of the bedrooms, and went into the other bedroom to retrieve the Silvas' daughter. (App. pp. 545-546).

Upon seeing Rodriguez inside of the apartment, the robbers became panicked and rapidly fled. (App. pp. 290-291; pp. 475-476; p. 546). Afterwards, Paulo and Olivera went outside and met up with some of their neighbors. (App. p. 291; p. 476). Paulo then briefly looked around for the robbers, went to the apartment manager's home, was unable to locate the apartment manager, encountered a Brazilian man, and spoke with him about the robbery. (App. pp. 291-292). While speaking with the Brazilian man, he saw two people walking down the road in clothing different from what the robbers were wearing and told the Brazilian man he thought they were the robbers. (App. pp. 292-293). The Brazilian man then asked his wife to call the police, and Paulo returned to his apartment. (App. pp. 292-293). Back at the apartment, Paulino discovered a cellphone that had been abandoned by the robbers when they fled. (App. p. 489; pp. 538-539).

At approximately 11:35 p.m., someone from the apartment complex called 911 and reported two black males wearing red-and-white-striped shirts committed a robbery at gunpoint.[1] (App. p. 205; p. 476). Officers were then quickly dispatched to the scene, and Deputy Jason Charlton of the Berkeley County Sheriff's Office arrived at the apartment complex at 11:39 p.m. (App. pp. 205-206; pp. 331-333; p. 359). Upon arriving, Deputy Charlton briefly spoke with people standing in the parking lot of the apartment complex, including the Brazilian man who Paulo spoke with, and was advised a laptop was taken during the robbery, the suspects were black males, and the suspects were armed with a gun. (App. p. 292; pp. 335-336). The people in the parking lot then indicated the robbers were walking along the side of a nearby road, and Deputy Charlton left to try and locate them. (App. p. 337).

Moments later, Deputy Charlton encountered three black males walking away from the apartment complex approximately one-quarter of a mile away from the entrance to it.[2] (App. p. 207; pp. 337-338; p. 391). One of the men was carrying a laptop. (App. p. 338). In response, Deputy Charlton stopped his vehicle and started to approach the men. (App. p. 339). However, upon seeing the officer, Petitioner, who was carrying the laptop, dropped the computer and began hiking up his pants like he was preparing to run while Clarence J. Fishburne, another of the men, told the others not to run and the third man fled. (App. pp. 339-340; pp. 392-393). Deputy Charlton then detained Petitioner and Fishburne, frisked them for weapons, found none, and waited for another officer to arrive on the scene to assist him. (App. pp. 341-343).

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[1] During trial, Theresa Barnett, the operations supervisor at the Berkeley County 911 call center, indicated there was a language barrier between the 911 operator who received the call and the caller who reported the robbery. (Tr. p. 205).

[2] Deputy Charlton arrived at the location of the men only seconds after leaving the apartment complex. (Tr. p. 342). The men were the first black males Deputy Charlton encountered, and they were the only black men in the area at the time. (Tr. pp. 365-366).

A few minutes later, Deputy Robert Ollic of the Berkeley County Sheriff's Office arrived and secured Petitioner and Fishburne while Deputy Charlton returned to the apartment complex to speak with the victims. (App. pp. 142-144; p. 208; pp. 341-342). Deputy Charlton then met with Paulo and Olivera along with one of their neighbors, Rubio Hillario, who assisted in translating for the officer and the victims.[3] (App. pp. 293-294; pp. 342-343; p. 477). After speaking with them briefly, Deputy Charlton advised the men he had detained some people who may or may not be the robbers, told them he wanted them to see if they could identify them, transported them to the location where Petitioner and Fishburne were being detained, pulled up in front of the suspects' location, stopped approximately twenty to thirty feet away, and used his spotlight to illuminate Petitioner and Fishburne, who were standing in front of Deputy Ollic's vehicle with their hands handcuffed behind their backs and with a police officer beside each of them. (App. p. 294; pp. 304-305; p. 324; pp. 344-345; pp. 367-368; pp. 477-478; p. 488). Upon seeing the suspects, Paulo and Olivera almost instantly began nodding and pointing in the direction of Petitioner and Fishburne, quickly identified them as the robbers without any hesitation, and indicated they were certain of their identifications. (App. p. 294; pp. 325-327; pp. 345-346; p. 478).

