STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Post-Conviction Relief Judge
The Honorable L. Casey Manning, Trial Judge

Appellate Case No. 2019-00549

Victor D. Smith, #348112,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to testimony that Petitioner was in the custody of the Mississippi Department of Corrections after October 21, 2008, because Counsel's defense centered around the argument that the State could not prove the murder took place before that date, and therefore, Petitioner had an indisputable alibi and must be acquitted.

III. The PCR court correctly found Counsel was not constitutionally ineffective for failing to renew his objection to the death certificate when it was introduced at trial because it was admissible under Rule 803(9), so even if Counsel's objection had been preserved, Petitioner was not reasonably likely to have succeeded on this issue on appeal.

IV. The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to the testimony of Deputy Coroner Bill Stevens regarding wind currents preventing the smell of decomposition from reaching the apartment complex as outside the scope of his expertise because the PCR court correctly concluded Petitioner was not prejudiced by such testimony where it was arguably proper because Stevens used it to help formulate his assessment of the age of the remains, which is within his expertise, and in any event, it was cumulative to the testimony of Dr. Clay Nichols.

STATEMENT OF THE CASE

Victor D. Smith (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the February 2010 term of the Court of General Sessions for Richland County for one count of murder (2010-GS-40-12999). Petitioner was represented by Christopher R. Hart, Esquire (Counsel). Assistant Solicitors Daniel Goldberg and Carter Potts prosecuted the case. Petitioner proceeded to trial on September 19-23, 2011 before the Honorable L. Casey Manning. The jury convicted Petitioner as indicted. On October 6, 2011, Judge Manning sentenced Petitioner to confinement for life without the possibility of parole.

A timely Notice of Appeal was filed on Petitioner's behalf, and an appeal was perfected by Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense – Appellate Defense Division. Following the submission of a brief pursuant to Anders v. California, 386 U.S. 738 (1967), the South Carolina Court of Appeals dismissed the appeal. State v. Smith, No. 2013-UP-423 (filed November 20, 2013). The Remittitur was issued on December 6, 2013.

Petitioner then filed an application for post-conviction relief on July 9, 2014. Respondent made its Return on July 23, 2015. An evidentiary hearing into the matter convened on December 11, 2015, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Jonathan D. Waller, Esquire, represented Applicant. J. Clayton Mitchell, Esquire, then of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf, and Counsel also testified. By written order filed February 18, 2016, the PCR court denied relief and dismissed the application with prejudice. Petitioner then filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, which was denied by written order filed March 29, 2019.

STATEMENT OF THE FACTS

Ernest "E.J." Melvin Robinson was last seen alive on September 27, 2008. Ernest's mother filed a missing persons report on December 10, 2008, stating she had last seen her son on the night of Saturday, September 27, 2008. App. pp. 161-62. Investigator Dottie Cronise (Cronise) was assigned to Ernest's case on December 29, 2008. App pp. 1578-60. Cronise first contacted Ernest's employer, a Beef O'Brady's restaurant, and determined he had last been seen at work on September 27, 2008, but he did not return as scheduled the next day. App. p. 162. He had also never returned to pick up the last paycheck owed to him. App. p. 162. However, when Ernest's mother made the initial report, she told Cronise it was not unusual for him to go missing for several months at a time. App. p. 171.

Marvin Shipman, a friend of Ernest's from high school, testified he picked Ernest up from the apartment complex on September 27, along with another friend of Ernest's named Allen.[1] App. pp. 203-04. Shipman drove Ernest and Allen to buy a bag of weed, and then all three went to another friend's house to smoke and hang out. App. pp. 204-05. Sometime that evening around 5:00 or 6:00 p.m., Shipman dropped Ernest off for his shift at Beef O'Brady's. App. p. 205. According to Shipman, Ernest gave the bag of weed to Allen and told Allen he would meet up with him after work to smoke the rest of it. App. p. 206. Shipman then dropped Allen off at the apartment complex. App. p. 206. Shipman never saw Ernest again, but he ran into Allen sometime later at a Verizon store. App. p. 206. According to Shipman, when Allen recognized him, the color drained from Allen's face, and Allen appeared to be scared. App. pp. 206-07. Shipman

[1] Cronise spoke with a witness named Melissa Rowe, a fellow Beef O'Brady's employee, who was friends with Ernest. App. p. 168. She and her husband, Michael, reported they had seen Ernest with Marvin Shipman on September 27, 2008, along with another African-American male whose name they did not know. App. p. 168.

approached Allen and demanded to know where Ernest was. App. p. 207. Shipman testified he and Ernest spoke regularly for over ten years – at least once a month – even when Ernest was out of town, but he had not seen or heard from Ernest since the night they were together with Allen. App. pp. 207-08.

