

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO ORANGEBURG COUNTY

Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

S.C. SUPREME COURT

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Appellate Case No. 2017-002009

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DESHAWN LEE POWELL,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

CHRISTIAN SAVILLE  
Assistant Attorney General  
S.C. Bar No. 103272

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

ATTORNEYS FOR RESPONDENT

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The PCR court properly found Petitioner failed to satisfy his burden of proving Trial Counsel was ineffective where Trial Counsel thoroughly pursued the relevant challenges regarding the knife found on Petitioner’s porch with the victim’s blood, where Trial Counsel made the proper strategic decision to preserve final argument rather than call Petitioner’s brother who would have been a weak, cumulative witness, and where Petitioner was not prejudiced by any alleged deficiencies because Trial Counsel raised the relevant issues regarding the knife and the lack of physical evidence on the knife was overshadowed by ample testimony and circumstantial evidence regardless.

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## **RESPONDENT'S ISSUE PRESENTED**

Did the PCR court properly find Petitioner failed to satisfy his burden of proving Trial Counsel was ineffective where Trial Counsel thoroughly pursued the relevant challenges regarding the knife found on Petitioner's porch with the victim's blood, where Trial Counsel made the proper strategic decision to preserve final argument rather than call Petitioner's brother who would have been a weak, cumulative witness, and where Petitioner was not prejudiced by any alleged deficiencies because Trial Counsel raised the relevant issues regarding the knife and the lack of physical evidence on the knife was overshadowed by ample testimony and circumstantial evidence regardless?

## STATEMENT OF THE CASE

### Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Orangeburg County Clerk of Court. During its February 2011 term, the Orangeburg County Grand Jury indicted Petitioner for murder (2011-GS-38-0015). Margaret E. Hinds, Esquire (“Trial Counsel”), represented Petitioner at trial. Robert D. Mellard, Esquire, sat second chair. Donald N. Sorenson, Esquire, and Harrison Bell, Esquire, prosecuted the case. On May 15, 2012, Petitioner proceeded to a jury trial before the Honorable Edgar W. Dickson. The jury found Petitioner not guilty of murder but guilty of the lesser included offense of voluntary manslaughter. On May 17, 2012, Judge Dickson sentenced Petitioner to imprisonment for thirty years for voluntary manslaughter.

Petitioner filed a timely notice of appeal. Kathrine H. Hudgins, Esquire (“Appellate Counsel”) of the Office of Appellate Defense, perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). In his brief, Appellate Counsel argued the trial judge erred in overruling hearsay objections made to the testimony of two witnesses about what a third witness said, finding the testimony met the present sense impression exception to the rule against hearsay. App. p. 551. On July 29, 2015, the South Carolina Court of Appeals dismissed Petitioner’s appeal and granted counsel’s motion to be relieved. State v. Powell, Op. No. 2015-UP-379 (Ct. App. 2015). The remittitur was issued on August 18, 2015.

On August 24, 2015, Petitioner filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on October 27, 2016, before the Honorable Diane Schafer Goodstein. Petitioner was present at the hearing and represented by Jonathan D. Waller, Esquire (“PCR Counsel”). Assistant Attorney General Ruston W. Neely represented the

State. Judge Goodstein denied and dismissed the application with prejudice by an order of dismissal signed January 9, 2017. Petitioner subsequently filed a motion to amend pursuant to Rule 59(e), SCRCP on February 2, 2017, in which Petitioner requested the PCR court to make specific findings of fact as to each claim of ineffective assistance of counsel. App. p. 535. Pursuant to Petitioner's motion, Judge Goodstein issued a second order denying and dismissing Petitioner's application with prejudice signed August 29, 2017, and filed September 8, 2017. App. p. 537.

Petitioner filed a timely notice of appeal on October 10, 2017. Petitioner then filed a petition for writ of certiorari on July 16, 2018. This return follows.

