

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Lancaster County
Brooks P. Goldsmith, PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2019-000191

AL MARTINEZ GREEN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

INDEX.....	i
RESPONDENT’S STATEMENT OF ISSUE.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
STANDARD OF REVIEW.....	16
ARGUMENT.....	16
The PCR court correctly found Counsel made a reasonable strategic decision to introduce the child’s out-of-court statement, “Shi’s daddy” shot his mother, into evidence as an excited utterance rather than calling the child as a defense witness because the child could have identified Green as being one of the perpetrators when Green was never alleged as the shooter.....	16
CONCLUSION.....	20

PETITIONER'S STATEMENT OF ISSUE

Whether the PCR court erred by ruling Green was not ineffectively represented where his attorney failed to interview the decedent's four-year-old son, and call the child as a defense witness, where it was undisputed the child told two or three police officers almost immediately after his mother was murdered that "Shi's daddy," who was not Green, shot his mother, since there was a reasonable probability that this exculpatory testimony would have led to an acquittal in this purely circumstantial evidence case, and the failure to interview and call this critical witness was not legitimate trial strategy as the PCR court erroneously ruled?

RESPONDENT'S STATEMENT OF ISSUE

Whether the PCR court correctly found Counsel made a reasonable strategic decision to introduce the child's out-of-court statement, "Shi's daddy" shot his mother, into evidence as an excited utterance rather than calling the child as a defense witness because the child could have identified Green as being one of the perpetrators when Green was never alleged as the shooter?

STATEMENT OF THE CASE

Al Martinez Green was indicted at the June 2012 term of the Lancaster County Grand Jury for murdering Jenika Jones. App. 1086-87. Devatee Clinton and Wayne Blakeney were also indicted for murdering Jones. App. 1086. Green and Clinton proceeded to a jury trial before Judge R. Knox McMahon on March 10–14, 2014. Blakeney testified for the State. App. 724-76. Amy S. Raney (Counsel) represented Green, and William Frick represented Clinton. App. 2. Solicitor Douglas A. Barfield, Jr. prosecuted the case. App. 1. The jury convicted Green and Clinton as indicted, and Judge McMahon sentenced both to life without parole. App. 1011. Green appealed. Appellate Case No. 2014-000603.

Jane H. Merrill, Esquire, represented Green on appeal¹ and raised the following issue:

Did the trial court err by refusing to direct a verdict for Al Green when the state failed to present direct or substantial circumstantial evidence that Mr. Green was an accomplice to murder?

The Court of Appeals affirmed. *State v. Al Martinez Green*, Op. No. 2016-UP-205 (S.C. Ct. App. filed May 11, 2016). The case was remitted back to the circuit court on May 27, 2016.

Green commenced the underlying PCR action on September 16, 2016. App. 1014-21. The State submitted its return on November 23, 2016. App. 1022-26. Thereafter, an evidentiary hearing into the matter convened before Judge Brooks P. Goldsmith on July 18, 2018. App. 1027-72. Green was represented by Nathan J. Sheldon (PCR counsel). App. 1027. Assistant Attorney General Deshawn H. Mitchell represented the State. App. 1027. At the conclusion of the PCR hearing, Judge Goldsmith denied relief from the bench, finding Green failed to meet his burden of proof and found “the decision to not call the child was clearly trial strategy.” App. 1072. Thereafter, on September 6, 2018, Judge Goldsmith issued a written order of dismissal denying relief and

¹ Merrill represented Green on appeal through the Appellate Practice Project.

dismissing the action with prejudice. App. 1074-85. Green appealed the denial of relief.

STATEMENT OF THE FACTS

In January 2012, Jenika Jones lived in a trailer park with her three minor children—ages four, two, and one. App. 216-19; 221-26. Clinton lived with his grandmother in the neighboring trailer. App. 740; 751; 793.

On January 19, 2012, law enforcement responded to a reported home-invasion of Jones's trailer. Once inside the trailer, law enforcement observed Jones's body on the couch, in a pool of blood, with a single gunshot wound to the head. She was dead. App. 215-27. Jones's one-year-old and two-year-old children were still inside the trailer. App. 220-22; 236.