Mark Wickham, the owner of the Beef O'Brady's restaurant, testified Ernest had worked for him as a line cook for approximately two years until September 2008 when Wickham last saw him. App. p. 177. Wickham testified Ernest was a good employee, and the only time he was ever absent from work without notice was September 28, 2008. App. p. 177. Wickham testified he had worked with Ernest the night before until Wickham left the restaurant around 10:00 p.m. App. pp. 177-78. Wendy Clifton, a manager at Beef O'Brady's, testified she closed the restaurant with Ernest between 11:00 p.m. and 11:30 p.m. on the night of Saturday, September 27. App. pp. 183-84. According to Clifton, she and Ernest left the restaurant together, and she saw him walk away towards the Elders Pond apartments.[2] App. p. 186, 188.

However, Ernest did not show up for his shift the next morning. App. p. 178. Wickham testified Petitioner had also been scheduled to work the morning of Sunday, September 28, 2008, but he showed up late and stayed only about an hour before simply walking off the job. App. pp. 178-79. Wickham testified he saw Petitioner again briefly the next Friday, when Petitioner picked up his final paycheck. App. p. 179. Ernest never picked up his last paycheck, which Wickham testified was very unusual. App. pp. 179-80.

Then, on July 20, 2009, Nolan Martin was working on a land surveying job in the Elders Pond area off Hardscrabble Road in Richland County. App. pp. 119-20. While surveying the retention pond area of the Northstone apartments, Martin discovered what he believed to be a body

[2] Cronise obtained Petitioner's address, which was on Elders Pond Road. App. p. 163.

wrapped in plastic and tied up with a belt. App. pp. 120-24. Martin testified he confirmed his suspicions with his coworker and his supervisor, then they called 911 to report the body. App. pp. 122-23.

Captain James "Stan" Smith, of the Richland County Sheriff's Department, testified he reviewed the missing person report on Ernest taken by Investigator Cronise and found "everything seemed to match up... logistically" between that report of a missing person and the unidentified body. App. pp. 286-87. Specifically, Smith noted the body was discovered at the apartment complex where Ernest was known to frequent around the time of his disappearance, and in fact, the apartment, which was in close proximity to the location of the remains, was the last place Ernest had been seen alive. App. pp. 287-88.

Smith testified Petitioner and his girlfriend, Jazmine Bright, had been living in the apartment when Ernest disappeared, and Bright still lived there when the body was found. App. p. 288. Smith participated in the execution of a search warrant on Bright's apartment. App. p. 289. According to Smith, while officers were searching the apartment, a man named Dietrich Williams showed up because Bright had asked him to check on the home while she was away. App. p. 290. Williams provided information which led investigators to identify "Allen" – the man Marvin Shipman picked up along with Ernest on the night before Ernest went missing – as Allen Fulten (Fulten). App. p. 290. Smith interviewed Fulten who ultimately gave a statement identifying Petitioner; Petitioner's brother, Darius; and a person nicknamed "Man," who police later identified as Jeremiah Jones, as being involved in Ernest's disappearance. App. p. 291. Smith testified Jones also gave statement implicating himself, Fulten, Darius Smith, and Petitioner in Ernest's murder.

App. p. 292. As a result of Jones's statement, Fulten and Darius Smith were also arrested and charged with murder. App. pp. 292-93. Jones and Fulten both testified at trial. [3]

Jones testified he knew Ernest as a friend of Petitioner and confirmed Petitioner lived in the apartment on Elders Pond Road with Bright. App. p. 438-39. Jones explained that he was at the apartment along with Petitioner's brother when Petitioner returned and realized someone had taken his rent money from his room. App. p. 439-440. Petitioner confronted Jones, but Jones denied taking it. App. p. 440. Jones then told Petitioner both Fulten and Ernest had also been at the apartment, and when Fulten returned, Petitioner confronted Fulten, but Fulten also denied taking the money. App. p. 440. According to Jones, Fulten claimed Ernest had taken the money, and Petitioner said he was going to kill Ernest for it. App. pp. 441-42.