#### **STATEMENT OF THE FACTS**

Petitioner was convicted of voluntary manslaughter after he killed sixty-nine year old Arthur Riley ("Victim") by beating him and stabbing him forty-two times. App. p. 256, ll. 1-5.

In the morning hours of November 3, 2010, law enforcement responded to Victim's home on Jameson Street in Orangeburg County and found him lying dead, face-up in a pool of blood on his living room floor just inside the front door. App. p. 27, l. 14; p. 137, ll. 2-4. Victim was basically undressed, with a t-shirt wrapped around his left arm and his underwear down at his ankles. App. p. 137, ll. 4-8. There was a "great deal of blood" in the living room. App. p. 137, l. 9. Law enforcement observed Victim appeared to have been attacked with a sharp object. App. p. 153, l. 16. The autopsy revealed Victim was stabbed forty-two times, with fourteen of those injuries being to the head. App. pp. 252-254.

Victim's home was a known "crack house" where people came to use drugs, sell drugs, prostitute, and drink. App. p. 41, ll. 20-25; p. 64, ll. 8-19; p. 93, ll. 22-25. Between 12am and 2am on the night Victim was killed, Wendy Noel ("Niki"), Ronnette Stevenson ("Red"), and

Todd Wise (“Todd”) were congregating at Victim’s home. App. p. 44, ll. 4-25. Niki, an admitted prostitute, was planned to be Victim’s “company” for the night but left the home for a few hours sometime before 2am with Thurmond Keitt (“Slick”) and a man known as Ebony because Ebony wanted to pay Niki for her services. App. p. 45, l. 23 – p. 46, l. 22; pp. 214-215. Red and Todd remained at the house until Victim asked them to leave as he was anticipating a date at his house with Niki. App. p. 94, l. 5 – p. 95, l. 2; p. 113, l. 14.

As Red and Todd left, they came upon Petitioner and Darrell Jones (“D-Shop”) who were walking up to Victim’s house. App. p. 95, l. 11; p. 113, l. 23. Red informed them Victim had shut down the house as he was expecting company, but Petitioner replied, “Well, he gonna open the door for me.” App. p. 95, l. 23 – p. 96, l. 6. At trial, D-Shop testified he and Petitioner were going to Victim’s house to look for girls, and Victim let him inside but would not let Petitioner come in. App. p. 69, l. 9. An argument ensued between Petitioner and Victim. App. p. 69, l. 17. This argument was also overheard by Red and Todd as they were walking away from the house. App. p. 115, l. 17. According to D-Shop, the argument turned physical and he tried to break it up but was told to leave. App. p. 69, l. 25 – p. 70, l. 8. While the dispute continued, D-Shop walked away from the house and came upon Red and Todd, who had turned around and were now walking back in the direction of the house. App. p. 71, l. 2; p. 96, l. 23; p. 117. At this point, according to D-Shop, Todd told D-Shop, “Go get your boy,” and D-Shop again attempted to break up the fight but was unsuccessful. App. p. 72, l. 19. According to Todd and Red, D-Shop had told them, “Man, he in there beating [Victim],” and “[Petitioner] is in there beating Victim or trying to kill him at some point.” App. p. 96, l. 23; p. 117, l. 1. D-Shop also gave a statement to law enforcement that Petitioner was beating Victim to “death” or “deaf,” as the exact word used was disputed. App. p. 82, l. 2. After D-Shop’s second unsuccessful attempt to end the

struggle, D-Shop left but yelled that the police were coming on his way out in a last unsuccessful attempt to stop the altercation. App. p. 74, l. 22.

Niki returned from her date with Ebony after 5am and approached Victim's house from her drop-off location about one block away. App. p. 50, ll. 3-24. When she knocked on Victim's front door, it opened slightly and she saw a room in disarray and Victim lying dead on the floor. App. p. 51, ll. 2-12. She ran away frightened and had neighbors call the police. App. p. 51, ll. 14-21.