Latoya Green (Latoya) testified that she is Green's sister. Also, she had been both friends with and a cousin of Jones. Jones and her children had shared an apartment with Latoya and Green at one time. When Jones moved out, she moved into an apartment with the man she was dating at the time, "Nard" Roseboro. Jones had only lived in the trailer park for several weeks before her death. Latoya testified that her brother and Clinton were friends. App. 261-67.

Dominique Davis was living in a Lancaster apartment complex in January 2012. On the morning of January 18, 2012, Davis and her daughter went to the apartment of her friend and neighbor, Y'eisha Tinsley, in the same complex. Tinsley was Green's girlfriend at the time and Green was at her apartment that morning. Clinton and Tinsley's brother, Madrey Tinsley (Madrey), were also there. App. 268-71.

While Davis and Tinsley were talking, Davis overheard Clinton and Green discuss doing a "lick," or robbing someone. She also heard Clinton say that "he had Taz's gun and he wasn't going to give it back to him." Further, Davis heard Green ask whether "she" drove "a black car."

However, the men never mentioned an intended victim by name or location and Davis did not know whom the friends were planning to rob. App. 271-79.

Jamal Twitty lived in the same apartment complex as Davis and Tinsley in January 2012. Also, he knew both women, Clinton, and Green. Twitty did not know Jones. Twitty saw Green at Tinsley's apartment on the morning of January 18, 2012. Twitty did not see Clinton there that morning, but he did not stay at the apartment very long. App. 281-84.

Sometime between 10:00 and 11:00 p.m. on January 18, Twitty had a conversation with Clinton while the men were standing in the area outside Tinsley's apartment. Teeshan Harris and Maleek Moore were also present. Clinton asked Twitty if Twitty wanted "to go on a lick with him." Twitty explained that a "lick" was slang for robbery. Twitty told Clinton, "yeah, whatever." App. 284-86; 287-88; 291-92.

Twitty asked Clinton where the robbery would take place, and Clinton responded, "Not far." Twitty then changed his mind about participating in the robbery and talked Clinton out of doing it that day when Clinton asked if Twitty could get a car. Twitty did not have a car and his girlfriend had told him that her car was parked for the night. App. 286-88; 292-93.

Green walked up a few minutes after that conversation, and Clinton asked Green whether Green "want[ed] to go on a lick." Green replied, "yeah, whatever," indicating that "he was down for it. . . . [H]e was like, yeah, he's ready." After these conversations, the men went their separate ways. While Twitty did not see Clinton with a gun that night, he had previously seen Clinton with one. Twitty was not with either Clinton or Green on January 19. Tr. pp. 286-89; 292-94.

Lieutenant Christy Rogers of the Lancaster County Sheriff's Office testified that she supervises the Office's crime scene investigators. In the early morning hours of January 20th, Rogers along with Investigators Ken Taylor and Jeff Steel processed the trailer pursuant to a search

warrant. There were no signs of forced entry on the front door and the back door was locked. In the den and kitchen area, they found Jones with a gunshot wound to her head. They also found a .380 cartridge casing behind the couch on which they found Jones—between the couch and the wall. Further, a picture had been knocked off of a wall near the front door and onto the floor. App. 402-10; 413-15; 424-25; 434-35; 439; 452-54; 456-65.

There was a great deal of blood covering Jones's face, head, upper arms, and on the couch under her body. Blood had also pooled on the floor in that area. There were bloody footprints that were apparently made by Jones's children and the only blood elsewhere in the residence had apparently been transferred by the children. There did not appear to be any bloody footprints made by adults. App. 409; 416-18; 422-25; 456-61; 498-501; 503; 517-19.

The only other area of the residence that had been disturbed was the master bedroom, and it had been "ransacked." No fingerprints of evidentiary value were recovered from the residence, there was no sign of forced entry and the front door was open when law enforcement arrived. Nevertheless, Investigator Taylor took swabs from underneath the exterior and interior door handles to the screen door and the main door to see if touch DNA could be developed. App. 409-12; 430-31; 456-61; 466-74.

Shakela Montgomery and her cousin, Tameca Nelson, testified that they dined at Applebee's on the night of January 19th. They returned to the trailer park where the crime occurred between 9:30 and 10:30 p.m. because they were planning to stay there that night with Montgomery's brother. As soon as they turned onto the road entering the trailer park, they were almost run off of the road by a white car speeding out of the trailer park without its lights on. Neither woman saw EMS, law enforcement, or a crowd present at the time and neither learned of the murder until the next day. App. 242-52; 295-301.