Thereafter, Petitioner and Fishburne were arrested and searched incident to their arrests. (App. p. 347). During the searches, Deputy Charlton discovered two cellphones in Fishburne's pockets, a cellphone in Petitioner's pocket, and $442 in cash in Petitioner's possession. (App. p. 347; p. 349; p. 352; p. 406). Deputy Charlton then asked Paulo and Olivera to identify the items discovered during the searches, and they identified the two cellphones recovered from

[3] Paulo and Olivera primarily spoke Portuguese and spoke very little English while Deputy Charlton spoke very little Portuguese. (Tr. p. 74; p. 341).

Fishburne's pockets as phones that belonged to Olivera and identified the laptop as the one taken from their home during the robbery. (App. p. 294; pp. 298-300; pp. 327-328; p. 349; pp. 351-352; pp. 478-480). The victims then provided Deputy Charlton with the cellphone Paulino found in the apartment after the robbery, and the officer looked inside and found a picture of Fishburne stored in the phone. (App. p. 295; pp. 353-356).

Subsequently, Petitioner and Fishburne were indicted for two counts of armed robbery, two counts of kidnapping, and one count of first-degree burglary, and they proceeded to trial together. (App. pp. 8-13; Indictments). At the outset of trial, Fishburne's defense counsel objected to the admission of any identification evidence, and the trial judge conducted an in camera hearing on the motion. (App. p. 53; pp. 64-65; p. 69).

During the hearing, Deputy Charlton testified he responded to the report of a home invasion at the victims' apartment complex, was advised three suspects were involved, and learned the suspects used a gun and took a laptop during the robbery. (App. pp. 69-71). At the time of the hearing, Deputy Charlton could not remember the specifics of the reported descriptions of the suspects he received but recalled the victims described the suspects as black males. (App. p. 109; p. 122; p. 124). After receiving the description of the suspects, Deputy Charlton indicated he encountered three men matching the descriptions of the robbers only one-quarter of a mile away from the apartment complex where the robbery occurred and one of the men was carrying a laptop. (App. p. 72). Based on his observations, Deputy Charlton stated he approached the men, one of the men dropped the laptop, another of the men told the others not to flee, and the third man fled. (App. pp. 72-74). He testified he then detained the two that did not flee until Deputy Ollic arrived on the scene, went to the apartment complex, told the victims he

found two men who may or may not have committed the robbery, asked them to come view the men, and directly brought them to Petitioner and Fishburne's location. (App. pp. 74-77). Upon arriving, the officer indicated Petitioner and Fishburne were positioned in front of a police vehicle with their hands handcuffed behind their backs, he used a spotlight to illuminate them, and the victims "rather instantly" identified them as the robbers without any prompting or hesitation. (App. pp. 78-81). Subsequently, Deputy Charlton stated the victims were shown property recovered during the investigation and search of Petitioner and Fishburne and the victims identified that property as belonging to them. (App. p. 84; p. 100). He noted Petitioner and Fishburne were the only non-uniformed people on the scene during the show-up, the victims were not separated during the show-up, and he could not remember if the victims indicated one of the suspects changed his shirt after the robbery. (App. p. 95; pp. 97-98; pp. 117-118).

In addition to Deputy Charlton's testimony, Deputy Ollic testified about the details of the show-up. (App. pp. 144-145). During his testimony, Deputy Ollic stated the suspects had their hands handcuffed behind their backs at the time of the show-up, he placed the suspects in front of a patrol car, the suspects were illuminated, and he stood out of the victims' line of sight while the identifications were made. (App. pp. 143-145). He further stated the suspects were identified one at a time and there were no other black males at the scene at the time of the identifications. (App. pp. 156-157).

Additionally, Olivera testified about the circumstances of his out-of-court identifications of Petitioner and Fishburne as the robbers. (App. p. 163). Regarding the identifications, Olivera stated he was asked to identify the robbers not long after the robbery and was taken to their location. (App. p. 162). Once there, he indicated both suspects were detained fifty feet from him,

he saw them clearly after they were illuminated, he identified them as the robbers who went upstairs during the robbery, and he was certain of his identifications. (App. pp. 162-163; p. 180). He further testified he immediately recognized them as the robbers when the police vehicle stopped in front of them, was not told who to pick, thought one of the robbers was wearing a blue t-shirt but could not remember if that robber was present during the show-up, and personally felt like all black males have "a lot of similar facial features." (App. p. 164; p. 169; p. 181).