Jones stated he and Darius had gone to the store when Petitioner called and told them to come back to the apartment because Ernest was on his way over. App. p. 443. Jones testified Ernest came straight from his job at the restaurant and brought some food to eat. App. p. 444. When Ernest arrived at the apartment, Petitioner was in the front bedroom along with Fulten, Jones, and Darius. App. p. 444. Jones testified the men were smoking and drinking when Ernest and Fulten started "getting into it," and each threatened to beat up the other. App. p. 445. Petitioner then gave Fulten a "mean look" and asked if Fulten "was going to do him." App. p. 445. Fulten punched Ernest in the face, and the other three men also jumped on him. App. p. 446.

Jones testified Petitioner then ordered Jones to hit Ernest with a brick, which was part of a snake cage that was in the bedroom. App. pp. 444-45, 447. Jones admitted he hit Ernest twice in the head, until the brick broke. App. p. 448. At that point, Ernest stumbled and tried to get out of

[3] Darius Smith did not testify at trial because he invoked his Fifth Amendment right against self-incrimination. App. pp. 654-55.

the room, but Petitioner pulled him back so forcefully Jones heard a pop. App. p. 448. Jones stated Petitioner then picked up a forty-pound weight and dropped in on Ernest's back, even though Ernest had already stopped moving. App. pp. 448-49. According to Jones, Fulten then picked up the weight and also struck Ernest with it. App. p. 449. Petitioner then shot Ernest in the head.[4] App. p. 449.

Jones testified Petitioner then ordered him to wrap Ernest up, so Jones took the shower curtain and sheet and wrapped the body. App. p. 450. Jones testified he also used his black belt to tie Ernest's body, and then he took Ernest out back and dumped him over the fence, at Petitioner's direction. App. p. 450. Jones stated he and Fulten then took the body and put it in the woods and left it there. App. pp. 451-52. Jones testified Petitioner then ordered them to clean up the blood and brought them some cleaner from his job. App. p. 452. Jones stated they cleaned the carpet and painted the walls and ceiling. App. p. 452. According to Jones, Bright, Petitioner's girlfriend, was asleep in the other bedroom when the murder occurred.[5]

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[4] Jones admitted on both direct and cross-examination that he first gave a statement saying Fulten fired the shot because he and Petitioner were "like brothers," and he did not want to get Petitioner in trouble. App. 442, 464-65.

[5] Bright also testified at trial. App. pp. 617-50, 658-83. She explained sometime in the late summer of 2008, so discovered some of hers and Petitioner's rent money was missing. App. pp. 624-25. Bright stated she overhead Petitioner having a conversation about it with Allen and Jones, and he told her they would "handle it." App. p. 626. Bright further testified, on the night of October 21, 2008, law enforcement searched their apartment on suspicion of marijuana dealing. App. pp. 627-28. Bright testified, the night before the search, Petitioner had become emotional and confessed to Bright that he had killed "E.J." because he took the rent money. App. pp. 628-32. Bright testified Petitioner told her he shot Ernest. App. p. 635. After the police searched the apartment the next day, Petitioner never returned to the apartment. App. p. 635.

Bright also stated she remembered hearing a gunshot in the night around the time the money went missing, but she was asleep, and she thought it came from the next apartment. App. p. 636. She testified Petitioner asked her the next day if she had heard anything, and she said she had, but she thought it was next door; Petitioner stated he heard it too, and they did not discuss it further. App. p. 636.

Allen Fulten testified he hung out with both Ernest and Petitioner back in September 2008. App. p. 476. He confirmed Marvin Shipman's testimony that Shipman drove him and Ernest to purchase a bag of weed for the three of them to smoke earlier in the day. App. pp. 476-77. Fulten stated Shipman dropped him off at Petitioner's apartment, then took Ernest to work at Beef O'Brady's. App. pp. 477-78. According to Fulten, Ernest planned to meet up with him at Petitioner's apartment after work to finish smoking the weed. App. p. 478.

Fulten testified when he got back to Petitioner's apartment, Petitioner questioned him about the missing rent money. App. p. 479. Fulten explained that Petitioner started drinking and eventually concluded Ernest had taken the money. App. pp. 480-81. According to Fulten, Petitioner said he planned to confront Ernest, beat him up, and make him pay. App. pp. 481-82. Fulten testified Petitioner wanted Fulten to hit Ernest first to start the fight. App. p. 482. When Ernest got there, he walked into the bedroom with Petitioner, Fulten, Jones, and Darius and sat down to eat, then the men began smoking weed and drinking. App. p. 483.