Montgomery could not tell anything about the other vehicle's occupants. However, she described the car as a late model vehicle, and indicated that it was "an Oldsmobile, Buick, [or] Cadillac style." App. 247; 250; 252. Nelson likewise could not tell anything about the other car's occupants, but she testified that the car "was a white Cadillac with a rag top." App. 297-98. Nelson saw the same car parked with a flat-tire at a nearby Piggly Wiggly the next day. App. 298-301.

The white car Montgomery and Nelson described was owned by fifty-year-old Pomp Blackmon. Blackmon testified that he had lived in Lancaster all his life. On January 19, 2012, he owned an "[e]ggshell white" 1991 Cadillac Seville "rag top." While his car was not a convertible, it looked like one. Blackmon would give rides to others on occasion, but it was unusual for anyone to ask that he loan his car to them. App. 380-84.

"A little after seven" on the night of January 19th, a black male, who was approximately 5' 8" tall and wearing a "bluish black" jumpsuit came to Blackmon's house and asked Blackmon to give him a ride to the store or let him use the Cadillac. Blackmon would not drive the car because he had been drinking beer, and he would not let the man borrow the car because he knew that the man did not have a driver's license. This man said that his cousin had a license. The man momentarily left and returned with his cousin. When Blackmon saw that the cousin had a license, he let the men borrow his vehicle. After the car pulled out of Blackmon's driveway and stopped at a stop sign, two more men wearing hoodies got into the car. App. 382-86.

Blackmon expected his Cadillac would be returned within ninety minutes and that he would receive beer and cigarettes in exchange for letting the men use his car. However, neither of these occurred. He reported his car missing the next morning and set out, on foot, to find his car. He found it in the parking lot of Piggly Wiggly located roughly a mile from the crime scene around 5:00 p.m. on January 20th. His car had a flat tire on the front driver's side, and it was almost out

of gas. Blackmon called police and let them know that he had found the car; however, he did not take it home until Saturday, January 21st. App. 386-91; 397-98; 455.

When Blackmon got his car on Saturday, the key to the car was missing, the car had red mud on it, a piece of molding was missing, and a blue jumpsuit and an ID card had been stuffed in the floorboard behind the passenger seat. Blackmon testified that the car was not muddy and the molding had not been missing when he loaned it on January 19; that the ID card had not been in the car when he loaned it; and that the jumpsuit was not his. Blackmon called law enforcement to report what he found, and he was later interviewed by Investigator Fred Thompson. App. 391-401.

Investigator Thompson testified that he was employed as an investigator in the Lancaster County Sheriff's Office in January 2012. As part of his duties in this case, he spoke to Blackmon on January 23, 2012. Thompson seized the blue jumpsuit and the ID card from the trunk of the Cadillac. Upon learning that a piece of the car's molding was missing, Thompson went to the road entering the trailer park to see if he could locate the missing piece of molding. He found some molding in the area of that road and subsequently verified that it was the missing piece by comparing it to the space on the car that did not have molding. App. 534-40; 546-47.

Additionally, Lt. Rogers, Inv. Taylor and Inv. Steel processed Blackmon's Cadillac. Taylor first processed the car on January 23, 2012, at Blackmon's residence. No identifiable latent prints were found, either inside or outside of the vehicle. All three officers processed it again on March 7, 2012, at a building owned by the Sheriff's Office. The officers re-searched the car in the hopes of finding evidence of blood in it. They used a "blue star chemical" that reacts positively to the presumptive presence of blood to help locate possible areas of human blood. Because the chemical reacted positively in several areas of the car, the officers took three swabs of reddish brown stains from the rear seat; cuttings from the front driver's seat and front passenger's seat; and cuttings

from the front passenger's seat belt. App. 440-42; 476-84.

Vivian Stradford testified that she has lived in Lancaster for thirty years and that she had known Jones for three or four years. Also, she knows Clinton and she "knows of" Green. Someone called Stradford and informed her of Jones's death around 10:30 p.m. on January 19. After going to her aunt's house to discuss what she had heard with her aunt and cousin, Stradford drove to the Crenco convenience store, which is located on Main St. in Lancaster. A nightclub known as the Hole in the Wall was across the street from Crenco in January 2012. App. 625-29.