Similarly, Paulo also testified about the circumstances of his identifications of the robbers. (App. p. 187). Regarding the identifications, he stated he was asked to view some men shortly after the robbery to see if they were the people who robbed him, he was taken approximately 200 yards from the apartment complex, the suspects were illuminated, and he immediately recognized the suspects as the robbers and was certain of his identifications. (App. pp. 185-187). He also testified he prepared a statement after the crimes indicating that the robber who choked Olivera was wearing a blue t-shirt but neither of the men at the show-up was wearing such a shirt. (App. p. 189). Furthermore, he stated the show-up was performed approximately an hour after the robbery while conceding he was not good at estimating time and further indicated he believed many black males look similar. (App. p. 195; p. 202).

At the conclusion of the hearing, Petitioner's defense counsel argued the show-up identification procedure used in the case was unduly suggestive. (App. pp. 227-228). In support of that contention, Petitioner's defense counsel asserted one of the victims indicated all black males looked the same to him, the victims did not have a good opportunity to view the suspects during the robbery, the victims did not know what was going on because the robbery occurred late at night, the victims' descriptions of the suspects did not contain sufficient detail and were

inconsistent in regard to Petitioner and Fishburne's clothing, there was confusion regarding the number of robbers and the certainty of the victims' identifications, and the details of the show-up were suggestive as both Petitioner and Fishburne were handcuffed and placed in front of a police vehicle. (App. pp. 229-232). For those reasons, Petitioner's defense counsel moved for the victims' out-of-court identifications to be suppressed, and Fishburne's defense counsel joined in the motion. (App. pp. 235-236).

In reply, the solicitor asserted the show-up identification procedure used was not unnecessarily suggestive and there was no substantial likelihood of misidentification. (App. p. 237). In support of that assertion, the solicitor noted the victims had an extensive opportunity to view the robbers during the incident, the victims' attention was focused because of fear, and any deficiencies in the victims' descriptions of the perpetrators resulted from language barrier issues. (App. pp. 237-238). The solicitor further noted the show-up was conducted shortly after the crimes only a short distance away from the scene of the crimes while the victims' memories were still fresh and at a time when the suspects had not had time to dispose of the victims' laptop and cellphones. (App. pp. 238-239). Based on those circumstances, the solicitor asserted there was no substantial likelihood of misidentification and the identifications should be admitted. (App. p. 241).

After considering the arguments of counsel, the trial judge denied Petitioner and Fishburne's motion to suppress the identification evidence. (App. p. 246). In making that ruling, the trial judge found the show-up identification procedure was not unnecessarily suggestive based on the facts it occurred within an hour of the crimes near the scene of the crimes and the suspects matched the limited description provided and were still in possession of the victims'

belongings. (App. p. 245). The trial judge further found the victims had an opportunity to view the suspects and expressed certainty in their identifications. (App. pp. 245-246).

Thereafter, during trial, Deputy Charlton and the victims testified about the robbery, the ensuing law enforcement investigation into the robbery, and the identifications of Petitioner and Fishburne as two of the robbers. (App. pp. 286-300; pp. 332-356; pp. 472-481; pp. 535-538; pp. 545-546). During his testimony before the jury, Paulo testified he got a good look at the robbers, identified them during the show-up conducted after the robbery, and was entirely certain of his identifications. (App. p. 294; pp. 326-327). He further identified the laptop introduced into evidence during trial as the one taken from his apartment during the robbery. (App. pp. 298-300; pp. 327-328). Subsequently, on cross-examination, he acknowledged he had previously prepared a statement indicating one of the robbers was wearing blue clothing even though neither of the men he identified was wearing blue clothing. (App. pp. 301-302). He further acknowledged he had previously indicated that the faces of black men all looked the same to him. (App. p. 321).

During Deputy Charlton's testimony, he noted the identifications of Petitioner and Fishburne were made without any hesitancy shortly after the crimes and the victims' property was discovered in a search of Petitioner and Fishburne after they were identified. (App. p. 335; p. 342; pp. 346-347; p. 349; p. 368). He further stated the victims' identifications of Petitioner and Fishburne as the robbers occurred "almost instantly" upon seeing them. (App. pp. 345-346). Additionally, he noted Petitioner was carrying the victims' laptop when he first encountered him and Fishburne's cellphone was located in the victims' apartment after the robbery. (App. p. 340; pp. 355-356). Subsequently, on cross-examination, he acknowledged the victims were not

separated during the show-up and he did not find any clothing or a gun during his investigation. (App. p. 370; pp. 373-374).

