STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Trial Judge
The Honorable G. Thomas Cooper, Jr., PCR Judge

Appellate Case No. 2020-000343

STATE OF SOUTH CAROLINA, ... Petitioner,

v.

RANATA JONES. ..... Respondent.

PETITION FOR
WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI

1. Whether the post-conviction relief court erred in granting relief, where Counsel was not deficient for failure to obtain 911 calls because he made a standard discovery request at the start of the case, did not know a 911 call existed, and, thus, expecting further discovery requests regarding the 911 call would be unreasonable.

2. Whether the post-conviction relief court erred in granting relief, where Counsel reasonable investigated the passenger as a potential witness when Counsel interviewed the witness, put her on the witness list, and ultimately excluded her testimony because of irrelevance.

STATEMENT OF THE CASE

Ranata Jones (hereafter "Jones") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During its February 2017 term, the Spartanburg County Grand Jury indicted Jones for driving under the influence (2017-GS-42-00979). Jones was represented by E. Joshua Schultz, Esquire (hereafter "Counsel"). Assistant Solicitors Andrew P. Miller and Sydni D. Kallam from the Seventh Circuit Solicitor's Office represented the State. On August 9, 2017, the case proceeded to trial before the Honorable Robin B. Stilwell and a jury. The jury found Jones guilty of the crimes charged. Judge Stilwell sentenced Jones to eighteen months' imprisonment, provided that upon the service of ninety days, the balance would be suspended with probation for two years.

Jones timely filed a PCR application on August 6, 2018, alleging:

1. Ineffective assistance of trial counsel, in that:
    a. "[Applicant] contends that she vehemently requested and expressed that Counsel request for medical records, [illegible due to poor scanning], and documentation from the automobile insurance company and photos of the automobile incident so that Counsel could solidify her alibi and make a strategic and solid argument proving her actual, factual, and legal innocence before the jury. Counsel assured defendant that he would compel, compile and gather all information and documentation that the defendant requested to be investigated for trial preparation."
        i. Defendant expressed to Counsel that she was not the driver of the vehicle the night of the accident and that she was the passenger. She expressed to counsel that the passenger side front windshield was damaged due to her head hitting the windshield, which is consistent to her medical records, the picture of the car, as well as the statement from the actual driver, Randall L. Scott and the third rear passenger, Kimberly Hughes Lyles."
        ii. "Counsel failed to make any reasonable search into any of the Defendant's request for this exculpatory evidence. . . . The jury was never presented nor notified of any of this evidence."
        iii. Applicant asserts she is entitled to a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984).
    b. "Defendant avers that she gave counsel all information and physical contact to

several witnesses that were part and parcel to the crime alleged and they were available, ready, and willing to be interviewed, subpoenaed, and able to stand trial. These favorable witnesses also contacted counsel on numerous accounts. Counsel expressed to these witnesses that he would interview them and have them ready available for trial but at no time did Counsel reach out to contact either witness prior to trial. However Defendant did get declarations, statements, affidavits to Counsel with witnesses available and present. Counsel never took any measures to correspond with either of the witnesses in preparation for trial."

   i. "Specifically, Kimberly H. Lyles, stated that she was the rear passenger in the vehicle and that Defendant was in front of her in the front passenger seat when they left the party and when the accident actually occurred."
   ii. Counsel did not subpoena or call Lyles as a witness, and Applicant appears to take exception to the State's calling of Randal L. Scott.

c. "Counsel failed to file Notice of Appeal as expressed by Defendant and others."
   i. "It is the defendant's contention that Counsel would file an appeal on her behalf challenging the sufficiency of the evidence; the Court's denial of the direct verdict, and the question from the jury. Defendant expressed to Counsel at the sentencing trial after the Court pronounced its order of sentencing, that Counsel file an appeal, Counsel assured defendant and her family that he had several issues he would address and that he only had 10 days to put in a Notice of Appeal."
      1. "Defendant's family and others contacted Counsel 3 days following sentencing to check the status of appeal and Counsel stated he would return the call and update them later. Defendant also had family to call Counsel on 3-way to check the status but only to be told by Counsel's secretary that Counsel was not in. When one week, 7-days passed Counsel refused to talk with defendant [or] her family and ignored [their] numerous messages to him."
d. "Counsel failed to understand the law and facts of the case and failed to conduct pre-trial reasonable investigative facts."
e. "Counsel failed to allow defendant the fundamental right to testify as expressed before trial and during trial."
   i. "At the conclusion of trial Counsel elected to address the Court stating he would not be calling his client to testify nor call any witnesses. At this instance defendant alerted Counsel that she wanted to and desired to testify. Counsel pulled one over on the defendant by expressing to her that if she desired to testify it would allow the Court and State to address her prior arrest and convictions of drug and alcohol offenses. He stated the jury would find defendant guilty and convict her in a heartbeat. Counsel

stated to defendant that he did not and was not prepared for that."