Fulten testified the plan was for Petitioner to signal him, and Fulten would hit Ernest. App. p. 484. According to Fulten, when Petitioner gave the signal, Fulten hit Ernest in the nose, and when Ernest got up to fight back, the rest of the men "rushed" him. App. p. 484. Fulten testified Petitioner then ordered Jones to hit Ernest with a brick, and Jones hit Ernest twice, until the brick broke in half. App. pp. 485-86. Fulten stated Petitioner then got on Ernest's back and did "like a wrestling move," then ordered Darius to hit Ernest with a forty-five-pound dumbbell. App. pp. 486-87. After Darius hit Ernest, Petitioner retrieved a gun from under a couch and shot Ernest in the side of the head. App. pp. 487-88.

Finally, Bright testified she recalled seeing Petitioner and his friends cleaning the front bedroom. App. p. 638. Petitioner told her they were "tak[ing] some initiative" because she always complained that his friends did not clean up after themselves. App. p. 638.

Fulten testified, after Petitioner shot Ernest, it was "bedlam" in the room until Petitioner pointed the gun at him and Jones and ordered them to help. App. pp. 488-89. Fulten stated the men stripped Ernest, then wrapped his body in a shower curtain and sheet. App. pp. 489-90. After the men disposed of the body, Fulten testified he and Jones spent all night and into the next day cleaning and painting the bedroom. App. pp. 490-92.

Because of the condition of the remains, investigators were not able to obtain any physical evidence such as DNA or fingerprints to conclusively identify the body as Ernest Robinson or to link Petitioner to the body directly. App. pp. 312, 325-30, 397-99. However, Deputy Coroner Bill Stevens, who conducted the autopsy, testified as an expert in forensic anthropology. App. p. 534. Steven testified the body showed both a gunshot wound and a blunt force trauma to the head, consistent with being hit with a brick. App. pp. 532, 539-40. Stevens also testified the skeleton was that of an African-American male in his twenties who was approximately 5 feet, 10 inches tall, and the body appeared to have been in that location "under a year, but close to a year." App. pp. 538-39, 541-42, 550.

Stevens explained it was not unusual for bodies to decompose in a residential area and still not be found for some time. App. p. 551. Stevens stated, in this case, the shower curtain would have helped contain the odor. App. p. 551. He also testified he reviewed some literature on air currents and discovered ponds and low-lying areas can produce "eddies" and "swirling wind currents," which may have prevented the odor from being carried back up the slope toward the apartments at certain times.[6] App. p. 551.

[6] Dr. Clay Nichols, who assisted with the autopsy, testified as an expert in forensic pathology. App. p. 277. Nichols also stated a body can decompose and emit odors for up to a year, but if a body were wrapped in a sheet or plastic, that would concentrate the odor underneath the wrapping, so the odor would not dissipate into the surrounding environment as much. App. p. 284. Nichols

Stevens testified the skeleton was consistent with Ernest's biological profile. App. pp. 547. Stevens further testified, in his expert opinion, the remains were Ernest Robinson's, and he was "convinced it was him based on circumstances and description." App. pp. 548, 554. The State entered into evidence, without objection, a death certificate for Ernest Robinson listing his date of death as September 27, 2008. App. p. 532.

The State's final witness was Travis Holdorf, the lead homicide investigator on the case. App. pp. 684-85. Holdorf recounted the discovery of the body, and stated investigators concluded the body had been placed in that location. App. p. 685. Holdorf testified one of the first things he did was search missing person reports for the area and familiarize himself with Investigator Cronise's investigation. App. pp. 685-86. Holdorf interviewed many of the same witnesses as Cronise, learned about Ernest's paycheck being left at Beef O'Brady's and the argument with Petitioner over the rent money, and concluded "all indicators pointed towards [Petitioner.]" App. pp. 685-87.