Furthermore, during Olivera's testimony, Olivera indicated he got a good look at all three of the robbers during the robbery since none of them were wearing masks, he could clearly see the suspects during the show-up, and he was certain of his identifications. (App. p. 478; pp. 491-492). He further noted his cellphones were discovered during a search of the suspects after they were apprehended and the cellphone of one of the robbers was discovered in his home after the robbery. (App. pp. 479-481). Subsequently, on cross-examination, he acknowledged he did not know any black males and had previously testified all black males have similar facial features. (App. pp. 498-499).

Following the close of the State's case, Petitioner and Fishburne moved for directed verdicts. (App. pp. 550-551). In support of his motion for a directed verdict, Fishburne's counsel argued, "Your Honor, at this point procedurally for the record we move for a directed verdict on all charges. Taking the evidence in the light most favorable to the state, we don't believe they have met the burden for each and every element of both armed robberies, both kidnappings and both burglary in the first degree. Thank you." (App. 550-551). Thereafter, Petitioner's counsel argued, "I would join [Fishburne's counsel] in his motions to also move for a directed verdict. And specifically I don't think they have met the elements for kidnapping, Your Honor. Even viewing this in the light most favorable to the State, there has been no direct evidence that there should be two counts of kidnapping, that could be there, Your Honor. I just see one. Thank you." (App. p. 551). When questioned by the trial judge as to how he saw only one kidnapping charge, Petitioner's counsel responded, "Because, Your Honor, if I recall testimony correctly, one man

was taken, one man was held against his will and the other one was not. The other man was strangled and forced to his knees, and the other one was not." (App. p. 551). The State then went through the elements of each offense and the evidence presented to satisfy each element. (App. pp. 552-3). Counsel for Fishburne and Petitioner then responded, arguing only one count of kidnapping and one count of armed robbery should be submitted to the jury based on the evidence presented. (App. pp. 554-557). Thereafter, the trial court denied the motion for directed verdict. (App. pp. 557-559). Neither defendant presented a defense, and both renewed their directed verdict motions, which were denied by the trial court. (App. p. 563).

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. (App. p. 550; pp. 563-564; pp. 571-637). During his closing argument, Fishburne's counsel attacked the reliability of the out-of-court identifications made by Silva and Olivera while reminding the jury that both of the victims indicated "black men look similar." (App. pp. 594-595). Likewise, during his closing argument, Petitioner's counsel specifically challenged the reliability of the victims' out-of-court identifications by pointing out the discrepancies in their testimony and emphasizing to the jury the victims both acknowledged all black men looked the same to them. (App. pp. 603-606).

Following the presentation of the closing arguments, the trial judge instructed the jury on the applicable law. (App. pp. 638-657). As part of her jury charge, the trial judge instructed the jury Petitioner and Fishburne were presumed to be innocent, the State had the burden of proving their guilt beyond a reasonable doubt, and it was the duty of the jury to determine the credibility and believability of the witnesses who testified during trial. (App. pp. 642-645).

Thereafter, at the conclusion of trial, the jury convicted Petitioner and Fishburne of all of the indicted offenses. (App. pp. 661-662). The trial judge then sentenced Petitioner to an aggregate term of imprisonment of fifteen years and Fishburne to an aggregate term of imprisonment of twenty years. (App. pp. 677-678; pp. 687-688).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, the reviewing court defers to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The post-conviction relief court properly determined Petitioner failed to establish trial counsel was constitutionally ineffective for failing to introduce bank statements at trial because trial counsel made a strategic decision not to introduce the statements and the statements were of low evidentiary value compared to the overwhelming and direct evidence of Petitioner's guilt presented by the State.

