STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge for Trial
Michael G. Nettles, Circuit Court Judge for Post-Conviction Relief

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Appellate Case No. 2018-002216

Shana Robinson,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

Whether the post-conviction court erred by finding defense counsel was not ineffective for calling Dr. Robert Bennett as an expert in forensic toxicology, where Bennett unexpectedly testified petitioner would have had a five to ten percent "impairment rate" at the time of the accident, which was directly counter to petitioner's defense that she was not impaired, where defense counsel admitted the state "completely destroyed [Bennett] on cross-examination," where Bennett also admitted his license expired in 1999, and that the Board of Pharmacy had issued him a cease and desist order to stop holding himself out as a registered pharmacist, since it was defense counsel's failure to adequately investigate Bennett's background which led to this "horrible" trial debacle?

RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny relief where trial counsel interviewed, prepared, and retained an expert witness with a positive reputation in the legal community who, at trial, offered unexpected testimony and was thereafter thoroughly deconstructed by the prosecution's cross-examination?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. Petitioner was indicted at the April 2014 term of the Berkeley County Grand Jury for felony driving under the influence resulting in death (2014-GS-08-00313). Aaron C. Mayer, Esq. represented Petitioner. Mason West and Bryan Alfaro, Esqs., of the Ninth Circuit Solicitor's Office, prosecuted the case. On June 2, 2014, Petitioner proceeded to trial before the Honorable Deadra L. Jefferson and a jury. The jury found Petitioner guilty as indicted on June 6, 2014. Judge Jefferson sentenced Petitioner to imprisonment for a term of 17 years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Robinson, Op. No. 2016-UP-036 (S.C. CT. App. filed Jan. 20, 2016). The Remittitur was issued on February 5, 2016.

Petitioner filed his application for post-conviction relief on February 5, 2016 (2016-CP-08-00300). In Petitioner's application, amended by and through counsel by filing dated September 27, 2018, he alleged the following grounds for relief in his application:

1. Ineffective assistance of trial counsel, in that:
    a. "Prejudicial testimony was allowed that should have been disregarded and prejudicial asst [sic] prosecution atty [sic] with hx [sic] of family matter"
    b. "Counsel was in failing to subpoena the records custodian from Verison Wireless in order to introduce cell phone records of decedent showing that [sic]"
    c. "Counsel was ineffective in his calling of an expert witness."
    d. "Applicant believes counsel was ineffective for failing to secure and preserve a final ruling as to the questioning of a witness regarding marijuana when there [was] an agreement between the State and the Defendant to not discuss this information."

e. "Applicant believes counsel should have challenged the chain of custody of the blood samples."
f. "Counsel failed to highlight throughout trial the presence of marijuana in the other driver's system and that the driver was otherwise distracted."
g. "Applicant believes counsel should have requested that the prosecuting attorney be removed due to a conflict of interest."
h. "Applicant believes counsel should have objected to jury instructions regarding a motorist's duties. (App. p. 1104-1107)."

Respondent made its return on June 13, 2016, and an evidentiary hearing into the matter was convened on October 1, 2018, before the Honorable Michael G. Nettles. Petitioner was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent. By written order dated December 5, 2018, and filed December 13, 2018, Judge Nettles denied and dismissed the application.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Robert M. Dudek, Esq., Petitioner filed a petition for writ of certiorari on July 31, 2019. This Return follows.

STATEMENT OF THE FACTS

On the night of November 10, 2011, after drinking at least three vodka cranberries with a friend at Applebee's and Geronimo's Bar and Grill, and after picking up more beer on the way home, Shana Robinson ("Petitioner") drove out of her lane into oncoming traffic and collided with Candy S. Zoll ("Victim"), killing her.

a. Petitioner's own version of events conceded a significant amount of drinking prior to the collision, which Dr. Robert Bennett opined would have only imperceptibly impaired Petitioner at the time of the collision, whereas Victim was high on marijuana.