Lieutenant Shumpert was one of the responding officers to the scene and learned that morning of an individual named Anthony Gardner ("Monkey Doo") who had been at the house earlier in the night. App. p. 186, l. 13 – p. 187, l. 3. He gave Lieutenant Shumpert the names of Niki, Red, and Todd. App. p. 187, ll. 15-23. Lieutenant Shumpert then spoke with Red who informed him Petitioner and D-Shop had been to Victim's house that night, and Petitioner lived behind her. App. p. 189, ll. 14-25.

Lieutenant Shumpert, along with Sergeant Furtick and Investigator Harter, proceeded to Petitioner's home. App. p. 193, l. 2. Sergeant Furtick and Investigator Harter went to check on a nearby occupied vehicle while Lieutenant Shumpert walked up to the front door. App. p. 193, l. 9 – p. 194, l. 5. Lieutenant Shumpert testified his attention was on the front door at that time, and his focus was on the front door rather than looking down at his feet because they were investigating a homicide and he was concerned someone would come out the front door to harm them. App. p. 194, ll. 21-25; p. 196, l. 24 – p. 197, l. 4. Once he knocked on the door, Petitioner's mother told him to come inside. App. p. 194, l. 9. Petitioner's mother and brother were home but not Petitioner, so Petitioner's mother made a phone call to tell him to come home. App. p. 195, ll. 5-22.

Once Petitioner's mother made the phone call, Investigator Shumpert walked out the front door and saw a small knife on the porch. App. p. 196, ll. 2-10. There appeared to be a red stain on the knife. App. p. 196, ll. 16-20. The blood from this knife later tested positive for Victim's DNA. App. p. 316, l. 13. Investigator Shumpert explained he did not see the knife when he first approached walked into the house because he was not looking down when he approached the door. App. p. 196, l. 21 – p. 197, l. 4. Petitioner eventually returned to his home on foot and was immediately detained, at which point he gave a Mirandized statement denying ever being at Victim's home. App. p. 197, l. 22 – p. 198, l. 15; p. 202, ll. 2-4. Law enforcement eventually let Petitioner go but arrested him after they spoke with D-Shop, Todd, and Slick. App. pp. 203-205.

Marlos Stevenson, who was housed in the same pod as Petitioner while in jail in Orangeburg, testified at trial pursuant to a plea agreement he had regarding federal charges in which he was required to testify truthfully. App. p. 269, l. 8 – p. 270, l. 20; p. 272, l. 12 – p. 273, l. 2. Stevenson described Petitioner as "in brag mode," and testified Petitioner told him he was fighting with an older man who would not let him sell drugs at his house when he stabbed the man several times with a knife, ran home, cleaned himself up, and went to a club until his mother called him to come home. App. p. 276, l. 5; p. 278, l. 25 – p. 279, l. 7. Stevenson testified Petitioner told him certain police do not like him and Petitioner's plan was to allege the detective planted the knife. App. p. 279, ll. 8-18.

#### **RELEVANT PCR HEARING TESTIMONY**

At the PCR hearing convened on October 27, 2016, the PCR court heard testimony from Petitioner and Trial Counsel. Petitioner's brother, Maurice Tucker, also testified.

#### *Petitioner*

At the PCR hearing, Petitioner testified he met with Trial Counsel four to five times

altogether. App. p. 472, l. 1. Petitioner recalled discussing his version of events with Trial Counsel as well as the lack of DNA evidence against Petitioner. App. pp. 472-473. Petitioner also recalled Trial Counsel had an investigator on the case. App. p. 473, l. 4.

Petitioner testified he was told by law enforcement the knife was found by law enforcement on the front door step as they were exiting his house. App. p. 475, ll. 9-10. Petitioner also testified law enforcement were in his house as well as his yard for hours, sifting through his yard and car. App. p. 475, ll. 9-14. As Petitioner recalled, law enforcement said the knife was found “between the doorway and where the door was at.” App. p. 475, l. 15. Petitioner recounted how he was not home when law enforcement first arrived at the house, but his mother, brother, and other individuals were present. App. p. 476, ll. 10-24.