2. "For good cause and in good faith, the [Applicant] contends actual, factual, and legal innocence."

The State made its Return on June 12, 2019, requesting an evidentiary hearing. An evidentiary hearing occurred on October 11, 2019, before the Honorable G. Thomas Cooper, Jr. Assistant Attorney General Jacob Isenberg of the South Carolina Attorney General's Office represented the State. Susannah Ross, Esquire was represented Jones.

On January 27, 2020, the PCR court granted relief, finding Counsel was ineffective for failing to reasonably investigate into the 911 call which, the Court found, would have led to Counsel actually obtaining the 911 call recording. Additionally, the Court found Counsel was ineffective for failing to call Kimberly Hughes (hereafter "Hughes") to testify at trial, stating that Hughes testified she was never called or interviewed by Counsel, though Counsel testified that he thought her testimony would be unconvincing because she was asleep. Concerning both issues, the court found that no strategy was utilized because he failed to obtain the evidence and Applicant was prejudiced as a result, finding that the jury likely would have acquitted Jones because the evidence that was not presented was favorable to her.

The State submitted a Motion to Reconsider, Alter, or Amend, Pursuant to Rule 59(e), SCRCP, filed on January 27, 2020. The Reply to the State's Motion to Reconsider was filed on February 17, 2020. The Order Denying Respondent's 59(e) Motion or Reconsider, Alter, or Amend was issued on February 24, 2020. The Notice of Appeal was filed on February 28, 2020.

STATEMENT OF FACTS

On November 19, 2016, Trooper Gregory Glenn Elder, responded to the scene of a single-car accident on Interstate 85. (Appx. 38-39). The Toyota was found with its hood "up against the guardrail" in the outermost highway lane. (Appx. 39-40). From paperwork in the vehicle, Trooper determined Jones owned the car. (Appx. 40).

Trooper encountered and spoke with Jones, Hughes and Randall Scott (hereafter "Scott"); all of whom smelled of alcohol. (Appx. 41).When the Trooper arrived at the scene, all three of the individuals were outside the car. (Appx. 50). They were all transported to the hospital without any field sobriety tests being conducted. (Appx. 42). Jones was uncooperative and did not answer any of the Trooper's questions following the accident. (Appx. 41, 44). Jones refused a blood test at the hospital. (Appx. 45). Hughes told Trooper Elder that she was sitting in the back seat. (Appx. 51). Scott initially told Trooper that he was in the front passenger seat. (Appx. 54, 63-64, 67). However, Scott called Trooper the next day and said he was driving when the accident occurred. (Appx. 60, 64, 68-70).

At trial, Scott, a witness in the car during the accident, testified that he called 911 after the accident occurred. (Appx. 62-63). Scott testified that both Jones and Hughes were asleep when he called. (Appx. 63). Scott stated that Jones was in the passenger seat and Hughes was in the back seat; they were both asleep. (Appx. 63). When asked if he remembered telling the Trooper the night of the accident that Jones was driving and he told her to slow down right before the accident, he stated he did. (Appx. 63). When asked who he told to slow down, he said Jones, but then said he was driving, not Jones. (Appx. 64). Scott stated he called the Trooper the day after the accident and told him he was driving. (Appx. 64). Scott testified that he was drunk that night, but did not think Jones was "sloppy drunk", though he conceded she had some alcohol

that night. (Appx. 64-65). Scott conceded he remembered telling Trooper Elder that he called Jones to pick her up and that he did that so they could go out that night; not because he wanted a ride home. (Appx. 65). Scott stated he initially told the trooper she was driving because he was drunk and scared. (Appx. 67). Scott also said he had previously gone to prison for a probation violation and lied because he did not want to go back to prison. (Appx. 67-68). Counsel declined to call any witnesses at trial.

STANDARD OF REVIEW

The standard of review in PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. 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). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

On appeal, the State argues the PCR court erred in granting Jones relief because Counsel reasonable investigated both the 911 calls and the potential trial witnesses. Specifically, the State argues that Counsel was effective because he issued a discovery requested that should have been sufficient to produce the 911 audio and he adequately investigated the potential trial witness and the exclusion of the witness was a valid trial strategy. Thus, the PCR court's findings are controlled by an error of law and are not supported by probative evidence in the record. Consequently, this Court should grant certiorari.