Stradford saw Clinton walk up to Crenco before she went inside. He was wearing the blue jumpsuit later found in the Cadillac, and he was coming from the Hole in the Wall. Clinton asked her for a cigarette and Stradford said that she did not have any but was going into the store to get some. When she told Clinton that "Somebody just killed my home girl," Clinton was uninterested in talking about the topic. Stradford went inside and purchased cigarettes. After she gave two to Clinton, he walked out of the store. By the time that she reached her vehicle, he was gone. App. 628-34.

Y'eisha Tinsley, Green's girlfriend, testified that she was pregnant with his child in January 2012. Tinsley also knows Clinton. She corroborated that Green, Clinton, Dominique Davis, and Jamal Twitty were all at her apartment during the day on January 18. App. 618-22.

Tinsley and Latoya Green learned about Jones's death on January 19. Tinsley and Green thereafter talked about where he had been the night before. He told her that he had been at the Hole in the Wall and that he met up with Clinton there. App. 622-24.

Wayne Anthony Blakeney, Jr., testified that he was arrested on March 8, 2012, and charged with murder in this case. He was facing between thirty years and life on that charge and the State had not made any promises in exchange for his testimony. Clinton is his cousin and friend, and

they hung out together sometimes. Blakeney also knows Green and he knew Delrico McDow by nickname. He was not close to Green or McDow, the latter of whom he had met through Clinton. App. 725-29; 732-34.

Clinton did not have a driver's license at the time and Blakeney drove Clinton places "a few times." Each time, Clinton provided the car. Mr. Blakeney testified that he was with Clinton Green and McDow on the night of January 19, 2012. They met up in the Newton area. They later went to a residence, where they borrowed a white Cadillac. After Clinton spoke to the Cadillac's owner, the men got the car and Blakeney drove them to the Hole in the Wall. App. 731-32; 734-38.

Blakeney drank beer while there, but he did not think that Clinton drank anything while there. He did not pay close attention to Green or McDow and he did not know whether or not they drank anything. The men left the Hole in the Wall when Clinton said that he needed for Blakeney "to drive him to get some money." Clinton did not indicate who owed him the money or where they were going to get it. However, he promised to give Blakeney some money for taking him to get it. App. 738-39.

The four men got into the white Cadillac, with Blakeney driving and Clinton in the passenger seat. Following Clinton's directions, Blakeney drove to the trailer park where Jones was murdered. As they rode to the trailer park, Blakeney saw that Clinton had a gun at his side. When they reached the trailer park, Blakeney parked the Cadillac in a location selected by Clinton. App. 739-42; 744-45; 761-62.

Blakeney stayed in the car, but Clinton, Green and McDow got out. The three men then went behind a trailer and disappeared. They came running back to the Cadillac about ten minutes later. Although Clinton told Blakeney to "just chill," Green and McDow told him to "go." So,

Blakeney drove “pretty quick[ly]” out of the trailer park and back to the Hole in the Wall. The four men hung out at the nightclub for thirty or forty minutes before leaving. App. 743-47; 762-63; 774-75.

When they left this time, two men whom Blakeney did not know also got into the car with them. Blakeney dropped off Green, McDow and the two strangers in the Newton area. He then took Clinton home. Following Clinton’s directions, Blakeney drove Clinton back to the trailer park where they had been earlier and to the mobile home of Clinton’s grandmother, where Clinton was staying. App. 740; 747-49; 755; 764.

Along the way there, Clinton told Blakeney, “I shot that bitch.” By the time Clinton got out, it was well into the morning of January 19. Clinton told Blakeney that he had left his gun in the glove compartment and he asked Blakeney to “hold it for him.” App. 749-50; 755.

Blakeney left the trailer park but soon realized that the car was low on gas. Also, it had a flat tire. So, Blakeney parked it in the parking lot of the Piggly Wiggly. He left the car unlocked with the key in it, and he walked home. He took Clinton’s handgun with him. App. 750-52.

Blakeney sold the gun to his cousin, Marcus Barnes, several weeks later. His arrest was prompted by a friend telling law enforcement that Blakeney had admitted involvement in the crime. After his March 2012 arrest, Blakeney gave a statement to the Sheriff’s Office. While he was not completely truthful at first, he soon was completely honest about what had occurred. Also, both he and Investigator Thompson unsuccessfully tried to get the weapon from Barnes. However, Barnes would not cooperate. App. 752-57; 759; 793-94.