Petitioner testified he felt Trial Counsel overlooked the knife, which he alleged could have shown his innocence, and his brother would have testified but Trial Counsel “pushed him away.” App. p. 482, l. 23 – p. 483, l. 6. Trial Counsel subpoenaed his brother, as Petitioner recalled. App. p. 478, ll. 3-5. Petitioner testified he did not know what their strategy was regarding an explanation of the weapon to the jury, but Petitioner acknowledged the transcript reflects Trial Counsel argued in her closing argument that the knife was planted by law enforcement. App. p. 484, ll. 6-17. According to Petitioner, it would have been impossible for law enforcement not to have seen the knife when they first walked up to the front door. App. p. 495, ll. 16-24. Petitioner was asked to recall the State presented a “jailhouse snitch” at trial who testified Petitioner had told him he was going to try to get his lawyers to argue that the knife was planted, but Petitioner testified he did not recall. App. p. 484, l. 18 – p. 485, l. 4.

*Maurice Tucker (“Petitioner’s brother”)*

Petitioner’s brother testified he was at the home when law enforcement arrived to speak

with Petitioner. App. p. 497, l. 12. Petitioner's brother recalled Trial Counsel contacting him and asking him if he had seen the knife at the home, to which he replied he had not. App. p. 497, l. 19 – p. 498, l. 1. He testified he had been through the same front door and had not seen the knife. App. p. 498, ll. 2-7. Petitioner's brother recalled Trial Counsel had him under subpoena, but testified she did not give him a reason why she did not call him as a witness. App. pp. 498-499.

#### *Trial Counsel*

While Petitioner testified Trial Counsel met with him “four to five” times, Trial Counsel testified her records indicate she met with Petitioner fourteen times prior to trial and “a lot of time” was put into this case. App. p. 501, l. 5; p. 513, l. 2. She recalled Petitioner's version of events was that he was not present when Victim was killed, but rather left after an engaging in a fistfight with Victim earlier that night. App. p. 511, ll. 2-8. Trial Counsel also recalled there was no DNA evidence implicating Petitioner in this case, although Petitioner was alleged to be the last person to see Victim. App. p. 512, l. 3. Trial Counsel testified that in terms of strategy, there were a lot of potentially good things on the side of the defense as there was no DNA or fingerprints linking Petitioner to the crime. App. p. 504, ll. 3-10.

Trial Counsel testified she initially had difficulty with Petitioner's brother as Petitioner's brother told her investigator he was not coming to the trial and there was no need to ask him questions. App. p. 503, l. 24 – p. 504, l. 2. Trial Counsel testified she believed Petitioner's brother later had a “change of heart,” and they met on January 26, 2012. App. p. 504, l. 3. While Trial Counsel did meet with Petitioner's brother, Trial Counsel testified he could not tell her anything other than he arrived home and did not see the knife. App. p. 504, l. 11. Trial Counsel explained she did not call Petitioner's brother as a witness because he did not sound strong enough as a witness to help his brother and it was more important to have last closing argument.

App. p. 504, ll. 11-20. The importance of last argument was reiterated by Trial Counsel, as she explained Petitioner's purported alibi he was at the club was problematic because the killing took place after that timeframe and it was "absolutely" more important to preserve last argument. App. p. 511, ll. 12-24.

### STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 179, 810 S.E.2d 836 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). The standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the PCR court's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1(e), SCRPC; 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, 300 S.C. at 117, 386 S.E.2d at 625. 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 errors, the result of the proceeding would have been different.” Id. At 117-18, 386 S.E.2d at 625.