Petitioner took the stand in her own defense at trial. (Appx. 823-72). Petitioner testified that she met with a friend at Applebee's and ordered drinks starting "just before 5 o'clock[.]" (Appx. 832-33). Petitioner ordered two vodka cranberries. (Appx. 833-34). Petitioner ordered a third vodka cranberry around 7:15 P.M. at Geronimo's Bar and Grill, but could not recall much else of what she did there. (Appx. 835, ll. 1-17). Despite the three drinks in two hours, Petitioner asserted she was not impaired at all after the third drink. (Appx. 835-36). Petitioner and Victim's vehicles collided at around 8:30 P.M. (Appx. 237-42).

Counsel called Dr. Bennett as a witness in Petitioner's defense. (Appx. 872-927). Dr. Bennett testified to receiving a pharmacy degree from the Medical University of South Carolina in 1980 and that he worked full time as a forensic toxicologist. (Appx. 873, ll. 6-16). Dr. Bennett noted he had been qualified as an expert in [m]any, many other cases." (Appx. 873, ll. 17-22). Upon voir dire by the State, Dr. Bennett indicated he regularly read "toxicology and scientific journals as a regular part of my practice" but that he had not attended any classes since graduating in 1991. (Appx. 876-77). The State asked if Dr. Bennett's work had been subject to peer review and, after some initial confusion, Dr. Bennett offered that anybody could review his work. (Appx. 877-78). Dr. Bennett offered that he speaks at seminars and trainings, most

commonly to lawyers. (Appx. 878-89). The State did not object to Bennett's qualification as an expert in forensic toxicology, and he was so qualified. (Appx. 879, ll. 12-17).

Dr. Bennett denied specifically testing Petitioner's blood alcohol level, but approximated her BAC at the time of the collision to be "anywhere between zero and .01, .015" given the number of drinks she had consumed, her size, and the time that had passed. (Appx. 880-84). Asked how such a BAC would impact a person, Dr. Bennett testified "[i]t would make them impaired to a slight degree. Any amount of alcohol is going to cause some amount of impairment." (Appx. 884, ll. 9-14). Dr. Bennett thereafter testified that on "an impairment scale of zero to 100 percent" where zero is full function and 100 is comatose, Petitioner would have clocked in at a "five, ten percent impairment rate level at that amount of alcohol." (Appx. 884-85). Counsel asked if a person would even notice such a low impairment, and Dr. Bennett agreed that a person's "self-perception of impairment would be that they feel not impaired because the level of impairment is not that high." (Appx. 885, ll. 10-14). Asked if Petitioner would be capable of safely driving a vehicle at that level of impairment, Dr. Bennett declined to answer conclusively as to Petitioner specifically, but offered that most people would be able to drive a vehicle, and noted the legal limit for intoxication was set at .08. (Appx. 886, ll. 8-20). Counsel noted SLED's testing produced a different BAC result, and Dr. Bennett noted Petitioner had a cyst on her liver, that SLED may have swabbed the blood draw site with ethanol, and that Petitioner received blood transfusions at the hospital after the accident. (Appx. 886-90). Dr. Bennett also postulated Petitioner's blood could have fermented in the vial. (Appx. 890-95).

After a successful proffer, Counsel elicited through Dr. Bennett that Victim's blood tested positive for marijuana. (Appx. 910-13). Dr. Bennett testified Victim would have been impaired by her level of marijuana intoxication at the time of the collision. (Appx. 913, ll. 6-22).

b. The State challenged Dr. Bennett's credibility with a newspaper article, a circuit court ruling, and a pharmacy board letter, each of which Dr. Bennett rejected as unfair or motivated by pecuniary interest.