Also, following Clinton’s arrest, Investigator Thompson had three conversations with him concerning his whereabouts on the night of January 19. The first conversation occurred on January 27, 2012, and was initiated by Clinton, who was in his jail cell. Clinton told Investigator Thompson

that he had gone to “the Hole in the Wall nightclub on Market Street” and that his cousin, Tony Cunningham, had taken him there. App. 795-97.

On February 23, 2012, Thompson interviewed Clinton in a break room at the Sheriff’s Office. Clinton’s trial attorney, William P. Frick was also present, as was Capt. Craig Bailey. Before they discussed the case, Thompson advised Clinton of and secured a written waiver of his *Miranda*² rights, with the exception of his right to counsel in light of counsel’s presence. The purpose of this lengthy interview was another attempt to establish where Clinton had been on the night of January 19. App. 797-807; 819-20.

Clinton claimed that he had been “[a]t the Self Controlled Brothers or at the Hole in the Wall.” He also claimed that he had worn “a camouflage jumpsuit.” Clinton brought up the topic of a blue jumpsuit. He admitted that he owned one but claimed that he would occasionally loan it to others. One person that he supposedly loaned it to was his roommate at the trailer park, Reggie Stover. Another was a person named “Wayne,” but he did not give a last name for Wayne. App. 808-09; 820-21.

Even though Jones lived in a mobile home immediately adjacent to the one in which Clinton was staying, he claimed that “[h]e didn’t know that she lived in the mobile home right beside his.” When asked about Pomp Blackmon and a white “rag top” Cadillac, Clinton initially claimed that he did not know Blackmon and that he had not seen such a car. However, he later admitted knowing Blackmon. He likewise admitted having seen Blackmon in various places and knowing both that Blackmon lived in the Newton area and that Blackmon owned a white “rag top” Cadillac. App. 809-11.

Clinton denied that he had ever been in the white Cadillac. When asked whether it would

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

be possible for his DNA to be in the Cadillac, he said that he had leaned into it once while talking to a girl. This occurred at the Hole in the Wall on January 19, 2012. He explained that his DNA would be on the blue jumpsuit because he had touched it when he moved it in his residence and when he loaned it to people. App. 811-12.

Thompson's third conversation with Clinton occurred on March 9, 2012. He first met with Clinton in the detention center and did not advise him of his *Miranda* rights at that time. Later that same day, however, Clinton initiated another conversation with Thompson and he was interviewed at the Sheriff's Office. Thompson advised Clinton of his *Miranda* rights and secured a written waiver of those rights before speaking to him. Thompson was especially careful to emphasize Clinton's waiver of his right to counsel because Frick represented him, but Clinton wanted to speak to Thompson without Frick present. App. 812-16; 822-23.

The resulting interview lasted "probably less than an hour." This time, Clinton admitted that he had seen Wayne Blakeney at the Hole in the Wall on January 19. He also said that Blakeney was in the white Cadillac. App. 816-17.

Capt. Michael Greene, of SLED, was likewise involved in the investigation of Jenika Jones' murder, and he interviewed Green on January 25, 2012 at the Lancaster County Sheriff's Office. Green had already been arrested for murder. Before they spoke, Capt. Greene used a Lancaster County Sheriff's Office advice of rights form to advise Green of his *Miranda* rights, and Green made a signed, written waiver of his rights. Capt. Bailey, of the Lancaster County Sheriff's Office was also present. Green was not restrained and was in street clothes. App. 827-33.

In the interview, Green claimed that he had been at the Hole in the Wall, starting around 11:30 p.m. on the night of January 19. App. 834.

At various points during the investigation, investigators collected a known blood sample

of the victim taken at autopsy, as well as buccal swabs from Clinton, Pomp Blackmon, Wayne Anthony Blakeney, Jr., Delrico Lamar McDow, and Green. This evidence was subsequently used for DNA testing by SLED. App. 363-64; 418-21; 438-39; 484-88; 530-32.

A SLED DNA analyst took fourteen cuttings from the blue jumpsuit. A presumptive test for the presence of blood was positive for each of these cuttings. App. 570-73.