### ARGUMENT

**The PCR court properly found Petitioner failed to satisfy his burden of proving Trial Counsel was ineffective where Trial Counsel thoroughly pursued the relevant challenges regarding the knife found on Petitioner’s porch with the victim’s blood, where Trial Counsel made the proper strategic decision to preserve final argument rather than call Petitioner’s brother who would have been a weak, cumulative witness, and where Petitioner was not prejudiced by any alleged deficiencies because Trial Counsel raised the relevant issues regarding the knife and the lack of physical evidence on the knife was overshadowed by ample testimony and circumstantial evidence regardless.**

Petitioner alleges Trial Counsel was ineffective for failing to focus on the murder weapon as a defense in this case. The murder weapon in this case was a small knife with Victim’s blood on the blade found on Petitioner’s front porch after numerous witnesses testified to seeing and hearing Petitioner in a physical altercation with Victim in the late night hours prior to the knife being found. Victim was stabbed forty-two times. Petitioner alleges, specifically, Trial Counsel should have focused more on the knife as a matter of strategy because Petitioner’s DNA was not found on the knife and Investigator Shumpert did not initially notice the knife on the porch when he first knocked on Petitioner’s door to investigate the homicide. Furthermore, Petitioner alleges

his brother should have been called as a witness to testify law enforcement did not notice the knife when they first got to Petitioner's home which would have allegedly supported a theory that law enforcement planted the knife after they arrived at Petitioner's home. PWC p. 9. However, the record reveals Trial Counsel thoroughly pursued every relevant challenge to the evidentiary value of the knife to include the fact the knife went unnoticed by law enforcement upon first arriving at Petitioner's home. As the PCR court properly observed, Trial Counsel elucidated valid trial strategies to include the strategy of not calling Petitioner's brother as a witness. App. pp. 540-542. The record supports this conclusion as Petitioner's brother would have made a weak witness whose testimony would have contributed nothing that was not already in evidence through testimony by law enforcement and addressed by Trial Counsel, and of course, Trial Counsel was able to preserve final argument. App. pp. 541-542. Petitioner has failed to prove Trial Counsel was deficient regarding these allegations, and notwithstanding, Petitioner has failed to prove there is any reasonable probability the trial would have ended differently had Trial Counsel addressed these issues regarding the knife any differently when they were already thoroughly addressed and there were valid rebuttals to these challenges regardless. Accordingly, the PCR court properly denied relief, and certiorari should be denied.

**A. Trial Counsel thoroughly addressed the issues surrounding the murder knife.**

The PCR court properly found Petitioner failed to satisfy his burden of proving Trial Counsel was deficient for not raising defenses regarding the knife as Trial Counsel thoroughly addressed these exact defenses. At the PCR hearing, Trial Counsel testified, in terms of trial strategy, there were a lot of "potentially good" things on the defense's side, to include the lack of DNA and fingerprints linking Petitioner to the crime, App. p. 504, ll. 5-10. In fact, Trial Counsel testified she took the initiative to make sure the evidence was tested and nothing came back to

Petitioner. App. p. 502, ll. 1-12. The record reveals Trial Counsel raised the issues that Petitioner's DNA was not found on the knife, Petitioner's fingerprints were not found on the knife, and the knife was not initially seen by law enforcement when they responded to Petitioner's home.

At trial, the State did not shy away from the fact there were no fingerprints found on the knife. App. p. 229, ll. 1-25; p. 231, l. 2. In fact, the latent print examiner from SLED testified there were no prints found on the knife, which was "very bloody." App. p. 231, ll. 2-16. Notwithstanding, Trial Counsel still cross-examined the latent print examiner and made the examiner reiterate there were no prints found on the knife or on the other evidence tested. App. p. 236, l. 23 – p. 237, l. 9. Furthermore, Trial Counsel again repeatedly reminded the jury during her closing argument there were no fingerprints linking Petitioner to the crime and no evidence Petitioner had a knife. App. p. 399, l. 18. As Trial Counsel explained, "There were no prints on the knife. There were no prints on the light switch. There were no prints at all. Nothing relating to [Petitioner]." App. p. 392, ll. 13-18. The State themselves entered into evidence testimony that there were no fingerprints linking Petitioner to the knife, and Trial Counsel called attention to this fact at every appropriate opportunity.

