STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BERKLEY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-000151

Steven Lee Morgan, #355128,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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[1] Williams v. Illinois, 567 U.S. 50 (2012).

RESPONDENT'S QUESTIONS PRESENTED

1. Did the PCR court correctly find Counsel was not ineffective in his handling of third-party DNA evidence where the State's expert witness was employed by an independent lab, Counsel thoroughly cross-examined him at trial, and where Petitioner did not present any independent expert witness testimony at the PCR hearing?

2. Did the PCR court correctly find Counsel was not ineffective in failing to object to expert opinion testimony of a SLED DNA analyst who did not personally perform the DNA analysis of Victim's rape kit, or to renew his request for a Williams[2] charge, even though the failure to object to the testimony was deficient, where Petitioner failed to prove prejudice since Petitioner never denied having sex with Victim on the night of the incident, and there was other overwhelming evidence of Petitioner's guilt?

[2] Williams v. Illinois, 576 U.S. 50 (2012).

STATEMENT OF THE CASE

Steven Lee Morgan (Petitioner) is incarcerated with the South Carolina Department of Corrections pursuant to the Berkeley County Clerk of Court's orders of commitment. Petitioner was indicted by the April 2012 term of the Berkeley County Grand Jury for one count of burglary – first degree, one count of criminal sexual conduct – first degree, one count of kidnapping, one count of attempted murder, and one count of possession of a firearm or knife during the commission of a violent crime (2012-GS-08-0496, -0497, -0498, -0499, -0500). Chad Shelton, Esquire (Counsel), represented him. On April 23, 2013, Petitioner proceeded to a jury trial pursuant to which he was found guilty as indicted on all charges. The Honorable R. Markley Dennis, Jr. sentenced Petitioner to confinement for forty years' imprisonment for the count of first-degree burglary. Judge Dennis also sentenced Petitioner to thirty years for each count of criminal sexual conduct, kidnapping, and attempted murder, all to be run concurrently. He then sentenced Petitioner to a consecutive term of five years' imprisonment for the count of possession of a firearm or knife during the commission of a violent crime.

A notice of appeal was filed on Petitioner's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738 (1967). The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Morgan, Op. No. 2015-UP-492 (filed on October 21, 2015). The Remittitur was issued on November 13, 2015.

On December 4, 2015, Petitioner filed an application for post-conviction relief. In his Application, Petitioner alleged that his counsel was ineffective for "[f]ell (sic) to hire DNA expert," "[f]ell (sic) to lack of confrontation to preserve issue for Appellate review (sic)," "[f]ell (sic) to request jury instruction for expert opinion." On June 19, 2016, the State of South Carolina made its return, and an evidentiary hearing was held in the Berkeley County Courthouse on July 31, 2017. Petitioner was represented by his attorney, Rodney Davis, Esquire.

Respondent was represented by Lindsey McCallister of the South Carolina Attorney General's Office. Petitioner and Counsel, testified at the hearing. On December 18, 2017, the Honorable Michael G. Nettles issued an Order of Dismissal denying Petitioner relief and dismissing his application.

On January 17, 2018, Petitioner filed and served a notice of appeal. Petitioner then filed a Petition for a Writ of Certiorari on August 6, 2018. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

In December of 2011, Rose Lampkin (Victim), who had been in a relationship with Petitioner for the preceding two years, decided to end her relationship with Petitioner because he was treating her in an increasingly threatening and possessive manner. App. pp. 109, 111-12, 158. To end the relationship, Victim loaded Petitioner's belongings into her pickup truck with the help of her college-aged son, left the truck for Petitioner to pick up from a truck stop, and instructed Petitioner not to return to her home.[3] App. pp. 110-13, 147, 158, 160. A few weeks later, Petitioner went to Victim's home shortly after midnight and attempted to force his way inside. App. pp. 147-49. Victim's son was home at the time and alerted the authorities of Petitioner's actions. App. p. 148.