Investigators eventually spoke with Bright, who told them Petitioner had confessed to killing Ernest and indicated Jones was also involved. App. p. 690. Holdorf testified he located Jones, who voluntarily accompanied officers to the station to give a statement. App. pp. 690-91. Holdorf stated Jones initially claimed Fulten shot Ernest in the woods where the body was found, but Holdorf knew that wasn't true because that scenario did not match up with the known facts. App. p. 691. When Holdorf confronted Jones about the lie, Jones then admitted Petitioner shot Ernest, and additionally admitted to his own involvement in the murder. App. p. 691. In discussing Jones's two statements, Holdorf testified:

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also stated if a body is outdoors, any odor will be carried in whichever direction the wind is blowing. App. p. 284.

> And after refuting or confronting him that [the first statement] just doesn't match up with the facts, he admitted that he lied. He did not want to implicate [Petitioner], that [Petitioner] was like a brother to him. He was emotional. I think it was very real what he was saying, because again, he was emotional. There are just some things you get a feeling they're not faking. He didn't want to tell, but he didn't have a choice. He even implicates himself in the murder. When he started doing that, that was actually very surprising to us. I had no – I didn't believe he was, at the time. So when he starts giving his statement where he admits hitting Ernest with the brick twice. And he's giving us details we wouldn't know.

App. pp. 692-93.

Holdorf stated, after speaking with Jones and interviewing Fulten twice, investigators charged Jones, Fulten, Darius Smith, and Petitioner with Ernest's murder. App. p. 694. In order to speak with Petitioner, Holdorf testified, he and another investigator travelled to Mississippi, where Petitioner was in the Department of Corrections. App. pp. 694-95. Petitioner gave two statements, both denying any involvement in the murder. App. pp. 699-701, 705-08.

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." Id. 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. 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 constitutionally ineffective for failing to object to Investigator Travis Holdorf's testimony he did not believe Petitioner's codefendant, Jeremiah Jones, was "faking it" when Jones implicated himself and Petitioner in the murder because the Counsel placed Jones's credibility at issue from the beginning of the trial as part of his defense strategy, to which the State was entitled to respond, and even if Holdorf's testimony improperly bolstered Jones's, it was not reasonably likely to have affected the outcome at trial where a second codefendant also testified to Petitioner as the shooter and Petitioner's girlfriend also testified he admitted shooting the victim, and the jury was properly instructed on their role in determining the credibility of witnesses.

The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to Investigator Travis Holdorf's testimony he did not believe Petitioner's codefendant, Jeremiah Jones, was "faking it" when Jones implicated himself and Petitioner in the murder. App. pp. 956. Petitioner argues this was error because, according to Petitioner, this was "improper opinion testimony" which vouched for the credibility of the codefendant, and Counsel failed to offer a reasonable strategy for his failure to object. PWC pp. 6-7. However, Petitioner placed Jones's credibility in issue, so the State was entitled to respond to the defense's assertions Jones was not believable, and in any event, this testimony was not reasonably likely to have changed the outcome at trial where a second codefendant also identified Petitioner has the person who actually pulled the trigger and killed Petitioner, and Petitioner's former girlfriend testified he confessed to the murder. Thus, even if Counsel was deficient in failing to object, Petitioner cannot meet his burden as to prejudice, and this Court should therefore deny certiorari as to this issue.

In this case, part of Petitioner's defense was to question the credibility of the two testifying codefendants, Jones and Allen Fulten. As Counsel explained, he "knew none of those witnesses told the truth up front," and he recalled arguing in his opening statement that the jury could not

believe anything they said. App. p. 903. Contrary to Petitioner's assertion that Counsel had no trial strategy for failing to object to the testimony, Counsel actually testified he simply could not remember if he had a strategic reason for not objecting. App. p. 903. Regardless, because Petitioner called Jones's credibility into question from the beginning of the trial, the State was entitled to respond to that assertion. See, e.g., Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 ("Conduct that would otherwise be improper may be excused under the 'invited reply' doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense.")

Petitioner cites to Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), for his assertion that Holdorf's testimony was improper bolstering, and yet Briggs acknowledges there are circumstances in which trial counsel can reasonably decide not to object to arguably bolstering testimony when such testimony is offered to respond to a disputed issue created by the defense. Id. at 327, 806 S.E.2d at 719 ("[T] State has a good argument that it offered the opinion to respond to [trial counsel's] statement in opening that made coaching an issue, not for the purpose of bolstering. Under these circumstances, we do not believe... testimony that the child had not been coached was improper bolstering, and we decline to hold that [trial counsel's] failure to object to it was deficient performance."). Similarly, here, Counsel readily acknowledged that challenging the codefendants' credibility was part of his trial strategy, and he attacked their credibility beginning in his opening statement, saying the jury "won't be able to believe one word that comes out of their mouths" because "when the police first talked to them they didn't tell the truth." App. p. 117. Based on this strategy, it is clear from a full reading of the record why Counsel failed to object to Holdorf's testimony – because he had opened the door.