In PCR actions, applicants bear the burden of proving allegations in their applications. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] 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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the

scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

I. The post-conviction relief court erred in granting relief, where Counsel was not ineffective for failure to obtain 911 calls because he made a standard discovery request at the start of the case, did not know a 911 call existed, and, thus, expecting further discovery requests regarding the 911 call would be unreasonable.

Here, the State contends that Counsel was not ineffective for not gaining actual possession of 911 calls. *Strickland* makes clear that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* However, counsel is required to, at minimum, "interview potential witnesses and make an independent investigation of the facts and circumstances of the case", *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff'd*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government's forensic evidence and conducting analyses of all other available forensic evidence." *Id*. (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in* 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel acted reasonably given the circumstances and, thus, was not deficient. Counsel submitted a standard discovery request, which produced other related evidence, including videos and reports. (PCR Tr. 32). Counsel testified he did not remember anyone telling him a 911 call existed and had relevant information on it. (PCR Tr. 32). Counsel stated he never received a copy of the 911 call, despite filing a discovery request, which was otherwise honored by the State. (PCR Tr. 37-38). It is unreasonable to expect Counsel to submit a secondary request for additional discovery consisting of one audio recording that he did not know existed, especially

since he received virtually all other pertinent discovery along with the original request without issue. That Counsel did not follow up on this request because he did not know a 911 call existed, much less was relevant, after reviewing the rest of the file, discovery, and conversations he had with Jones, was not a deficiency on Counsel's part.

Even if this Court finds that Counsel was deficient, Jones was not prejudiced by this deficiency. Counsel testified at the PCR hearing right after hearing the 911 call that he thought it would be difficult to say whether or not the call would have had an impact at trial, if played. (Appx. 218). Additionally, the jury did not find Scott to be credible. At trial, Scott testified that he called 911 when the accident occurred. (Appx. 62-63). Also at trial, Scott stated that he was driving when the accident occurred; not Jones. (Appx. 64-65). He stated that he only told the officer on scene that Jones was driving because he did not want to return to prison. (Appx. 67). His testimony was demonstrably disbelieved by the jury because of the contradictory statements given and, as a result, Jones was convicted at trial. A 911 call recording consisting of the same statements already deemed incredible, delivered by the person impeached at trial whose testimony was rejected when the jury voted to convict presumably would not have changed the results of the proceedings and, thus, Jones was not prejudiced by Counsel's alleged failure to procure and play the 911 call at trial.

II. The post-conviction relief court erred in granting relief, where Counsel reasonable investigated the passenger as a potential witness when Counsel interviewed the witness, put her on the witness list, and ultimately excluded her testimony because of irrelevance.

Here, the State contends that Counsel was not ineffective for failing to call an irrelevant witness to the stand. "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a

particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover v. State,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Counsel was not deficient here, because his decision not call Hughes to testify was a strategic move. Counsel stated that he interviewed Hughes prior to trial, who told him that she was asleep in the back seat and was in and out of consciousness during the course of the accident. (Appx. 216). Counsel testified that he subpoenaed Hughes but did not call her as a witness. (Appx. 216). He stated he did not remember why he did not call her, but thinks it was because she was in and out of consciousness. (Appx. 216-17). Counsel stated he thought the state would attack Hughes's testimony as coming from someone without a clear recollection of events. (Appx. 218). Counsel stated he thought that the sleeping and intoxication would be used to impeach Hughes. (Appx. 218). Deciding to exclude an easily impeachable witness who did not have a clear recollection of the events and whose testimony mirrored another witness's testimony without contributing new information was a strategic move and Counsel was not deficient for

executing it.

Even if Counsel was deficient, Jones was not prejudiced by this deficiency. Prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Jones testified that Counsel should have called Hughes to testify at trial, who was a passenger in the car at the time of the accident. (Appx. 203). Hughes testified at the PCR hearing that Counsel never asked her to testify and, if she was asked, she would have been willing to testify that Scott was driving. (Appx. 208-09). Later on, however, Hughes testified she was subpoenaed to be at trial to be a witness but Counsel decided not to call her to the stand. (Appx. 212). Given the contradictory statements concerning being called to the stand, Hughes's testimony is not credible and the jury likely would have determined this and rejected her testimony.

Further, Hughes's proposed testimony was a repetition of Scott's actual testimony. Specifically, Hughes, like Scott, stated that she would have testified that Scott was driving, not Jones. (Appx. 208-09). However, this statement was already rejected by the jury and presumably would be rejected again if Hughes testified, especially since she was such a weak witness, given her unconsciousness at the time and contradictory statements given at the PCR hearing. Hughes

would likely be impeached, and that she was unconscious when the accident occurred. Thus, Jones was not prejudiced by failure to call Hughes to testify.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issues presented.

Respectfully submitted,

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