STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Richland County
G. Thomas Cooper, Jr., Trial Judge
Jocelyn Newman, Post-Conviction Relief Judge

Appellate Case No. 2020-000205

H. DEWAIN HERRING,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES PRESENTED FOR CERTIORARI

Petitioner's Statement of Issues

I. Whether the lower court erred by failing to find that trial counsel rendered ineffective assistance by failing to properly address Petitioner's mental health, which resulted in prejudice to Petitioner that requires a new trial?

II. Whether the lower court erred in failing to find that trial counsel rendered ineffective assistance of counsel by failing to properly prepare and full utilize a crime scene investigation expert prior to and during trial, which resulted in prejudice to Petitioner that requires a new trial?

Respondent's Counterstatement of Issues

I. Did the PCR court properly find Petitioner failed to establish any constitutional ineffectiveness of trial counsel regarding Petitioner's mental health?

II. Did the PCR court properly find Petitioner failed to establish any constitutional ineffectiveness of trial counsel regarding crime scene analysis?

STATEMENT OF THE CASE
Procedural History

On January 29, 2006, Petitioner H. Dewain Herring, a prominent Columbia attorney, shot and killed John "John John" Johnson at Chastity's all-nude strip club in Columbia following Petitioner's removal from the club for indecent behavior. After a lengthy stand-off with police at his home where firearms were discharged by both Petitioner and law enforcement, Petitioner was taken into custody. During the February 2006 term, a Richland County Grand Jury indicted Petitioner for murder and pointing and presenting a firearm. He was represented by Richard A. Harpootlian, Esquire, Graham L. Newman, Esquire, and Jamie Lindler, Esquire. Fifth Circuit Solicitor Barney Giese and Deputy Solicitor John Meadors prosecuted the case on behalf of the State. On May 7, 2007, the State called Petitioner's case to trial before the Honorable G. Thomas Cooper, Jr., circuit court judge, and a jury. Following a lengthy trial, the jury convicted Petitioner as indicted. On May 21, 2007, Judge Cooper sentenced Petitioner to imprisonment for thirty years for murder and a concurrent five years for pointing and presenting a firearm.

Petitioner appealed and was represented by counsels Harpootlian and Newman, as well as Katherine Carruth Goode, Esquire. On Petitioner's motion, the case was certified to the Supreme Court from the Court of Appeals. Following brief and argument, the Supreme Court affirmed Petitioner's conviction and sentences. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). Petitioner's petition for rehearing was denied, and the remittitur was sent on May 14, 2010.

Thereafter, on June 4, 2010, Petitioner filed a *pro se* PCR application for on June 4, 2010, raising general claims of ineffective assistance of counsel at the pre-trial, trial, and appellate

stages.[1] On June 19, 2010, Respondent served its return to the application and requested an evidentiary hearing. After numerous pre-trial hearings and various counsel changes, the matter proceeded to an evidentiary hearing before the Honorable Jocelyn Newman on January 4, 2017. Petitioner was present and represented by counsel Tricia A. Blanchette. Petitioner proceeded forward on the twelve claims raised in a September 12, 2016, amendment to his PCR application. Following the evidentiary hearing, the Court requested proposed orders from both parties. After review of these orders, Judge Newman issued her own order of dismissal, denying and dismissing all claims with prejudice. This order was signed May 9, 2019, and filed May 10, 2019. Petitioner subsequently filed a motion to reconsider pursuant to Rule 59(a) & (e), SCRCP, asserting Judge Newman did not properly address the claims pertaining to Petitioner's mental health. This motion was summarily denied and dismissed by Form 4 filed on February 14, 2020.

Statement of Facts Presented at Trial

At about 11:00 p.m. on Saturday, January 28, 2006, Petitioner arrived at Chastity's all-nude strip club on River Drive in Columbia. Renisha Grainger, or "Mia", was a dancer working that night, and Petitioner signaled her he wanted a private "lap dance" in the champagne room. Mia paid a bouncer, Carl Weeks, his cut of the fee and Carl escorted Petitioner back to the champagne room. (App. 436; 598-604; 745-747).

Mia left the room after a couple of minutes to freshen up and planned to return to her customer; however, when Carl checked on Petitioner waiting in the champagne room, he found Petitioner completely naked and sitting on the couch masturbating. Petitioner told Carl he was

[1] On February 3, 2011, while Petitioner's PCR was pending, he filed a petition for habeas corpus in the United States District Court. Respondent moved for summary dismissal, which was granted on March 19, 2012 and Petitioner's attempt to appeal was dismissed.