Maryann Boehm, another SLED DNA analyst, testified that she had received the victims known blood standard, as well as the buccal swabs from Clinton, Blackmon, Wayne Blakeney, Jr., McDow and Green. She was able to develop DNA profiles for each of these individuals. She also received a number of items of evidence and tested those items against the known standards. Specifically, she received the .380 shell casing; the swabs from the underside of the exterior storm door handle; swabs from the exterior doorknob on the main door; twelve cuttings from the blue jumpsuit; a swab from the jumpsuit and debris from the jumpsuit; cuttings from a portion of the passenger side seat belt; a cutting from a stained fabric from the front passenger seat; a cutting from stained fabric from the front driver's seat; and swabs of reddish brown stains from the rear seat, which she sub-categorized as swabs of reddish brown stains from the rear seat, seat section, and swabs of reddish brown stains from the rear seat back rest. App. 585-87; 591-94; 596-97.

The DNA profile developed from the .380 shell casing found at the murder scene matched Jones. App. 594-95. Agent Boehm did not get a match on the swabs from the storm door and the doorknob. Although Clinton, Green and Blakeney could be eliminated from the DNA found in the swab of the screen door handle, the co-defendant McDow could not be eliminated. With respect to the swab of the door handle, "no conclusive statement could be made regarding inclusion or exclusion of Jenika Jones or Devatee Clinton as contributor to the mixture." App. 597-99.

Agent Boehm did not find human blood on any of the cuttings from the jumpsuit. She also

tested for the presence of touch DNA. The DNA profile developed on item 6.1 was a mixture of at least three people. Jones, Mr. Blackmon and the four defendants—Clinton, Green, McDow and Blakeney—were excluded as possible contributors to this mixture. Also, the DNA profile developed on item 6.2 was from an unidentified male. However, the DNA profile developed on item 6.3 was a mixture of at least two individuals and “Clinton could not be excluded as a possible contributor to this mixture. The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 580.” Also, Agent Boehm opined that “[n]o conclusive statement can be made regarding the inclusion or exclusion of Jenika Jones as possible contributor to this mixture.” App. 599-603; 610.

As to the DNA profile developed SLED item 6.4, a swab from the blue jumpsuit, Agent Boehm found a “mixture of at least four individuals.” Again, Clinton could not be excluded as a possible contributor to the mixture. “The probability of randomly selecting an unrelated individual who could have contributed to this mixture is approximately one in 12.” Also, she could not make a conclusive determination as to whether the victim, Green, or McDow were contributors to the mixture found. Agent Boehm performed more specific testing for the presence of human blood on one of the cuttings from the Cadillac’s passenger side seatbelt and the other cuttings and swabs taken from the Cadillac, but she did not find human blood. App. 603-07.

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove “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 (quoting *Strickland*, 466 U.S. at 694).

ARGUMENT

The PCR court correctly found Counsel made a reasonable strategic decision to introduce the child's out-of-court statement, “Shi's daddy” shot his mother, into evidence as an excited utterance rather than calling the child as a defense witness because the child could have identified Green as being one of the perpetrators when Green was never alleged as the shooter.

Green argues Counsel was ineffective for failing to call the victim's child (Minor), who was four years' old at the time of the incident, as a defense witness because Minor stated to several witnesses someone other than Green or Clinton shot his mother. It is undisputed that Minor stated “Shi's daddy” shot his mother to several witnesses after his mother's murder. However, Counsel was not ineffective for failing to call Minor as a witness because Counsel strategically chose not to call Minor as a witness because he could have identified Green as one of the perpetrators when

Green was never alleged to be the shooter in the case and instead tried to get Minor's statement in as an excited utterance. For the reasons discussed below, certiorari should be denied.

Strickland requires trial counsel must 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. *Strickland*, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts 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). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Green argues Counsel was ineffective for failing to call Minor as a witness after the trial court ruled Minor's statement "Shi's daddy" shot his mother was inadmissible hearsay and not an excited utterance. This argument fails because Counsel strategically chose not to call Minor as a witness because Minor could have testified Green was one of the men who broke into the trailer

without differing from his statement who the shooter was because Green was never alleged to be the shooter.