Further, Holdorf testified Jones's second statement, in which Jones admitted Petitioner shot

Ernest, was the catalyst for issuing an arrest warrant for Petitioner. App. pp. 292-93. Holdorf explained he knew Jones had lied in his first statement because it did not match up to the evidence, but he felt Jones's second statement "was very real," and Jones was "not faking" when Jones finally confessed Petitioner had been the shooter and admitted his own participation in the murder and disposal of the body. App. pp. 691-93. Given this context, Holdorf's testimony was appropriate to respond to the defense's contention Jones could not be believed because he lied to police in his first interview.

In any event, Holdorf's testimony, even if improper bolstering of Jones, is not reasonably likely to have affected the outcome of trial because Jones's testimony was cumulative to that of the other codefendant, Allen Fulten, and Petitioner's former girlfriend, Jazmine Bright, and the jury was properly instructed that it was the sole factfinder as to witnesses' credibility. Fulten also gave a statement to police and testified at trial that Petitioner was the shooter. App. pp. 291, 487-88. Additionally, Petitioner's former girlfriend, Jazmine Bright, testified Petitioner admitted to her that he shot and killed Ernest. App. pp. 628-32, 635.

Moreover, the trial court properly instructed the jury as to the primacy of their role in determining the credibility of witnesses. The trial court's instruction read:

> You are also the judges, the sole judges, of credibility, the believability of the witnesses who have testified, and passing upon their credibility, you may take into consideration many things, such as number one, the demeanor or manner of testifying. Two, whether the witness has a reason to be biased or prejudiced. Three, whether a witnesses (sic) testimony was contradicted on the one hand or supported and corroborated on the other hand. You certainty to (sic) not determine the credibility or believability by counting the number of witnesses for either side. You

> may believe a small part of a witnesses (sic) testimony and disregard the larger or vice versa. You may believe one witness against many or many against one.

App. p. 786.

The jury, therefore, had other credible evidence Petitioner was the principal perpetrator responsible for Ernest's murder, and the outcome at trial is not reasonably likely to have been different had Counsel objected to Holdorf's testimony.

Accordingly, the PCR court correctly denied relief, and this Court should deny certiorari.

II. The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to testimony that Petitioner was in the custody of the Mississippi Department of Corrections after October 21, 2008, because Counsel's defense centered around the argument that the State could not prove the murder took place before that date, and therefore, Petitioner had an indisputable alibi and must be acquitted.

Petitioner argues Counsel was constitutionally ineffective for failing to object to testimony that Petitioner was in the custody of the Mississippi Department of Corrections after October 21, 2008, because it was bad character evidence that was unnecessary to establish Petitioner's alibi. PWC p. 9. However, Counsel clearly articulated that one of his defense strategies was to argue the State could not prove the murder took place prior to October 21, 2008, on which date police searched Petitioner's apartment on an unrelated narcotics warrant. App. pp. 896-898. Counsel argued the search failed to find any evidence a murder had recently been committed in the apartment, and because Petitioner never returned to the apartment after that date because he was sent to Mississippi, Petitioner could not possibly be the perpetrator. App pp. 520-23, 766, 772, 777, 896-98. Counsel only agreed to allow mention of Petitioner being in jail in Mississippi when the trial judge ruled Counsel could not otherwise continue to make his argument about the discrepancy in the timeline, and as such, this was clearly a reasonable strategic decision as

contemplated under Strickland. This Court should therefore deny certiorari as to this issue because the PCR court correctly denied relief on this ground.