However, at approximately 4:00 a.m., on January 29, 2012, Petitioner returned to Victim's residence and threw a piece of wood through the rear sliding-glass door. App. pp. 103-104, 113-15, 129-31. The noise awakened Victim, and she started to go downstairs to investigate. App. pp. 113-15. As she did so, Petitioner, who was armed with a knife, entered the house and ran up the stairs towards her. App. pp. 115-16. Petitioner then grabbed Victim, began choking and striking her, and told her he would kill her if she did not do what he told her to do. App. pp. 115-16. Thereafter, Petitioner threw Victim to her bed, removed her clothing, forced her to perform oral sex on him, and raped her both anally and vaginally. App. pp. 116-17, 122, 165, 222.

Once Petitioner finished sexually assaulting Victim, he sat on the bed and smoked a cigarette. App. pp. 117. Petitioner then got up from the bed and looked out the window. App.

[3] Petitioner was a professional truck driver at the time. App. pp. 158.

pp. 117-18. When he did so, Victim grabbed her cell phone and tried to flee from the home. App. pp. 117-19. However, Petitioner chased her, pushed her down the stairs, followed her to the bottom, and began slamming her head into the floor. App. p. 118. He then ordered Victim to return upstairs while threatening her with his knife, but she was unable to do so because she had badly injured her knee in the fall. App. pp. 118-19. Undeterred, Petitioner cut Victim's neck with the knife, dragged her back upstairs by her hands and hair, threw her on the bed, and raped her again. App. pp. 118-19, 133.

After Petitioner was finished sexually assaulting Victim, he began to pace around Victim's house. App. p. 120. He then retrieved a towel, wiped blood off of Victim's face, and attempted to wipe away any evidence from Victim's vagina. App. p. 120. He then tore the towel into strips, stuffed a strip of the towel into Victim's mouth, covered her face with another piece of towel and some tape, and hog-tied her hands and feet together using the towel and pieces of wire hangers he retrieved from Victim's closet. App. pp. 120-21. Petitioner took Victim's keys, destroyed her cell phone, covered her with clothing and blankets, informed her he was going to get coffee and would return, and left the residence. App. pp. 121-22, 136.

Victim remained bound on the bed for thirty to forty-five minutes but was eventually able to free herself from the restraints despite her injuries. App. pp. 123-24. Victim then crawled down the stairs, opened the front door, and screamed for help when she saw a neighbor walk by her house.[4] App. p. 124. The neighbor quickly alerted another of Victim's neighbors, John McCurdy, who rushed to Victim's home. App. p. 187. When McCurdy arrived, he observed Victim had beaten to such an extent her face was nearly unrecognizable, and he immediately called 911. App. pp. 188-89.

[4] Victim could not walk or run due to her injuries, which included a broken kneecap. App. pp. 123-24, 156.

Within minutes, Officer William Tisdale of the Goose Creek Police Department arrived at Victim's residence and found her seated in the doorway to her home. App. pp. 193-95. At that time, Victim was "very" battered, her face was bloody and swollen, she was suffering from numerous cuts and bruises, and her kneecap was swollen and out of place. App. p. 195. Officer Tisdale briefly spoke with Victim, and Victim advised him Petitioner had broken into her residence and sexually assaulted her. App. p. 196. In response, Officer Tisdale relayed a description of Petitioner – and the truck in which Petitioner left Victim's residence – to dispatch, and Victim was transported to the emergency room. App. p. 196-97.

At the hospital, Victim was treated by medical personnel, who noted she was suffering from a knee deformity, abrasions to her knee, a puncture wound to the neck, eye redness symptomatic of strangulation, and extensive facial injuries. App. pp. 208-09, 213. Investigator Leroy Goodyear of the Goose Creek Police Department spoke with Victim and took a statement from her about the incident. App. pp. 242, 244-45. Several hours later, Victim was examined by Nancy Hall, a sexual-assault nurse examiner and registered nurse. App. p. 218. During the examination, Victim advised Hall she had been physically and sexually assaulted in her home earlier that morning, and Hall collected samples from Victim's body along with a DNA sample from Victim. App. pp. 222-23, 227. However, Hall was unable to perform a full examination of Victim due to Victim's knee injury. App. pp. 227-28.