Petitioner asserts trial counsel was ineffective for failing to introduce bank statements during Petitioner's trial to explain why he had a large sum of currency when arrested and the post-conviction relief court erred in denying him post-conviction relief. Specifically, Petitioner asserts the bank records "provided additional evidence that Petitioner was not involved in the

home invasion" and asserts trial counsel never presented a strategic reason for not introducing these statements. However, as the post-conviction relief court correctly held, trial counsel was not constitutionally ineffective for electing not to introduce Petitioner's bank statements because the statements were of little probative value and counsel strategically decided not to introduce the statements to allow him to have the final closing argument. This Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 [it] 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. First, the applicant must prove that counsel's performance was deficient. Id.; 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. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.' " Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). "The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made." Edwards v. State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 689)). Reviewing courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Petitioner has failed to prove counsel's performance was constitutionally ineffective, as trial counsel made a strategic decision not to introduce the bank statements because they were of low evidentiary value and not worth forfeiting the final argument to the jury. As an initial matter, Petitioner's repeated assertions the post-conviction relief court erred as a matter of law because trial counsel denied it was strategic decision not to introduce the records is a misrepresentation of the record. Trial counsel testified twice at the evidentiary hearing he specifically weighed potential benefits from introduction of evidence to challenge the amount of money found on Petitioner versus the benefit of presenting the final closing argument to the jury and strategically

decided not to present any evidence to preserve the final argument. Specifically, trial counsel testified,

> That made no sense, because if you look at – again, you go back to – this was never a concern. One, this wasn't an issue for the defense or one that we were concerned about at all, because even – you know, obviously, you know the prosecution, they are going to throw everything at the wall and see what sticks. Throwing the money is just an extra card, but it was something that was easily defeatable, considering the amount of money they are alleging they took, the times, all the sudden met real quick, split it up. And, yet, the amounts they got were completely different. And the other guy didn't have any money on him. Didn't make any sense.
>
> So again, the money issue was not an issue, And it absolutely was never even a thought of myself or my co-counsel, including conversations with our client, **to lose final argument to prove an nonissue in the case**.
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> . . .
>
> **As far as trying to lose my final, you know, get the final say in as opposed to putting in just this one piece**, knowing I wasn't going to have my client testify due to what he had disclosed to me[4] and my ethical obligations and knowing that his co-defendant wasn't going to testify, absolutely not was it worth putting in a couple of bank statements that were not going to change where he was found, how close he was found to electronics, and any of the testimony of the eyewitness victims who said he was there.

(App. pp. 914, 919) (emphasis added). Counsel clearly testified as to his strategic reasons for not introducing the bank statements, or any other evidence to explain the large amount of currency on Petitioner when arrested, because he felt the issue was a red herring and not worth loosing final argument to the jury. The post-conviction relief court's findings do not constitute an error of law and are supported by probative evidence in the record, and therefore, require this Court's deference on appellate review.

Furthermore, as trial counsel correctly stated and the post-conviction relief court properly noted, the bank statements were of little evidentiary value and would not have impacted the

[4] Trial counsel testified Petitioner admitted he was guilty of these crimes during the course of his representation. (App. p. 923).

jury's verdict in light of the direct evidence of Petitioner's guilt—an identification as one of the assailants by the victims. See State v. Salisbury, 343 S.C. 520, 524, 541 S.E.2d 247, 249 (2001) ("Direct evidence is evidence based on actual knowledge and proves a fact without inference or presumption.").

Moreover, there is overwhelmingly strong circumstantial evidence of Petitioner's guilt. Testimony and evidence was presented establishing Petitioner, Fishburne, and another man were walking along the side of the road in close proximity to the scene of the robbery shortly after the incident occurred. When they saw a police officer stop nearby and begin to approach them, Fishburne found it necessary to encourage his confederates not to flee, Petitioner immediately dropped a laptop he was carrying to the ground, and their accomplice quickly fled from the area. See State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt."); State v. Al-Amin, 353 S.C. 405, 413, 578 S.E.2d 32, 36 (Ct. App. 2003) ("Flight from prosecution is admissible as evidence of guilt."); see also Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing but it is certainly suggestive of such."). Significantly, the laptop Petitioner dropped to the ground was the laptop stolen from the victims' apartment only minutes earlier.[5] See State v. Lyles, 211 S.C. 334, 339, 45 S.E.2d 181, 183 (1947) (instructing proof of a defendant's possession of recently-stolen property supports an inference the defendant was the person who stole the property); see also State v. Cooper, 279 S.C. 301, 302, 306 S.E.2d 598, 599 (1983) (instructing the inference to be drawn from recent