"waiting on a girl", and Carl told Petitioner he could not do that here and needed to leave. Petitioner did not respond and kept masturbating. (App. 604-614; 748-750; 786-787).

Carl went and got the club's manager, John "John John" Johnson, who went in the room to talk to Petitioner. Eventually, Petitioner and John John emerged, and Carl told Petitioner he could either leave or they would call the police and report him for solicitation of prostitution. Petitioner responded, "No, I will fucking shoot you", and which point Carl replied, "you're not going to shoot anybody." Another bouncer, Donald Hawkins, overheard Petitioner threaten to kill Carl and John John. At this point, John John pushed Carl back to de-escalate the situation. (App. 417-426; 491; 720-753). Carl went off to attend to other duties and Donald came up to assist John John with Petitioner. They escorted him outside, but did not have to use force or put their hands on him. However, Petitioner was upset, wanting his money back. He told the two strip club employees that they did not want him to come back because someone is going to get "fucked up." A security video played at trial shows Petitioner exiting the club at 11:56 p.m. (App. 426-436; 546-553; 677-683; 754-756).

Petitioner got in his SUV, leaned over towards the glove compartment, and then very slowly left the parking lot at 12:03 a.m. John John called out the vehicle's license tag over his radio and Carl wrote it down on his hand. Carl told Donald they should step inside in case Petitioner started shooting. They watched as Petitioner drove away until he was totally gone, and Carl went inside to his duties. Donald and John John saw then saw the SUV coming back down River Drive, so they went back inside. (App. 436-465; 757-758; 762-764; 773).

John John was at the door of the club peeking out and Donald was watching the monitors. Suddenly, John John said, "oh shit." He then fell to the floor, having been struck almost directly in the left ear by a bullet that passed through the front door. The security video shows the SUV

returning to the parking lot, pausing directly in front of the club before the shot was fired, and then departing. (App. 435-468; 759-762).

The man who was in the room naked, who was ordered to leave, and who threatened the strip club employees was identified as Petitioner at trial by Renisha, Carl, Donald, bartender Nicole Beran, and club vice president Jewel Koon. (App. 457; 554; 604; 688; 766).

Law enforcement was called and given the license tag Carl had written down from the SUV. It came back registered to Petitioner at his office address. Officers also compared a picture of the man on the club's security video with Petitioner's driver's license photograph and his picture on his office website, and it matched. Officers found no one present at the business address during early morning hours on a Sunday, but they did locate Petitioner's home address in a gated community. (App. 848-853; 856; 954-956; 959-960; 1291-1294).

Officers then went to Petitioner's home and knocked on the door, but no one responded. One officer looked in the windows of the garage and saw inside an SUV like the one on the video. (App. 853-856; 1290-1291). Officers then left Petitioner's residence to obtain a search warrant. After acquiring a search warrant, officers returned to Petitioner's home and after again knocking on the door without response, they made a forcible entry. Two officers came down the hall to see Petitioner, who retreated into a bedroom. As an officer looked into the bedroom, he saw Petitioner pulling a gun from a nightstand. The officers yelled "gun, gun, drop the gun," but Petitioner continued to turn and point the gun towards them. An officer dropped to one knee and fired, and other officers in the house also opened fire. The officer felt debris kicking up around him and retreated. (App. 854; 862-874; 903-908; 960-968; 978; 986; 999-1000; 1295-1303).

A standoff between Petitioner and the officers lasted for some time. The officers continued to yell that they were law enforcement and for Petitioner to come out, but received no

response until he said he had been shot. The officers told him to come out and he would get help. Petitioner refused, asking why the officers were there, and when told it was relating to an incident earlier that night, Petitioner yelled he had been in bed all night. (App. 875; 968-972). The officer heard a gun cock from the bedroom, so they retreated further and called superiors. They were informed Petitioner had called 911 and was on the phone reporting a home invasion. Petitioner told 911 he did not believe the people were police officers, and a number of questions were coordinated between 911 and Petitioner to satisfy him as to the identity of the officers. Petitioner came out and was arrested and had a gunshot wound to his arm. (App. 876-880).