On cross-examination, Dr. Bennett testified he did not prepare any report pursuant to Counsel's request, and that though he had not yet produced a bill that he charges $300 per hour for his services. (Appx. 915, ll. 3-22). Dr. Bennett agreed the elimination rate of alcohol through the body is somewhere between .015 and .02 per hour. (Appx. 916, ll. 17-22). Dr. Bennett agreed that a person with a blood alcohol content of .15 would be significantly impaired. (Tr. 916-17). Dr. Bennett agreed his conclusions as to Petitioner's intoxication were based on her reporting the consumption of three standard drinks, and that where mixed drinks were involved, the amount of vodka in the drink would dramatically affect the accuracy of his calculations. (Appx. 917, ll. 6-18). Dr. Bennett, upon prompting by the State, explained that alcohol, as well as all of the other drugs found in Petitioner's system, were depressants, which reduce a person's ability to respond to stimuli. (Appx. 917-18). Dr. Bennett agreed the use of a Betadine wipe to clean the draw site would not impact the accuracy of SLED's blood draw. (Appx. 918-19).

Dr. Bennett admitted to having never worked in law enforcement or attending the South Carolina Criminal Justice academy, and the State noted his curricula vitae indicated experience in crime scene analysis, fingerprinting, and gunshot residue. (Appx. 919-20). Dr. Bennett admitted to representing himself as a registered pharmacist for a decade despite the expiration of his license in 1999. (Appx. 920-21). Dr. Bennett admitted the South Carolina Board of Pharmacy had issued him a cease and desist order to stop calling himself a registered pharmacist, but offered that he was still registered with the South Carolina Board of Pharmacy, inactive though his license may be. (Appx. 921, ll. 8-17). Dr. Bennett acknowledged an article from the Charleston Post and Courier describing the reliability of his findings as suspect or controversial,

and that most of his training in other fields was self-taught from reading journals and books. (Appx. 921-22). The State confronted Bennett with a case where a mother temporarily lost custody based upon his findings, which were later contested by a physician. (Appx. 922, ll. 7-11). Bennett testified "[t]here are constantly questions about the practice that I have. Questions do not implicate a wrong doing; it's just questions." (Appx. 923, ll. 2-4). Dr. Bennett rejected the condemnation of the Post and Courier, arguing the newspaper's job was "to sell newspapers." (Appx. 923, ll. 9-11).

On redirect, Counsel emphasized SLED performed the tests in question and did so in an accurate fashion. (Appx. 924-25). Dr. Bennett again asserted that "keeping up with the licensure is necessary if you fill prescriptions at a pharmacy and that's all." (Appx. 926, ll. 1-8). Dr. Bennett noted that subsequent to his training as a pharmacist, he had studied and received a Ph.D. "in pharmaceutical drug sciences, which includes toxicology and pharmacology." (Appx. 926, ll. 16-22).

In closing arguments, Counsel laid blame for the collision upon Victim:

> The State drew Ms. Zoll's blood immediately after the accident. She was not given any substances. She was not operated on. She did not receive six plus liters of fluid. She did not receive 28 different medications and fluids. She did not receive an injection of THC. That was in her system when she was driving that car. She was high when she was driving that car.

(Appx. 1030, ll. 4-10).

c. At the PCR evidentiary hearing, both Petitioner and Counsel testified that Counsel put considerable effort into the case, and Counsel explained Dr. Bennett's shortcomings as a witness at trial were a surprise.

At the evidentiary hearing, Petitioner testified she very frequently met with Counsel but that they did not much discuss Dr. Bennett, and that Counsel had found him to testify in her defense. (Appx. 1163-64; Appx. 1168-69). Petitioner testified the defense strategy for trial was that she was not intoxicated at the time of the collision. (Appx. 1167, ll. 9-21). Petitioner

recalled the cross-examination of Dr. Bennett was a train wreck, and that he was completely discredited. (Appx. 1169-71). Nonetheless, Petitioner expressed her opinion that Counsel "put his heart and soul into this case." (Appx. 1178-79). Separately, Petitioner recalled that Grover Seaton, Esq., briefly assisted Counsel in her defense but was removed from the case at an early stage due to a conflict of interest. (Appx. 1175-76).