[5] Petitioner's assertions that the victims never identified the laptop Petitioner dropped is a misrepresentation of the record. (App. p. 294-95; pp. 298-300).

possession of stolen property is an evidentiary fact as opposed to a rebuttable presumption and constitutes circumstantial evidence of guilt). Thereafter, law enforcement officers discovered Fishburne had two of Olivera's cellphones in his pockets and Petitioner was carrying a large quantity of cash in his pocket, and the victims located Fishburne's cellphone in their apartment shortly after the robbery. See McNamara v. Henkel, 226 U.S. 520, 525 (1913) ("Possession of [recently stolen property] in these circumstances tended to show guilty participation in the burglary. This is but to accord the evidence, if unexplained, its natural probative force."); see also Barnes v. United States, 412 U.S. 837, 845-846 (1973) (approving of a jury instruction allowing for the jury to infer the defendant's guilt from his unexplained possession of recently stolen property and recognizing common sense and experience support such an inference).

The post-conviction relief properly denied this allegation, finding trial counsel had a strategic reason for not introducing the bank records and the value of the records was minimal. The post-conviction relief court's findings do not constitute an error of law and are supported by probative evidence in the record. This Court should deny certiorari.

II. The post-conviction relief court properly determined Petitioner failed to establish trial counsel was constitutionally ineffective for failing to move for a severance because there was no reasonable likelihood a severance would have been granted and Petitioner cannot establish any resulting prejudice.

Petitioner asserts trial counsel was ineffective for failing to move to sever his trial from Fishburne and the post-conviction relief court erred in finding counsel ineffective because the lower court "did not properly consider the prejudicial effect of allowing a joint trial when Petitioner's co-defendant was so much older, and had a more significant criminal history than Petitioner." However, the post-conviction relief court properly denied relief as to this meritless

issue, as none of the complained "prejudicial effect" was presented to the jury, and therefore, could not have possibly had any impact on Petitioner's trial. This Court should deny certiorari.

In South Carolina, criminal defendants indicted for connected crimes are not entitled to separate trials as a matter of right and ordinarily may be jointly tried together. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see also United States v. Chorman, 910 F.2d 102, 114 (4th Cir. 1990) ("Barring 'special circumstances,' the general rule is that defendants indicted together should be tried together." (citation omitted)). In fact, joint trials are preferred due to the vital role they play in the criminal justice system. Zafiro v. United States, 506 U.S. 534, 537 (1993); see also State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999) (recognizing the principles espoused by the United States Supreme Court in regard to joint trials are fully consistent with South Carolina law); see generally Kansas v. Carr, 577 U.S. __, 136 S. Ct. 633, 645 (2016) ("Joint proceedings are not only permissible but are often preferable when the joined defendants' criminal conduct arises out of a single chain of events."). Specifically, joint trials are vital because they promote efficiency in the administration of justice. Zafiro, 506 U.S. at 537. Likewise, joint trials serve the interests of justice by avoiding inconsistent verdicts, preventing inequity, and enabling more accurate assessments of relative culpability in cases involving multiple defendants, which may operate to the advantage of some defendants. Richardson v. Marsh, 481 U.S. 200, 210 (1987).

However, even though joint trials are generally preferred, severance is warranted when there is a serious risk a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Zafiro, 506 U.S. at 539; see United States v. Smith, 44 F.3d 1259, 1266 (4th Cir. 1995) ("[P]rejudice [warranting

severance] may be shown only where there is a 'serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " (citation omitted)). Situations in which a joint trial might potentially be improper include: (1) when prejudicial evidence that would not be admissible against one defendant is admitted against a co-defendant; (2) when there is a marked difference in the degrees of culpability between different defendants; and (3) when essential exculpatory evidence would be available to a defendant only if he or she was tried alone. Zafiro, 506 U.S. at 539. Importantly though, "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice" that might result from a joint trial. Id.; see Hughes, 346 S.C. at 559, 552 S.E.2d at 317 ("A proper cautionary instruction may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial."). Moreover, "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Zafiro, 506 U.S. at 539; see State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005) ("The rule allowing joint trials is not impugned simply because the codefendants may present evidence accusing each other of the crime.").