Because officers had been involved in a shooting, SLED was called out to investigate pursuant to routine policy. (App. 1016; 1100-1102). SLED agents interviewed Petitioner after advising him of his rights. Petitioner gave a statement in which he claimed he went to bed at 11:00 p.m., and was awakened by a loud banging on his door. He asserted he did not recognize the people entering his house as officers, and asked them to speak up because he could not hear them. The men then started shooting at him, so he retreated to his bedroom and got a .357 magnum revolver from his nightstand. Petitioner admitted cocking and uncocking the weapon. Petitioner called 911 and told them some men were in the house claiming to be from the sheriff's department, but he was unsure. A supervisor got on the phone with him and told him the men were there to speak to him with regard to an incident on River Drive, but Petitioner told the supervisor he did not know anything about any such incident. Petitioner surrendered to officers and was placed into custody. He claimed he was worried because there had been a number of burglaries in the area and the officers entered with great force. (App. 1106-1127; 1211-1226).

The SLED agent then spoke with Richland County officers and determined a number of inconsistencies between Petitioner's version of events and the facts. He spoke to Petitioner again,

asking him to go back further in the day. Petitioner admitted he went to Aiken to play golf with his friend, Chris Isgett, and drank about nine beers. They then went to a bar and grill, where he drank four scotch and sodas. The two men returned to Petitioner's house, where they had more drinks, and Isgett left around 8:30 p.m. Petitioner then claimed he took a shower and laid down and did not remember going anywhere. He claimed he thought about going to the Tombo Grill, but decided to stay home. (App. 1132-1134).

When asked if he went to Chastity's strip club, Petitioner stated he knew where it was but did not recall ever going there. The SLED agent then pointed out that the strip club's security cameras had a picture of him entering, at which point Petitioner admitted he remembered "the white woman with the big tits." Petitioner said he had a scotch there, and while his recollection was "hazy," he did now recall being there. (App. 1134-1136).

When asked if he had a problem with anyone at the club, Petitioner admitted he went into the back room for a lap dance performed by a light-skinned black woman. He admitted driving his black 4Runner SUV, but stated he "typically [did not] go to places like [Chastity's] because the people who go there have bad attitudes." Petitioner admitted owning four handguns and one shotgun, and stated he usually has one in the SUV with him. However, he claimed he did not remember which gun he had in the SUV that night. (App. 1136-1138).

When asked if he fired his weapon at Chastity's while leaving, Petitioner said he did not recall doing so. When asked if he fired a gun at all, Petitioner replied:

> If I did, I was not shooting at anyone. I'm not saying that I did not do it. If the gun went off while in my hand, it was harmless error. It was probably the Ruger .357, and if it went off, it was an accident.

Petitioner claimed he was not shooting at anyone because “there was nobody to shoot at.” Petitioner then specifically wrote at the end of the statement that he reserved the right to “edit, add, or delete” from the statement. (App. 1138-1140; 1227-1241).

After the SLED agent took the second statement, a Richland County investigator spoke with Petitioner. Petitioner told the investigator he remembered having a dispute with the strip club employees, and remembered shooting the gun although he stated he was not shooting at anyone. Petitioner again stated the weapon fired was likely his Ruger handgun, as that was the one he usually kept in his car. Petitioner then asked if he was under arrest, and was told he was under arrest for murder. Petitioner looked surprised, and the investigator told him the bullet had killed someone. Petitioner then put his head into his hands and said, “no, no, no.” Petitioner said he had not intended to hurt anyone, and requested a lawyer. (App. 1382-1387).

SLED agents investigating the shooting found evidence of the shootout and standoff between Petitioner and the officers executing the warrant. Sixteen casings and fifteen projectiles were recovered, and it was determined a total of seventeen shots had been fired by the group of officers who entered the home. (App. 1024-1026; 1036-1060; 1442).

A Smith and Wesson .357 revolver was found on Petitioner’s bed. In a closet under some clothes, officers found a Ruger .357 pistol. The Ruger had one fired casing in its revolver and four unfired cartridges. (App. 1031-1034; 1142; 1170; 1241-1242).

No gunshot residue was found on Petitioner’s hands, although that could be explained by the time lapse. No gunshot residue was found on the driver’s side of Petitioner’s 4Runner, but all three swabs from the passenger side showed gunshot residue. (App. 1438; 1471-1482). In Petitioner’s 4Runner, officers found six boxes of shotgun shells and other gun-related items. (App. 1430-1433.). The security tape from Petitioner’s gated community showed someone

matching his description and wearing the red sweater similar to the one on the Chastity's tape entering the subdivision at 1:12 a.m. on Sunday morning. (App. 1551).