Respondent called Counsel as a witness at the PCR evidentiary hearing. Counsel testified that at the time of trial, he possessed about three years of experience as a practicing criminal attorney, and otherwise represented clients in family court, some personal injury cases, and the occasional immigration case. (Appx. 1183-84). Counsel was retained by Petitioner after meeting her through one of his family court clients. (Appx. 1184, ll. 12-17). Counsel received voluminous discovery in the case, including the MAIT report and hospital records, and discussed "all the main portions of the different things that came out." (Appx. 1184-85). Counsel demonstrated a strong command of the facts of the case, and noted Petitioner's memory of the collision was very, very bad, such that she had a very limited recollection of what occurred the night of the collision. (Appx. 1186-87). Counsel described his strategy as "reasonable doubt," and that he felt strongly that he could show both that Petitioner was not intoxicated while Victim was under the influence of Marijuana, and was further distracted by a phone call and her dog. (Appx. 1187-92).

Counsel testified he knew of Dr. Bennett from his work in family court, and described Dr. Bennett as a heralded expert witness in family court matters, such that he commands the respect of the family court bench and is often specifically requested by judges. (Appx. 1192, ll. 8-21). Counsel explained that his background investigation of Dr. Bennett was circumscribed by the doctor's sterling reputation, but noted that he did speak to others before hiring Dr. Bennett,

and that he may have used Dr. Bennett in the past in his family court practice. (Appx. 1192-93). Counsel vaguely recalled Seaton telling him not to use Dr. Bennett as an expert, but that Seaton did not articulate a reason why he should not do so, only telling him "don't." (Appx. 1193-94). Nonetheless, Counsel acknowledged Dr. Bennett was a "terrible choice." (Appx. 1193, line 1). On cross-examination, Counsel again acknowledged the scope of the State's impeachment of Dr. Bennett, and described the experience as "horrible." (Appx. 1202-03). Counsel noted that despite preparing with Dr. Bennett multiple times prior to trial, Dr. Bennett had never brought up the percentage-scale portion of his testimony, and that it was very confusing when he did bring it out at trial. (Appx. 1203-05). On redirect, Counsel explained that Bennett's testimony at trial, as compared to their pre-trial discussions, was new, "supplemental" testimony. (Appx. 1207-08). Counsel agreed that the testimony he had expected Dr. Bennett to give at trial, based upon their preparation, would have made more sense. (Appx. 1208, ll. 6-14).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

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; 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 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "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). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). 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. 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. Strickland, 466 U.S. at 696. 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. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL REASONABLY RELIED UPON HIS PRIOR EXPERIENCE AND DR. ROBERT BENNETT'S POSITIVE REPUTATION IN THE LEGAL COMMUNITY IN CHOOSING TO RETAIN THE DOCTOR, WAS JUSTIFIABLY SURPRISED BY ELEMENTS OF DR. BENNETT'S TESTIMONY ONLY AFTER REASONABLE PREPARATION, AND WHERE DR. BENNETT'S TESTIMONY WAS STILL CONSISTENT WITH PETITIONER'S THEORY OF DEFENSE.

The post-conviction relief court properly found Counsel was not ineffective where he retained Dr. Robert Bennett to testify in Petitioner's defense based upon Dr. Bennett's excellent reputation with the bench and bar in this State *prior to trial*, and thoroughly prepared for trial with the doctor. Though Counsel was surprised by Dr. Bennett's "percentage" testimony, and was surprised by the strength of the State's impeachment of the doctor, these surprises only occurred after reasonable preparation with Dr. Bennett for trial and were not otherwise clearly foreseeable to Counsel. Despite the surprises, Dr. Bennett's testimony still contained elements critical to Petitioner's defense, and the worst possible impact to Petitioner's case would be that his testimony was a nullity.

"A criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)). The scope of a reasonable investigation depends on a number of issues, but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Id., 372 S.C. at 331-32, 642 S.E.2d at 597. As noted by the lower court, "strategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation." McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)); Strickland, 466 U.S. at 690-91. "In any ineffectiveness case,

a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

Calling a witness where said witness contradicts the defense's theory of the case may constitute ineffective assistance. See, e.g. Ingle v. State, 348 S.C. 467, 560 S.E.2d 402 (2002) (finding counsel ineffective for calling a witness whose testimony contradicted the defense's theory of the case, where counsel never interviewed the witness but relied only on his client's insistence and the witness' absence from the state's case-in-chief); McKnight, 378 S.C. at 43-46, 661 S.E.2d at 359-60 (finding counsel ineffective for calling an expert whose testimony contradicted the defense's theory of the case, where counsel knew or should have known she would do so given her testimony from the prior mistrial).

a. Counsel was justifiably surprised by Dr. Bennett's "percentage" testimony where Counsel had gone over the doctor's anticipated testimony prior to trial, which did not include the percentages of impairment.