In the present case, there is no reasonable likelihood that Petitioner's case would have been severed from Fishburne has counsel so moved. As the lower court correctly noted, neither Petitioner nor Fishburne testified and Petitioner was unable to name a specific right that was infringed by a joint trial with Fishburne. Petitioner's assertions he was prejudiced because Fishburne was older and had a criminal record are patently meritless as Fishburne's prior record was not presented to the jury and only was mentioned during sentencing **after** Petitioner was

convicted. Petitioner acknowledged this during the evidentiary hearing. (App. p. 887). The post-conviction relief court properly denied relief as to this ground. This Court should deny certiorari.

III. The post-conviction relief court properly determined Petitioner failed to establish appellate counsel was constitutionally ineffective for failing to challenge the sufficiency of the evidence on appeal because appellate counsel properly briefed a meritorious issue on Petitioner's behalf.

Petitioner asserts appellate counsel was ineffective for failing to raise the denial of Petitioner's motion for a directed verdict on appeal. In support of this argument, Petitioner asserts "the evidence adduced at trial was not compelling" and cites to several somewhat recent cases addressing directed verdict motions in circumstantial evidence cases. However, the post-conviction relief court properly denied relief as to this allegation as appellate counsel had no duty to raise every preserved issue on appeal and there is no reasonable likelihood this issue would have prevailed on appeal in light of the direct and overwhelming circumstantial evidence establishing Petitioner's guilt. This Court should deny certiorari.

"A defendant is entitled to effective assistance of appellate counsel." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). However, although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is **not** required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983) (emphasis in original)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754.

In arguing appellate counsel was ineffective, Petitioner states "[a]ppellate counsel rendered ineffective assistance of counsel when she failed to raise this issue that was properly preserved and meritorious." Petitioner appears to be arguing for a standard that would require appellate counsel to raise ever colorable claim on appellate review, which has been expressly rejected by both this Court and the United States Supreme Court. Thrift, 302 S.C. at 539, 397 S.E.2d at 526; Jones, 463 U.S. 745. In Tisdale, this Court reversed the post-conviction relief court's grant of post-conviction relief, finding the lower court erred by employing an incorrect standard that "effective Appellate Counsel has an obligation to raise all meritorious issues on appeal. The strategy of choosing one or two issues on direct appeal when several meritorious issues exist deprives the applicant of effective assistance of counsel." Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. Therefore, the post-conviction relief court properly determined appellate counsel was not deficient when she elected to raise the preserved issue regarding identification on appeal and did not raise the issue pertaining to the sufficiency of the evidence.

Moreover, there is no reasonable likelihood this issue would have been successful on appeal in light of the direct and overwhelming circumstantial evidence establishing Petitioner's guilt. When considering a directed verdict motion, the court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001). "If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, we must find the trial court properly submitted the case to the jury." State v. Rogers, 405 S.C. 554, 562–63, 748 S.E.2d 265, 270 (Ct. App. 2013) (citing State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011). "Direct evidence 'is based on personal knowledge or observation and . . ., if true, proves a fact without inference or

presumption.' " Rogers, 405 S.C. at 563, 748 S.E.2d at 270 (Ct. App. 2013) (quoting Black's Law Dictionary 636 (9th ed.2009)). "The presentation of direct evidence 'immediately establishes the main fact to be proved.' " Rogers, 405 S.C. at 563, 748 S.E.2d at 270 (Ct. App. 2013) (quoting Salisbury, 343 S.C. at 524 n. 1, 541 S.E.2d at 249 n. 1). As discussed above there is direct evidence of Petitioner's guilt—an identification as one of the assailants by the victims. Therefore, the trial court was required to deny Petitioner's directed verdict motion. This Court should similarly deny certiorari.

CONCLUSION

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

Respectfully submitted,

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July 23, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JUL 23 2018
S.C. SUPREME COURT

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., PCR Judge
Kristi L. Harrington, Trial Judge

Appellate Case No. 2017-000547

DOUGLAS THOMPSON,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two copies in the United States mail, postage prepaid, addressed to:

Elizabeth Anne Franklin-Best, Esquire
Blume Norris & Franklin-Best LLC
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

This 23rd day of July, 2018.

Jennifer Jennison
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

July 23, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Douglas Thompson v. State of South Carolina
Appellate Case No.: 2017-000547

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/jaj
Enclosures

cc: Elizabeth Franklin-Best, Esquire
Victim Advocacy Division