During a search of Chastity's, officers did not find any projectiles at the scene (later determined because the bullet did not exit the victim's body) but did find a bullet hole in the right top area of the front door to the club. A trajectory analysis was not conducted because officers had the security video of the shooting. (App. 806-810; 818; 892; 937-938).

An autopsy revealed the bullet struck John John almost directly in his left ear canal, and the bullet fragmented upon hitting bone. The pathologist was able to remove five fragments, but left in others too small for removal. (App. 937-938; 1532). These removed bullet fragments were taken to SLED for processing. A SLED expert conclusively matched one of the fragments to the Ruger .357 Petitioner owned; analysis on the others was inconclusive or impossible. The expert noted the weapon could not be fired in its holster without use of some sort of tool, and even then it would need to be manually cocked first. Finally, the SLED expert found no evidence the weapon had been fired while within its holster. (App. 1504-1515; 1548).

At trial, Petitioner put up a defense focusing on involuntary intoxication and challenging the State's assertions that the shooting of John John was intentional. The defense first began by calling Lawton Yates, who was qualified over State objection in forensics and ballistics. He opined that the forensic evidence was inconsistent with officers' claims that they only fired once when Petitioner grabbed the gun from the nightstand and turned toward them. Yates asserted the club video evidence was inconsistent with Petitioner aiming at the door and firing through it without some ricochet. Yates stated he would have expected to see a fireball when the weapon was fired, and the alleged absence of that on the video indicates the weapon was fired below the plane of passenger side window. However, Yates conceded that the SLED expert was correct in

concluding Petitioner's Ruger .357 fired the shot that killed John John. (App. 1620-1647). On cross, Yates conceded the shot was fired from the vehicle. (App. 1675-1682).

Next, the defense called a dancer a Chastity's who stated some dancers take a fee, tell a customer they would perform oral sex, and then arrange for a bouncer to check on them. She also claimed she had heard of people putting things in other people's drinks at the club. (App. 1709-1710). Two other dancers testified later, of which one stated she believed she had once been drugged at Chastity's, and the other said she was with the first dancer and also believed the first dancer had been drugged. (App. 1984-2037).

Petitioner also took the stand in his own defense. He stated he played golf with Isgett in Aiken, and then went to the bar and grill where he had a few drinks. Upon getting back home at about 7:30, he took a shower and laid down, but then got up intending to go to the Tombo Grill. However, he testified the kitchen had closed early, so he went to Platinum Plus. Something there made him nervous, so he decided to go home. On the way, though, he stopped at Chastity's, and he admitted on the stand the person in the security video was him. (App. 1733-1739). However, Petitioner claimed that he does not have a coherent memory of anything that happened after he ordered a drink at Chastity's, which he attributed to being drugged there in support of his defense of involuntary intoxication. (App. 1755-1758). Petitioner noted that he wears glasses and is hard of hearing, and also sleeps with a medical device that makes an audible hum. He asserted that while he could hear the officers making noise and yelling, he could not tell they were officers. He denied ever pointing his gun at them. (App. 1744-1748). Despite the fact that Petitioner remembered the previous point, he claimed he had no memory of being advised of his rights or signing the waiver form. Consequently, he did not believe his first statement was accurate, but said as the officers continued to question him, his memory began to come back "hazily."

Petitioner claimed that although he said that if the gun went off, it was an accident or "harmless error", he did not actually remember anything happening. (App. 1758-1778).

Petitioner was cross-examined on his claim that he did not fire the gun intentionally, his assertion that except for the gun going off he supposedly did not remember anything after he got his drink at Chastity's, the fact that he did not appear to be physically impaired on the video even though he claimed he was drugged, the fact that he remembered what happened when police invaded his home but did not remember signing a Miranda waiver some five hours later, and his claim that SLED was setting him up and he did not believe he told the SLED agent he had a dispute with the employees at Chastity's. (App. 1783-1825).

Petitioner next called Dr. John Holbrook, who was qualified as an expert in pharmacology. He asserted that date rape drugs can cause amnesia and loosen inhibitions, and claimed that in his opinion Petitioner did ingest a date rape drug that night. Dr. Holbrook arrived at this conclusion because Petitioner's behavior was supposedly out of character, he showed behavioral disinhibition when he took his clothes off, and he had no memory after a certain time. The doctor asserted that had Petitioner been given a drug test, it would have revealed the presence of such a drug. (App. 1846-1870). Dr. Holbrook was crossed-examined on the fact that everyone who observed Petitioner did not find him obviously intoxicated, and that the effects of any drug should have worn off by the time he signed his advice of rights form at 9:42 a.m. The doctor was also cross-examined on the fact that Petitioner never claimed he was drugged on the day of the incident, and on the fact that Petitioner stated in his first statement that he had not been out all night and had gone to bed at 11:00 p.m. (App. 1892-1940).