Although Petitioner argues Counsel "needlessly" agreed to allow the assistant solicitor to elicit testimony that Petitioner was in the Mississippi Department of Corrections, the record is clear Counsel only did so after the trial judge ruled Counsel would not be allowed to continue to make the timeline argument unless the prosecution was also allowed to explain the reason Petitioner was absent from the state. App. pp. 524, 529-30. Initially, Counsel argued he had not opened the door to any information about why Petitioner was in Mississippi because all he had done was elicit testimony Petitioner left the apartment after October 21, 2008, and did not return. App. pp. 521-23. Counsel stated to the trial judge that he was not arguing that Petitioner's whereabouts at that time were unknown, simply that he did not return to the apartment. App. pp. 522-23. The trial judge, nevertheless, ruled the State was entitled to explain why Petitioner did not return. App. p. 524. Only *after* the trial judge indicated he would not allow Counsel to make his argument as to the date of the murder without also allowing the State to explain where Petitioner was did Counsel agreed to allow the investigator to testify he interviewed Petitioner in Mississippi at the Department of Corrections. App. pp. 529-30.

Petitioner cites Felder v. State, 427 S.C. 518, 832 S.E.2d 591 (2019), for his contention Counsel improperly consented to the admission of evidence Petitioner was incarcerated in Mississippi. Petitioner's case, however, is distinguishable from Felder because in that case, trial counsel rendered ineffective assistance when he failed to object to the portion of his client's statement to police where his client admitted he had a pending lynching charge, which was unrelated to the alibi trial counsel claimed he was trying to establish by allowing the statement into evidence. Id. at 524, 832 S.E.2d at 594. But in Petitioner's case, the unrelated Mississippi charge

and sentence *is* Petitioner's alibi. Consenting to the admission of Petitioner's whereabouts in the Mississippi Department of Corrections was the compromise Counsel had to make in order to be allowed to present his main defense to the jury – that the State could not prove the murder occurred before October 21, 2008, and therefore, Petitioner should be acquitted because he was indisputably not present in South Carolina after that date. App. pp. 892-93.

Thus, this was clearly a strategic decision on Counsel's part, and therefore, it cannot be the basis for a finding of ineffective assistance. As this Court has repeatedly explained, there is a strong presumption that this decision was based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). Because Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions, where trial 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).

The PCR court therefore correctly found Counsel was not constitutionally ineffective on this basis, and this Court should deny certiorari.

III. The PCR court correctly found Counsel was not constitutionally ineffective for failing to renew his objection to the death certificate when it was introduced at trial because it was admissible under Rule 803(9), so even if Counsel's objection had been preserved, Petitioner was not reasonably likely to have succeeded on this issue on appeal.

One of the main issues at Petitioner's trial was Ernest Robinson's date of death, as the State argued the murder took place on the night of September 27, 2008, and Counsel argued it had to have happened after October 21, 2008 – the date law enforcement searched Petitioner's apartment without finding any evidence of a recent murder. In support of its contention, the State offered into evidence a certified copy of Ernest Robinson's death certificate from the South Carolina Department of Health and Environmental Control, which listed the date of death as September 27,

2008. App. p. 532. Petitioner now contends Counsel was constitutionally ineffective for not making an objection under Rule 403, SCRE, and not renewing that objection when the document was introduced. PWC p. 13. However, Counsel *did* make an objection based on the probative versus prejudice analysis of Rule 403, SCRE, even if he did not explicitly cite to the rule, but his objection was overruled. Because the document was admissible under Rule 803(9), SCRE, the PCR court correctly denied relief, and this Court should deny certiorari.

In a bench conference prior to the entry of the exhibit into evidence, Counsel explained he objected to it coming in because it was not "true and accurate." App. pp. 516-17. The judge immediately ruled the document was admissible, and Counsel did not renew his objection when it was formally offered into evidence. App. pp. 517, 532. However, Counsel further explained his objection for the record, stating "[T]his jury is going to look at this document and think that, well, okay, may (sic) it did happen because now we have an official document." App. p. 517. In particular, Counsel told the trial court he was concerned because the death certificate listed both a cause of death – a gunshot wound to the head – and the date of death as September 27, 2008. App. pp. 517-18. The trial court responded that the State had presented "strong circumstantial evidence" to support the September date, and he overruled the objection because "[i]t's a public document. . . . It's an exception to the hearsay rule." App. p. 519. Counsel again responded the document does not say the date is based on circumstantial evidence, "it says it's true and accurate." Although Counsel never specific cited to Rule 403, SCRE, he was clearly making a prejudice argument as contemplated by that rule, and he testified as much at the evidentiary hearing. See Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."). App. pp. 519-20, 890-91, 930-31. Counsel does not have to specifically cite to Rule 403 in order to preserve

his argument for appeal; he simply has to make the basis of his argument reasonably clear, which he did. See Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("In order to be preserved, an issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge."). Here, the trial court stated it understood Counsel's objection, but it was allowing the State to admit the death certificate for the reasons previously explained. App. p. 520.