Meanwhile, Wendy Myers, a crime scene investigator and evidence technician from the Goose Creek Police Department, processed Victim's residence for evidence. App. pp. 272-73. During her investigation, Myers located strips torn from a towel near the front door, a piece of wood leaning against a wall, a trail of broken glass leading from the piece of wood to a broken sliding glass door, several cigarette butts discarded onto the floor in the dining room and

hallway, bloodstains leading up the stairwell, more strips of towel and some wire at the top of the stairs, even more strips of towel and wire in the master bedroom, a pile of clothing on the bed, a blood-stained green jacket with a hole in the collar on the floor, more cigarette butts on the floor next to the bed, and a stained sheet on Victim's bed. App. pp. 274-77, 284, 288-89. Myers collected all of the evidence she discovered and sent it off for analysis. App. pp. 276, 285-89.

Later that day, Petitioner was apprehended and arrested in Augusta, Georgia, while in possession of Victim's truck. App. pp. 136, 140-41, 246, 253. Following his arrest, Investigator Nicholas Powell of the Goose Creek Police Department collected a sample of his DNA for analysis, and Victim's truck was transported back to South Carolina and searched. App. pp. 246-48, 265-66. Although no evidence was discovered in the initial search of the vehicle, a friend, Victor Mazyck, later bought the truck from Victim and discovered the set of keys Petitioner took from Victim along with the knife Petitioner had wielded during the incident after removing the center console from the vehicle in order to replace it.[5] App. pp. 136-39, 247-49, 257-59. That evidence was turned over to authorities, and the knife was submitted for analysis. App. pp. 249, 305.

Subsequently, the evidence collected from Victim's residence was transported to Intelligenetics, a DNA testing laboratory. App. pp. 302, 304-05. Dr. Daniel DeMiers, an expert in forensic science and DNA analysis, analyzed the submitted evidence, including the strips of towel, the green jacket, the pieces of wire, the cigarette butts, and the knife. App. pp. 304-05, 321. Based on this analysis, Dr. DeMiers determined Petitioner's DNA was present on the green jacket in a concentration too significant to have resulted from casual contact, and Petitioner's DNA and semen were present on the torn strips of towel. App. pp. 314-17, 336. Additionally,

[5] The keys found in the truck were readily identifiable as belonging to Victim because the key ring had a leather band with Victim's first name on it attached to it. App. p. 249.

Dr. DeMiers located Petitioner's DNA on pieces of wire and cigarette butts collected from Victim's bedroom and the hallway. App. pp. 318-21. Dr. DeMiers also concluded the DNA of three different contributors was present on the handle of the knife, and he could not exclude either Victim or Petitioner as contributors of that DNA. App. pp. 321-24.

Similarly, the evidence collected during Victim's sexual-assault examination at the hospital was transported to SLED, where it was analyzed by Mary Boehm, a forensic DNA analyst. App. pp. 356-58, 373-74. As part of her analysis, Boehm developed DNA profiles from the samples collected during the sexual-assault examination and compared them to profiles developed from the known DNA of Petitioner and Victim. App. pp. 360-63. Based upon that analysis, it was determined Petitioner's DNA profile conclusively matched the profile developed from semen found on a rectal swab collected during the sexual-assault examination of Victim. App. p. 364.

Boehmn was unavailable to testify at trial. App. p. 14. The solicitor moved instead to admit the expert testimony of Amanda Webb, a DNA analyst at SLED and a peer reviewer of Boehm's work on the case, in regard to Webb's opinion about the evidence originally analyzed by Boehm. App. pp. 14-15, 352, 354. Counsel objected, arguing Webb's testimony would impermissibly allow for the admission of Boehm's opinions without having Boehm present during trial. App. pp. 15-16. After considering the arguments of both sides, the trial judge ruled Webb's expert testimony would be admissible if she was properly qualified and instructed he would make a determination as to admissibility immediately before the testimony was presented to the jury. App. pp. 16-18. Following the judge's ruling, Counsel asked the trial judge to consider several proposed jury instructions in regard to expert testimony admitted under similar circumstances in the United States Supreme Court decision in Williams v. Illinois, 567 U.S. 50

(2012)."[6] App. pp. 17-18. After considering the proposed instructions, the trial judge determined those instructions would constitute a comment on the facts and indicated he intended instead to present the standard South Carolina jury instructions on expert testimony. App. pp. 18-20. The trial judge then proceeded with the trial. App. p. 20.