Petitioner's golf partner testified Petitioner only had about five beers during the round of golf, and only two scotches at the bar and grill in Aiken. Back in his house here in Columbia, Petitioner was just on his second scotch when Isgett left to go home. (App. 2039-2044.)

Finally, Petitioner called his wife to testify. She also stated that Petitioner wears hearing aids and sleeps with a device on that makes a humming sound, and that on many occasions he has slept through the door bell or phone ringing. (App. 2049-2052.)

In reply to the defense's case, the State first called Dr. Demi Garvin, an expert in forensic toxicology who had analyzed hundreds of cases of drug facilitated sexual assault. She reviewed, among other things, all the incident reports, witness statements, medical records, 911 calls, and Petitioner and Dr. Holbrook's trial testimony. She opined to a reasonable degree of scientific and medical certainty that Petitioner was not involuntarily intoxicated by any such substance. (App. 2104-2107.) She stated that given the alcohol he had voluntarily consumed, any surreptitiously provided drug would render him relatively incapacitated or significantly impaired. She noted that while anterograde amnesia can result from a date rape drug, that would not occur in isolation from significant physical impairment. Further, Petitioner's purposeful and goal-directed behavior, and ability to fend for himself, was inconsistent with such a level of intoxication. (App. 2107-2111.) Dr. Garvin also concluded based on her review of the evidence that Petitioner knew right from wrong at the time of the shooting. (App. 2111-2116).

Indeed, throughout the State's case in chief, many of the witnesses who interacted with Petitioner, from the strip club employees to the officers at his house to the officers who interviewed him, testified consistently that Petitioner was coherent, not overly intoxicated, and responsive to questions. (App. 429; 498; 561; 653; 880-881; 971-972; 1140; 1277).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts the PCR court erred in denying him relief as to two separate claims of ineffective assistance of counsel—first, Petitioner claims counsel was ineffective in his handling of Petitioner's mental health; and second, Petitioner claims counsel was ineffective in his handling of the crime scene investigation. However, the PCR court properly considered the record in its entirety, listened to the evidence and arguments presented, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective as to either claim. These findings are supported by ample probative evidence and not premised on any errors of law, and accordingly, this Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that "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, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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. 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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the

defendant by the Sixth Amendment." Id. at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of

the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). "In addition, the PCR court should consider the strength of the State's case in

light of all the evidence presented to the jury." Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case . . . ," and "we must consider the totality of the evidence before the jury.")). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Strickland, 466 U.S. at 696 (stating "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). However, while the strength of the State case is one significant factor the PCR court must consider when determining whether an applicant can establish prejudice, it is generally not a categorical bar that precludes a finding of prejudice. Smalls, 422 S.C. at 188, 810 S.E.2d at 843. However, this Court has reiterated that there are rare cases where overwhelming evidence of an applicant's guilt precludes a finding of prejudice; in those cases, "the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt'" cannot possibly be met." Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

I. The PCR court properly found Petitioner failed to establish counsel was constitutionally ineffective in his handling of Petitioner's mental health.

Petitioner argues the PCR court erred in denying him relief because counsel was ineffective in handling his mental health. In support of this claim, Petitioner presented evidence through two expert witnesses establishing he has mild dementia. Petitioner asserts counsel should have recognized his mild dementia and used it in a variety of ways. Specifically, Petitioner asserts trial counsel should have used his mild dementia: first, during plea negotiations to secure a favorable plea offer to a lesser-included offense; second, to challenge the

voluntariness of his statements to law enforcement both pre-trial and during trial; third, to advise Petitioner not to testify in his own defense; and fourth, to respond to the State's reply testimony that Petitioner was not drugged or involuntarily intoxicated. Petitioner further asserts counsel's failure to utilize this mild dementia resulted in such prejudice that he is entitled to a new trial.

The PCR court correctly rejected these claims, finding trial counsel properly relied upon his vast personal experience with Petitioner—a fellow successful lawyer whom he had known for decades—and Petitioner's treating psychiatrist with whom he consulted extensively in preparation for trial, in determining his trial preparation and strategy and the course of conduct to take or recommend in Petitioner's case. These findings are supported by ample evidence in the record and are not premised by any errors of law.