At the conclusion of the bench conference, however, and before the State called the next witness, it moved the death certificate into evidence without objection from Counsel. App. 532. However, because the death certificate was admissible under Rule 803(9), SCRE, the trial court correctly overruled Counsel's objection, and Petitioner would not have prevailed on this issue on appeal. Rule 803(9), SCRE ("Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law."). See also McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (holding an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel but to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability). Therefore, the PCR court correctly denied relief as to this issue, and this Court should deny certiorari.

IV. The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to the testimony of Deputy Coroner Bill Stevens regarding wind currents preventing the smell of decomposition from reaching the apartment complex as outside the scope of his expertise because the PCR court correctly concluded Petitioner was not prejudiced by such testimony where it was arguably proper because Stevens used it to help formulate his assessment of the age of the remains, which is within his expertise, and in any event, it was cumulative to the testimony of Dr. Clay Nichols.

Petitioner contends Counsel should have objected to Deputy Coroner Bill Stevens's testimony regarding wind currents which may have prevented the smell of decomposition from reaching the apartment complex because such testimony was beyond the scope of his expertise. PWC p. 18. Petitioner argues this issue was important because it related to Counsel's contention that the murder must have taken place at later date than alleged by the State because otherwise, someone in the apartments would have smelled the decomposition. PWC p. 18. The PCR court found this testimony was indeed outside Stevens' scope of expertise, but nonetheless found Petitioner was not prejudiced by it because of the "insurmountable" testimony of his codefendants and his girlfriend. App. p. 950. Counsel was not deficient for failing to object, however, because the testimony was arguably proper because Stevens conducted professional research on the issue in order to help date the age of the remains and, in any event, it was cumulative to the testimony of Dr. Clay Nichols, to which Petitioner does not object. Therefore, because the PCR court correctly denied relief on this ground, this Court should deny certiorari.

Stevens testified as an expert in forensic anthropology and explained part of his job is to "identi[fy] decomposed bodies." App. pp. 532-33. In doing so, Stevens must assess the remains and determine how old they are; in this case, he determined the remains were slightly less than a year old. App. pp. 537-38. Further, he testified anthropologists specialize in decomposed bodies

in the "middle to long range," and he testified extensively on the factors he considers in assessing decomposition to determine the age of a particular set of remains. App. pp. 548-49.

Stevens stated, in his experience, he had seen decomposing remains found even closer to a residence than these remains were to the apartment complex without detection, so he did not find it unusual that no one had reported a smell. App. p. 551. Stevens then explained he had done some research on air currents in the course of his assessment of the age of the remains and found the lack of smell *may* be explained by the fact that the remains were located in low-lying land near a pond, which can prevent the smell from floating back up to higher ground. App. p. 551 (emphasis added). This testimony is permissible under Rule 703, SCRE, which allows an expert to "rely on facts or data in giving an opinion which are not admitted into evidence," so long as it is data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 703, SCRE. Stevens testified the smell of decomposition, or lack thereof was one of the "variables" he considered "that lead me to making that estimate [as to the age of the remains] being under a year, but close to a year." App. pp. 550-51. This testimony is within Stevens' area of expertise, and therefore, Counsel's failure to object was not deficient.

In any event, this testimony was cumulative to the testimony of Dr. Clay Nichols, who assisted Stevens in his analysis of the gunshot wound, and testified as an expert in forensic pathology. App. p. 277. Nichols also stated a body can decompose and emit odors for up to a year, but if a body were wrapped in a sheet or plastic, that would concentrate the odor underneath the wrapping, so the odor would not dissipate into the surrounding environment as much. App. p. 284. Nichols also testified if a body is outdoors, any odor will be carried in whichever direction the wind is blowing. App. p. 284. Nichols gave this testimony in response to the defense's line of questioning regarding the variables "that go into how pungent that odor can be at the time."

App. p. 284. Because Petitioner has not objected to this testimony by Nichols, Stevens' testimony is cumulative, and Petitioner cannot prove he was prejudiced by it, as the PCR court correctly found.

Accordingly, because the PCR court properly denied relief as to this issue, this Court should deny certiorari.

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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