At trial, Victim recounted the details of the incident and identified Petitioner in the courtroom as her assailant. App. pp. 110-57. Likewise, McCurdy, the investigating officers, and the medical personnel who treated Victim after the incident testified concerning Victim's numerous visible injuries following the attack and sexual assault, her consistent identification of Petitioner as her assailant, and the readily observable evidence of the struggle that had occurred in Victim's home. App. pp. 188-90, 195-97, 201, 209, 213, 222-23, 227-28, 237, 244-45, 273-87. Further, Dr. DeMiers testified the results of his analysis of the evidence collected from Victim's home indicated Petitioner's DNA was discovered on many of the pieces of evidence, and he confirmed Petitioner's semen and DNA were present on the torn strips of towel recovered from Victim's home. App. pp. 314-24, 336. Dr. DeMiers also testified the third-party semen found on Victim's bedsheet was from a male relative of Victim, most likely her son who lived in the house with her. App. pp. 310-12.

Thereafter, Webb, who was qualified as an expert in forensic science and DNA analysis without objection, testified for the prosecution. App. pp. 352, 355. During her testimony, Webb testified every DNA analysis conducted at SLED was reviewed by two other SLED analysts. App. p. 354. She confirmed she conducted a peer review of Boehm's work in this case. App. p.

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[6] Specifically, Counsel indicated the Supreme Court's opinion stated the jury should be instructed "that out-of-court statements cannot be accepted for their truth and that an expert's opinion is only as good as independent evidence as the underlying premises. And that if the prosecution cannot muster any independent admissible evidence to prove that foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the triers of the facts." App. p. 18.

354. Webb indicated she reviewed the case report, the incident report, the sexual-assault nurse examiner's notes, the evidence received by Boehm, and Boehm's notes and scientific data before checking the analyst's work for accuracy and scientific validity. App. p. 356. Based on that review, Webb opined – without objection – semen was present on both the vaginal and rectal swabs taken from Victim, no male DNA profile could be developed from the vaginal swab, and the DNA profile developed from the rectal swab matched Petitioner. App. pp. 360, 362-64. Furthermore, during cross-examination, Webb readily acknowledged she was not present when the original laboratory work was performed, and her opinions and conclusions were based on work performed by Boehm. App. p. 364. Webb also acknowledged her opinions were premised on her assumption Boehm conducted her analysis correctly. App. p. 365.

Following Webb's testimony, both the State and Petitioner rested, and the trial judge conducted a charge conference to ascertain what jury instructions the parties desired to be presented to the jury. App. pp. 372, 383-89. During the charge conference, neither the solicitor nor Counsel requested any jury instructions based on the suggested instructions from the United States' Supreme Court's decision in Williams. App. pp. 383-89. Thereafter, the solicitor and Counsel made their closing arguments to the jury, and the trial judge instructed the jury on the applicable law. App. pp. 390-445. At the conclusion of the jury charge, the trial judge asked the parties if there were any exceptions to his instructions or any additional instructions desired, and Counsel directly responded: "No, sir." App. p. 445.

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 (2018). On appellate review, courts defer 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. Id. at 180, 810 S.E.2d at 839. (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. at 180-81, 810 S.E.2d at 839-40. 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).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "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. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR court correctly found Counsel was not ineffective in his handling of third-party DNA evidence where the State's expert witness was employed by an independent lab, Counsel thoroughly cross-examined him at trial, and Petitioner did not present any independent expert witness testimony at the PCR hearing.