Counsel discussed the possibility of calling Minor as a witness with Green. Counsel stated she decided not to call Minor as a witness because Green could not guarantee that Minor would not identify him as one of the intruders. App. 1061. Counsel stated she and Green discussed the possibility of calling Minor as a defense witness, but they decided not to put Minor on their witness list and they were not going to call Minor as a witness at trial. App. 1056. Specifically, Counsel testified, “I point blank asked my client . . . are we absolutely a hundred percent certain if we put Minor, who was the four-year-old at the time of the murder, on the stand that he is absolutely going to say you weren’t there? And I was never given - - my client was like, well, no, I can’t promise that.” Based Green’s response, Counsel testified she chose not to call Minor as a defense witness. App. 1052.

Counsel’s decision not to call Minor as a witness was reasonable. Counsel knew Green was not the alleged shooter; however, Counsel also knew Minor could possibly identify Green as being one of the intruders that night and chose not to call Minor as a witness to limit that damning evidence from coming in. Arguably, from Applicant’s response, Counsel could have inferred that Minor would indicate Green was one of the intruders because Green could not guarantee her that Minor would not identify him. Therefore, Counsel reasonably chose not to call Minor as a witness making Counsel’s performance not ineffective. Based on the foregoing, certiorari should be denied as to this issue.

Because Counsel reasonably decided not to try and call Minor as a witness, Counsel attempted to get Minor’s statement into evidence through Rule 803(2), SCRE—the excited utterance exception to the rule against hearsay. Rule 803(2) provides a hearsay exception for “[a]

statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” However, getting in Minor’s statement was more important to Clinton’s case because Clinton was the alleged shooter, not Green.

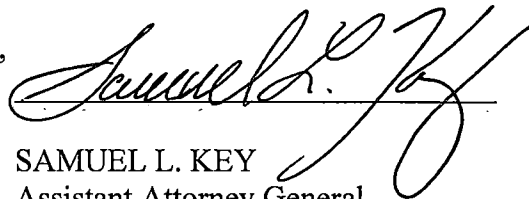
Counsel’s initial strategy was reasonable because Minor made the statement shortly after his mother had been murdered while he was still covered in his mother’s blood. App. 162-63; 1054. However, Investigator Taylor, who heard Minor say “Shi’s daddy” shot his mother testified Minor “didn’t really seem too upset to a great extent. [Minor was] [k]ind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep [their] mind[s] off maybe their thoughts or whatever.” App. 502. When Clinton’s counsel asked Taylor if anything was told to him, the State objected, and the trial court sustained the objection and prompted Clinton’s counsel to move on to the next question. App. 502-03. It seems the trial court found Minor’s statement was not an excited utterance based off of Taylor’s testimony Minor did not seem upset.

Based off of the trial court’s ruling during Clinton’s attorney’s cross-examination of Taylor, Counsel decided not to pursue getting in Minor’s statement as an excited utterance because she “didn’t think it was the end-all-be-all for this case by any stretch of the imagination” because Green “was never accused of being the shooter.” App. 1055. Additionally, as noted above, Counsel had already decided she was not going to call Minor as a witness because Green could not guarantee that Minor would not name him as one of the intruders. Because Counsel’s decision not to call Minor as a witness was reasonable given her discussions with Green, she was not ineffective for failing to call Minor as a witness. Therefore, certiorari should be denied.

CONCLUSION

Based on the foregoing argument, Counsel was not constitutionally ineffective. Counsel articulated a reasonable strategic decision not to call Minor as a witness because Minor could have identified Green as being one of the intruders because Green was never alleged to have been the shooter. Because Counsel was not going to call Minor as a witness, she attempted to get Minor's statement into evidence as an excited utterance; however, the witness who heard Minor make the statement testified Minor did not seem upset, and the trial court ultimately ruled Minor's statement was not an excited utterance. After this ruling, Counsel chose not to keep pushing the issue because Green was never alleged as the shooter. Therefore, Minor's statement had no bearing on whether Green was present when the shooting occurred which makes Counsel's decision not to call Minor as a witness all the more reasonable. As such, the State requests certiorari be denied.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2019-000191

RECEIVED
JAN 15 2020
S.C. SUPREME COURT

Al Martinez Green,

Petitioner,

v.

State of South Carolina,

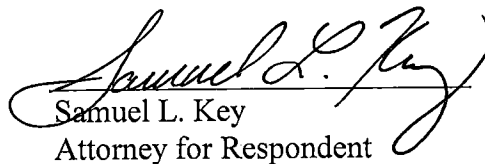
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Robert Michael Dudek, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

This 13th day of January, 2020


Samuel L. Key
Attorney for Respondent