There was likewise never any dispute Petitioner's DNA was not recovered from the knife. The DNA case work analyst from SLED testified swabs taken from the handle and blade of the knife matched Victim's DNA. App. pp. 316-317. Trial Counsel subsequently cross-examined the analyst and asked her to explain the great precautions taken to preserve the integrity of the samples, a clear strategic prelude to Trial Counsel's next point. App. pp. 320-322. Trial Counsel then elicited the testimony from the analyst that she never found any DNA consistent with Petitioner. App. p. 323, ll. 2-4. Furthermore, Trial Counsel questioned the analyst

at length regarding each and every piece of evidence tested, including the knife, to repeatedly highlight the fact Petitioner's DNA was not found on the evidence. App. pp. 323-326. Following the extensive cross-examination of the DNA analyst, Trial Counsel also thoroughly addressed the lack of DNA evidence in her closing argument. Trial Counsel reminded the jury a State's witness had testified a perpetrator would usually leave DNA at a crime scene like the present case, but the State did not find anything. App. p. 388, ll. 5-12. Trial Counsel reiterated, "They found nothing, absolutely no evidence linking [Petitioner] to that crime scene." App. p. 388, ll. 19-20. Trial Counsel reminded the jury the State collected fifty items of evidence yet nothing matched Petitioner. App. p. 389, ll. 5-10. Again, Trial Counsel explained the DNA was tested through meticulous procedures and none of it "whatsoever" matched Petitioner. App. p. 397, l. 23 – p. 398, l. 6. Trial Counsel also moved for a directed verdict in this case and argued there was no DNA linking Petitioner to the knife. App. p. 329, l. 2. Therefore, the record reveals Trial Counsel thoroughly addressed the issue of lack of Petitioner's DNA on the knife recovered from his own front porch.

Finally, Trial Counsel repeatedly raised the issue that the bloody knife found on Petitioner's porch was not located by law enforcement when they first entered through the front door, but only found upon their exit from the home, thereby implying either someone planted the knife or negligence in law enforcement's investigation. At trial, Lieutenant Shumpert testified he went to Petitioner's home with Sergeant Furtick and Investigator Harter to speak with Petitioner. App. p. 193, l. 2. When they arrived at the house, Furtick and Harter went to speak with some people in a nearby vehicle, leaving Shumpert alone to approach the home. App. p. 193, l. 9 – p. 194, l. 2. Shumpert, whose focus was on the front door as he was approaching cautiously because they were investigating a homicide, knocked on the door and was told to come inside by

Petitioner's mother. App. p. 194, ll. 7-25; p. 197, l. 2. When Petitioner's mother informed Shumpert she would call Petitioner to tell him to come home, Shumpert exited through the same front door and then noticed the bloody knife on the floor as Furtick rounded the corner and the two met on the front porch. App. pp. 195-196. Again, Shumpert clearly explained he did not notice the knife when he first walked through the front door because he was not looking down at his feet but rather at the front door as a precaution. App. p. 194, l. 25; p. 197, l. 1. Thereafter, Marlos Stevenson, who was housed in the same pod as Petitioner while incarcerated in Orangeburg, testified Petitioner confessed to killing Victim to him and also indicated he planned on having his attorneys argue law enforcement planted the knife. App. p. 278, l. 25; p. 279, ll. 16-18. Nevertheless, Trial Counsel thoroughly addressed this issue in her closing argument. Trial Counsel argued law enforcement knew they were investigating a stabbing and with three officers present, "Wouldn't you think he would see the knife?" App. p. 390, ll. 1-18. While Trial Counsel claimed she was not suggesting "*Shumpert* planted the knife" the reasonable inference from her argument was the knife must have been planted there by *someone* for the knife to have gone unnoticed upon his arrival. App. p. 390, l. 10 (emphasis added). In fact, Trial Counsel argued, "I would submit to you that saying that his focal point would have been directly on the front door as opposed to the general scene seems a little disingenuous to me ... He's a trained observer." App. p. 310, ll. 11-17. Trial Counsel also asked the jury to consider what else during the course of the investigation was not seen if he was capable of overlooking the knife. App. p. 310, ll. 21-23. Clearly, Trial Counsel raised Petitioner's issues regarding the recovery of the knife in a manner which not only suggested the knife could have been planted, but also impeached law enforcement's investigation into the case. As Trial Counsel thoroughly addressed the very issues now raised by Petitioner, the PCR court properly found Petitioner has failed to satisfy his burden