At trial, one of the State's scientific experts, Dr. DeMiers, testified regarding the presence of third-party DNA found on some of the items collected from the crime scene – most importantly, the knife and Victim's bed sheets. App. pp. 323-25, 310-12. Dr. DeMiers did not work for SLED, but instead was employed by an independent laboratory called Intelligenetics. App. p. 302. He testified the third-party semen found on Victim's bedsheet was from a male relative of Victim, most likely her son who lived in the house with her, and DNA on the knife was mixture of several people from which Petitioner could not be ruled out. App. pp. 310-12, 321-24.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012), overruled on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 744 (2014). However, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In order to prevail on a claim of ineffectiveness based on counsel's failure to call a favorable witness, this Court has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509

S.E.2d 807, 809 (1998) (emphasis added). Petitioner's speculation the witness' testimony would have been favorable cannot, by itself, satisfy his burden of showing prejudice. Glover v. State, 318 S.C. 396, 498-99, 458 S.E.2d 538, 540 (1995).

Additionally, "[c]ourts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Further, a defense counsel's failure to procure expert witnesses does not render his or her representation deficient when counsel vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). See also Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure expert witness to challenge DNA evidence where trial counsel vigorously cross-examined State's DNA experts and attacked accuracy of evidence).

Here, Counsel testified he did not see the need to hire a DNA expert, and he chose to rely on the Intelligenetics results. App. pp. 502. Counsel testified Petitioner's defense – that the sexual encounter was consensual – did not require him to contest the DNA results, and he could explain the presence of Petitioner's DNA on items found at the crime scene because Petitioner had lived in the house and been in a relationship with Victim. App. p. 504. Counsel also vigorously cross-examined Dr. DeMiers on his conclusions at trial. App. pp. 326-49. Further, Petitioner did not retain an independent DNA expert as he claims Counsel should have done, and he did not present any testimony or evidence at the PCR hearing challenging Dr. DeMiers' analysis and conclusions. App. pp. 476-539.

Accordingly, the PCR court correctly found Counsel was not deficient as his defense strategy included choosing not to contest the DNA results. Even if Counsel's decision not to retain an expert was deficient, Petitioner has not met his burden of proving he was prejudiced, so certiorari as to this issue should be denied.

II. The PCR court correctly find Counsel was not ineffective in failing to object to expert opinion testimony of a SLED DNA analyst who did not personally perform the DNA analysis of Victim's rape kit, or to renew his request for a Williams[7] charge, even though the failure to object to the testimony was deficient, where Petitioner failed to prove prejudice since Petitioner never denied having sex with Victim on the night of the incident, and there was other overwhelming evidence of Petitioner's guilt.

The evidence collected during Victim's sexual-assault examination at the hospital was transported to SLED, where it was analyzed by Mary Boehm (Boehm), a forensic DNA analyst. App. pp. 356-58; pp. 373-74. As part of her analysis, Boehm developed DNA profiles from the samples collected during the sexual-assault examination and compared them to profiles developed from the known DNA of Petitioner and Victim. App. pp. 360-63. Based upon that analysis, it was determined Petitioner's DNA profile conclusively matched the profile developed from semen found on a rectal swab collected during the sexual-assault examination of Victim. App. p. 364.

However, Boehmn was unavailable to testify by the time of trial. App. p. 14. The solicitor moved instead to admit the expert testimony of Amanda Webb (Webb), a DNA analyst at SLED and a peer reviewer of Boehm's work on the case, in regard to Webb's opinion about the evidence originally analyzed by Boehm. App. pp. 14-15, 352, 354. Counsel objected, arguing Webb's testimony would impermissibly allow for the admission of Boehm's opinions without having Boehm present during trial. App. pp. 15-16. Nonetheless, the trial judge ruled

[7] Williams v. Illinois, 567 U.S. 50 (2012).

Webb's expert testimony would be admissible if she was properly qualified and instructed he would make a determination as to admissibility immediately before the testimony was presented to the jury. App. pp. 16-18.

Counsel then asked the judge to consider several proposed jury instructions in regard to expert testimony admitted under similar circumstances in the United States' Supreme Court decision in Williams v. Illinois, 567 U.S. 50 (2012). App. pp. 17-18. Counsel argued the jury should be instructed "that out-of-court statements cannot be accepted for their truth and that an expert's opinion is only as good as independent evidence as the underlying premises. And that if the prosecution cannot muster any independent admissible evidence to prove that foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the triers of the facts." App. p. 18. After considering the proposed instructions, the judge determined those instructions would constitute a comment on the facts, and he would instead give the standard South Carolina jury instructions on expert testimony. App. pp. 18-20.