However confusing Dr. Bennett's testimony may have been regarding the "percentage" of Petitioner's impairment, the PCR court rightly denied relief because the testimony was a surprise to Counsel despite meeting and preparing with Dr. Bennett multiple times at trial. The present matter is not a case where Counsel did not speak to a witness at all prior to trial, as was the case in Ingle, or knowingly disregarded the harm a witness would cause by testifying, as was the case in McKnight. Rather, Counsel thoroughly prepared Dr. Bennett to testify, poured his soul into the case (as Petitioner herself put it), and Dr. Bennett diverged from pre-trial preparation during his trial testimony. The oblique warning from Seaton, who resigned from the case due to a conflict of interest, was insufficiently specific to put Counsel on notice that Dr. Bennett would go off the rails. As such, Counsel performed well within the parameters of reasonably effective assistance of counsel, and the PCR court's denial of relief is justified.

Additionally, however confusing the "percentage" portion of Dr. Bennett's testimony may have been, it was not clearly harmful to Petitioner. It would strain credibility before the jury for Dr. Bennett, or any other expert, to testify that Petitioner was wholly uninhibited shortly after downing three vodka cranberries. Rather, the only reasonable testimony Counsel and Dr. Bennett could have presented was that there was at least some level of alcohol in Petitioner's system, which would result in some theoretical impairment, but which would be below the threshold necessary to sustain a conviction for felony DUI. Dr. Bennet testified in precisely such a fashion, consistent with Petitioner's defense. Thus, even if Counsel was somehow deficient for failing to foresee Dr. Bennett's unexpected testimony, Petitioner still failed to establish the outcome at trial would have been different but for Dr. Bennett's "percentage" testimony.

b. Counsel reasonably relied upon his prior experience with Dr. Bennett and the doctor's reputation among the bench and bar in choosing to retain him, and was justifiably surprised by the strength of the State's impeachment on cross-examination.

As to whether Dr. Bennett should have been called at all, the record is replete with information to justify the scope of Counsel's pre-trial investigation of Dr. Bennett and call him as a witness at trial, and the PCR court's ruling thereon. Counsel relied upon his own knowledge of Dr. Bennett's reputation at that time and additionally confirmed that then-existing reputation through conversations with other members of the legal community. The PCR court, relying upon both Counsel's testimony and review of published opinions in South Carolina jurisprudence, found that Dr. Bennett was positively regarded by the bench and bar, a ruling now owed deference by this Court.

Only one person, Seaton, shared any hesitation or warning with Counsel regarding the doctor, and the warning was so nonspecific as to be useless to put Counsel on notice as to anything. Petitioner *mocks* the PCR court's finding on this point through the use of *italics* for

emphasis in the petition (Petition for Writ of Certiorari at 20), but he can only aver that the broad, nonspecific warning by Seaton should have prompted Counsel to engage in an equally broad, nonspecific investigation into Dr. Bennett. Petitioner's argument only works in a vacuum, and fails to take into consideration that Counsel's investigation was reasonably defined by his own prior experience with Dr. Bennett and his firmly established positive reputation among the bench and bar. See, e.g. Hall v. Desert Aire, Inc.., 276 S.C. 338, 354-56, 656 S.E.2d 753, 761-62 (Ct. App. 2007) (noting in a worker's compensation case the great weight afforded to Dr. Bennett's opinion as to intoxication, to the benefit of the injured worker who offered him). For all Counsel knew, and for all the record reflects, Seaton could have disliked Dr. Bennett due to any number of prior difficulties[1] or prejudices. Seaton's failure to identify a specific reason did not impose upon Counsel a constitutional obligation to scour every last aspect of Dr. Bennett's past.