of proving Trial Counsel was deficient for failing to pursue these defenses. Furthermore, the PCR court properly found Petitioner has failed to satisfy his burden of proving prejudice from Trial Counsel's conduct as there is no reasonable probability the result of the trial would have been different because Trial Counsel raised these very arguments. Accordingly, the PCR court's proper dismissal should be affirmed and certiorari should be denied.

**B. Trial Counsel made the proper strategic decision to preserve final argument rather than call Petitioner's brother who would have been a weak, cumulative witness.**

Petitioner argues Trial Counsel was ineffective for not calling his brother as a witness at trial to testify law enforcement did not find the knife when they first arrived at the home. However, as the PCR court properly found, Trial Counsel's decision to not call Petitioner's brother at trial was a valid strategic decision, and notwithstanding, Petitioner has failed to establish prejudice from Trial Counsel's decision.

Where counsel articulates a valid reason for employing certain strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689.

At the PCR hearing, Trial Counsel explained she spoke to Petitioner's brother and subpoenaed him for trial, but strategically did not call him as a witness because she felt he was not a strong enough witness for Petitioner and she felt it was more important to preserve final argument. App. p. 504, ll. 12-20. As Trial Counsel explained, although Petitioner's brother was

first uncooperative and told Trial Counsel there was no need to ask him questions, Trial Counsel was later able to speak with him but he could not tell her anything “other than when he got there he didn’t see him,” and she felt it was more important to preserve final argument. App. p. 504, ll. 11-15. As the PCR court properly observed, Trial Counsel elucidated a valid trial strategy as to why she did not call Petitioner’s brother as a witness at trial, and therefore, Petitioner has failed to satisfy his burden of proving Trial Counsel was deficient in this regard.

Moreover, as the PCR court noted, the record supports Trial Counsel’s decision not to call Petitioner’s brother as a witness because his testimony at the PCR hearing reveals his testimony would have added nothing substantive into evidence which was not already elicited through the testimony of law enforcement. App. p. 541. At the PCR hearing, Petitioner’s brother merely testified he informed Trial Counsel prior to trial that he was the first one through the door that day and he did not see the knife. App. pp. 497-498. Even assuming his assertions are true, evidence that the knife went unnoticed until law enforcement exited the house was already presented by way of Lieutenant Shumpert’s testimony. As Trial Counsel explained at the PCR hearing, the substance of Petitioner’s brother’s testimony would not have been strong enough or useful enough for Petitioner to justify forsaking final closing argument. App. p. 504, ll. 11-20. This is particularly reasonable in light of the fact Trial Counsel was able to use this final argument to impeach the credibility of law enforcement and the quality of their investigation without the State’s rebuttal by addressing the fact the knife was not initially recovered.

Therefore, ample probative evidence supports the PCR court’s finding Trial Counsel was not deficient for not calling Petitioner’s brother as a witness. Furthermore, as Petitioner’s brother’s testimony would not have provided anything substantively significant enough to justify forgoing final argument, the PCR court also properly found Petitioner has failed to establish he

was prejudiced by Trial Counsel's valid strategic decision. Accordingly, the PCR court's proper dismissal should be affirmed and certiorari should be denied.

**C. Petitioner was not prejudiced by any alleged deficiencies because Trial Counsel raised the relevant defenses regarding the knife and the lack of physical evidence on the knife was overshadowed by ample testimony and circumstantial evidence regardless.**

Notwithstanding the fact Trial Counsel rendered strategically sound and reasonable performance regarding Petitioner's allegations, there is no evidence to support a finding the result of the proceeding would have been any different had Trial Counsel performed differently. As the PCR court properly found, Petitioner has failed to satisfy his burden of proving he was prejudiced by Trial Counsel's performance. App. p. 542.