Webb was qualified as an expert in forensic science and DNA analysis without objection and testified for the prosecution. App. pp. 352, 355. Webb indicated she reviewed the case report, the incident report, the sexual-assault nurse examiner's notes, the evidence received by Boehm, and Boehm's notes and scientific data, but did not independently perform any of the DNA analyses. App. pp. 356, 364. Webb opined – without objection – semen was present on both the vaginal and rectal swabs taken from Victim, no male DNA profile could be developed from the vaginal swab, and the DNA profile developed from the rectal swab matched Petitioner. App. pp. 360, 362-64. However, during the charge conference and after the jury instructions

were given, Counsel did not object to the judge's failure to include a Williams instruction. App. pp. 383-88, 414-45.

While it was error for Counsel to fail to renew his objection to Webb's testimony at the time it was presented to the jury, the PCR court nonetheless correctly denied relief because Petitioner failed to prove he was prejudiced by the error. See State v. McCray, 413 S.C. 76, 91-92, 773 S.E.2d 914, 922 (Ct. App. 2015) (allowing expert witness who had not performed DNA analysis to testify was harmless error where defendant never denied shooting victim). Even if Counsel had objected and preserved the issue for appellate review, the judge's decision to allow the testimony was harmless error because the fact that it was Petitioner's DNA was not disputed. Counsel testified it was part of his trial strategy not to contest the DNA findings since Petitioner never denied he had a sexual encounter with Victim that night. App. pp. 501-02. Therefore, Webb's testimony confirming Petitioner's DNA was found on swabs from the rape kit was not inconsistent with his defense.

Further, the testimony from Intelligenetics' Dr. DeMiers was not objectionable and could not have been excluded, and that testimony also placed Petitioner's DNA at the crime scene, specifically on items used to restrain Victim after the attack. Victim was a credible witness with no criminal history or prior inconsistent statements who gave detailed testimony, and her identification of Petitioner as the perpetrator was virtually unassailable. Lastly, Petitioner wrote a letter to Victim while the case was pending apologizing for his behavior that night, saying "the devil" had taken over him. App. p. 501. Accordingly, there is independent, overwhelming evidence of Petitioner's guilt such that it is not reasonably likely the result of the trial would have been different even if Webb's testimony had been excluded.

Finally, the PCR court correctly found Counsel's request regarding the language of the expert-witness jury instruction was properly denied by the trial judge, as it would have constituted a comment on the facts. "Under South Carolina law, it is a general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). The requested instruction directed "that out-of-court statements cannot be accepted for their truth and that an expert's opinion is only as good as independent evidence as the underlying premises. And that if the prosecution cannot muster any independent admissible evidence to prove that foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the triers of the facts." This is clearly a comment on the credibility of a witness and the weight to be given to certain evidence, and the trial court properly declines to give it. Therefore, Counsel was not deficient for failing to renew his request for an additional instruction, and the PCR court correctly denied relief as to both the Williams charge issue and the issue of Counsel's failure to object to Webb's testimony.

Certiorari should therefore be denied as to both of these issues.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's denial of relief. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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December 5, 2018

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CERTIORARI TO BERKLEY COUNTY
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The Honorable Michael G. Nettles, Circuit Court Judge

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STEVEN LEE MORGAN,

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:

W. Scott Palmer, Esquire
W. Scott Palmer Attorney At Law
Post Office Box 722
Santee, South Carolina 29142

This 5th day of December, 2018.

Jennifer Jennison
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 05 2018
S.C. SUPREME COURT

December 5, 2018

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

RE: Steven Lee Morgan v. State of South Carolina
Appellate Case No.: 2018-000151

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,

Lindsey A. McCallister
Assistant Attorney General
S.C. Bar # 79054

LAM/jaj
Enclosures

cc: W. Scott Palmer, Esquire
Victim Advocacy Division