The primary source of the State's cross-examination, the July 2006 Charleston Post and Courier article criticizing Dr. Bennett, was not something that would naturally present itself in the course of investigating Dr. Bennett's suitability at trial. To the contrary, the article was already eight years old at the time of trial, and would have been mixed, if not buried, under various reports tending to praise Dr. Bennett's work. The article evidently made little impact on Dr. Bennett's reputation prior to Petitioner's trial, which at that time remained very positive. Counsel never would have found the article without some outside information to direct him to it specifically. Counsel never received any such direction.

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[1] For example, perhaps Seaton lost a case where Dr. Bennett testified for the opposing side, or perhaps he lost a game of poker with the doctor, or perhaps Dr. Bennett accidentally ran over Seaton's dog. All of these are equally likely and unlikely because, as is the point, Seaton never gave Counsel any specific, actionable information.

c. Dr. Bennett's testimony still facilitated the presentation of critical information to the jury, and Petitioner presented no other witness at the evidentiary hearing to do the same without Dr. Bennett's weaknesses.

As noted in subsection a., above, however flawed Dr. Bennett may have been as a witness, he still provided substantial information and testimony which was essential to Petitioner's defense. Dr. Bennett testified Petitioner was barely intoxicated at all, that any impairment would have been imperceptible, that her elevated blood-alcohol content revealed by SLED's testing could be inaccurate for a number of reasons, and that Victim was herself under the influence of marijuana. None of this testimony was harmful, and the worst case outcome from the State's cross-examination was that Dr. Bennett was discredited, and his testimony a nullity. Petitioner cannot show prejudice under Strickland because, absent Dr. Bennett, none of this favorable testimony would have come in before the jury, the lack of which would have substantially diminished his own theory of defense.

Petitioner opines that "any toxicologist, without the baggage of Dr. Bennett, could have also rendered this opinion from the *available evidence*[,]" (Petition for Writ of Certiorari at 20) but Petitioner only speculates to that end. Petitioner never offered another expert witness at the evidentiary hearing who would have been willing and able to testify to the same or better conclusions at the time of trial who was not similarly impeachable. Petitioner cites to Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (2015), in support of his argument, but the applicant in Reeves provided in support of his claim the testimony of Dr. Frederick Morris Thompson; no such comparable testimony exists in the record now before the Court. Assuming *ad arguendo* that Dr. Bennett is a quack, as Petitioner now functionally complains, it may be that only Dr. Bennett would have provided the helpful testimony he provided, and that no other more qualified expert would have been willing or able to so testify.

CONCLUSION

In sum, the lower court properly frames the issue now before this Court:

> "[A]n imperfect expert witness provided imperfect testimony in a case that offered [Petitioner] imperfect facts for a defense. No witness is perfect, and where a defendant's expert witness has testified numerous times over a career it is unlikely the prosecution will be unable to obtain some valid means of challenging their credibility. Here, Dr. Bennett provided testimony consistent with defense strategy, freckled by a zealous prosecutorial effort to discredit him. Counsel is not rendered ineffective thereby.

(Appx. 1224). The record contains more than enough evidence to support the PCR court's factual findings and its legal conclusion is sound; absent a showing of a lead which would have led Counsel specifically to Dr. Bennett's deficiencies, and absent a showing of a superior expert witness to provide the same information, Petitioner cannot meet his burdens under Strickland.

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

Respectfully submitted,

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By: [signature] for
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Dec. 16, 2019

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Shana Robinson,

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v.

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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 placing one copy in the United States Mail, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29201

This 16th day of December, 2019.

Jennifer Jennison
Administrative Coordinator for Respondent

ALAN WILSON
ATTORNEY GENERAL

December 16, 2019

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

RE: Shana Robinson v. State of South Carolina
Appellate Case No.: 2019-002216

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,

per Johnny E. James Jr.
Assistant Attorney General
S.C. Bar # 101260

JEJ/jj
Enclosures

cc: Robert M. Dudek, Esquire
Victim Advocacy Division