As previously noted, Trial Counsel raised the arguments regarding lack of DNA, fingerprints, and challenges to provenance of the knife. Trial Counsel was able to repeatedly bring attention to the lack of any DNA evidence linking Petitioner to the crime or the knife, thoroughly addressed this issue in her closing argument, and used this argument in her motion for a directed verdict. Trial Counsel likewise reiterated to the jury the lack of Petitioner's fingerprints on any of the evidence examined, including the knife. Furthermore, Trial Counsel thoroughly argued the issue concerning the provenance of the knife, even implying perhaps the knife was planted by someone or other evidence was being "overlooked" by law enforcement. Clearly, Trial Counsel did use the arguable issues surrounding the knife as significant devices in furtherance of Petitioner's defense. Accordingly, Petitioner cannot establish the result of the proceeding would have been any different when he alleges Trial Counsel should have made the very same arguments she made at trial.

Furthermore, the fact remains numerous witnesses testified to Petitioner engaging in a physical altercation, more specifically "beating the hell" out of Victim and "beating him to

death” just hours before he was found stabbed to death in his home, and there is no evidence or testimony that anyone else saw Victim alive after Petitioner left the house. App. pp. 69-82; pp. 96-98; p. 115. In fact, when Red was walking back in the direction of Victim’s house, Petitioner was walking away from the house and told her, “Red, y’all don’t need to come back up this way.” App. p. 99, ll. 19-24. Trial Counsel recalled at the PCR hearing that Petitioner was allegedly the last one to see Victim but Petitioner’s version of events was they had a fist-fight and he left, despite the fact Petitioner told law enforcement he was never at the house. App. p. 202, l. 2; p. 509, l. 4; p. 515, l. 20. Furthermore, the State presented testimony from inmate Marlos Stevenson that Petitioner told him he was fighting with an older man who would not let Petitioner sell drugs at his house when he pulled a knife and killed the man before cleaning himself up, and he intended on arguing law enforcement planted the knife. App. pp. 278-279. Therefore, the significant amount of circumstantial evidence and ample consistent testimony regarding Petitioner’s whereabouts and hostile behavior the night of the homicide, as well as his own admissions and misrepresentations to law enforcement, loomed large over Petitioner’s defense regardless of Trial Counsel’s arguments regarding the knife.

Notwithstanding the fact Trial Counsel effectively represented Petitioner in his defenses regarding the lack of physical evidence on the knife, there is no reasonable probability the result of the proceedings would have been different in light of other evidence presented and the fact Trial Counsel made the same arguments Petitioner alleges should have been made. There is ample probative evidence to support the PCR court’s finding that Petitioner has not met his burden of proving ineffective assistance of counsel, and therefore certiorari should be denied.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

CHRISTIAN SAVILLE  
Assistant Attorney General

By: *Christian Saville*  
ATTORNEYS FOR RESPONDENT

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

11/28, 2018

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO ORANGEBURG COUNTY  
Court of Common Pleas  
Diane Schafer Goodstein, Circuit Court Judge

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Appellate Case No. 2017-002099

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DESHAWN LEE POWELL,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**PROOF OF SERVICE**


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I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant  
South Carolina Commission on Indigent Defense—Division of Appellate Defense  
P.O. Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 28<sup>th</sup> day of November, 2018.

  
CHRISTIAN SAVILLE  
Assistant Attorney General  
S.C. Bar No. 103272  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737



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NOV 28 2018

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

November 28, 2018

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

**RE: Deshawn L. Powell v. State of South Carolina**  
**Appellate Case No.: 2017-002099**

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,

Christian Saville  
Assistant Attorney General  
S.C. Bar # 103272

CS/jaj  
Enclosures

cc: LaNelle Cantey DuRant, Esquire  
Victim Advocacy Division