Trial counsel Harpootlian, who knew Petitioner prior to his representation in this criminal matter, testified he had no reason to believe that Petitioner was suffering from dementia based on his personal experiences and interactions with Petitioner. (App. 2882, 2891-93, 2917-18). He testified he was aware Petitioner had mental health concerns, including a bipolar diagnosis, and he consulted extensively with Petitioner's personal psychiatrist, Dr. Phil Steude, who had been treating Petitioner for a decade at the time of the incident, to assist in crafting his defense strategy. (App. 2855, 2887). Trial counsel elaborated Dr. Steude was one of the "go-to people in criminal cases to do all the sort of analysis" needed to formulate a defense or attack a conviction and counsel previously used him as an expert witness in criminal cases. (App. 2888-2904, 2928, 2946-47, 2953). Trial counsel testified based on Dr. Steude's "great" reputation and his prior experience with Dr. Steude coupled with Dr. Steude's extensive experience with Petitioner, trial counsel relied on Dr. Steude's advice regarding Petitioner's mental health and any possible mitigation or defense evidence related to Petitioner's mental health. (App. 2888-2904, 2928,

2946-47, 2953). This was reasonable based on the facts and circumstances of this case. See Garren v. State, 423 S.C. 1, 13, 813 S.E.2d 704, 710–11 (2018) (finding the record contained "no evidence to support a finding that counsel's decision not to seek a competency evaluation fell below reasonable professional norms" based on counsel's own interactions with his client); Jeter v. State, 308 S.C. 230, 232–33, 417 S.E.2d 594, 596 (finding counsel acted reasonably in relying on his own perceptions of a defendant's competency), Ramirez v. State, 419 S.C. 14, 22–23, 795 S.E.2d 841, 845–46 (2017) (finding plea counsel was deficient in failing to seek an independent competency evaluation where plea counsel was "clearly on notice" the defendant had mental health issues based on his own personal interactions with the defendant, as well as a previous psychological evaluation identifying several mental health issues). The PCR court properly found trial counsel performed reasonably as to Petitioner's mental health. Petitioner's assertions "counsel was deficient in relying upon his own familiarity with Petitioner and Petitioner's treating psychiatrist" is wrong and not supported by law. (PWC 16).

Moreover, the PCR court properly found Petitioner could not establish any prejudice. While the PCR court used the term "overwhelming evidence of guilt," it is clear the finding is premised on the strength of the State's case and the belief that trial counsel's purported failure to recognize and utilize Petitioner's mild dementia would not have resulted in a different result. Simply put, Petitioner still would have been convicted of murder even if trial counsel had presented the same evidence from the PCR hearing regarding his mild dementia. The State's case against Petitioner was overwhelmingly strong: numerous eyewitnesses identified Petitioner as the man who was in the champagne room naked, who was ordered to leave, who threatened the strip club employees, and who got into an SUV from which John John was fatally shot a short time later. Additionally, the SUV from which the fatal shot was fired was registered to Petitioner

and security footage from the entrance to his gated community showed Petitioner arriving home in the same vehicle wearing the same clothing he was wearing at the club. Even if you discount the evidence Petitioner now asserts should have been challenged with his mild dementia diagnosis, such as his statement to law enforcement, there is still overwhelming evidence that would have led a jury to convict Petitioner of John John's murder. The PCR court properly found the result of Petitioner's trial would remain unchanged based on the strength of the State's case. See Smalls, 422 S.C. at 188, 810 S.E.2d at 843 ("In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury.")

Additionally, trial counsel correctly (and extensively) testified that any mental health information, whether it was bipolar disorder (which he knew of) or mild dementia (which he was unaware of and had no rational reason to suspect) would not have been a viable defense, but could have potentially been exclusively used in mitigation. Any of the evidence Petitioner presented at the post-conviction relief hearing would not have had any impact on the result of Petitioner's proceeding—his *mild* dementia diagnosis was not a viable defense to murder. It would not have impacted the sheer absence of any sufficient legal provocation or heat of passion to reduce the killing to voluntary manslaughter. See State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (noting voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing."). Lastly, Petitioner's mild dementia would have reduced the killing to involuntary manslaughter because Petitioner was neither engaged in (1) an unlawful activity not naturally tending to cause death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others. Sullivan v. State, 407 S.C.

241, 244–45, 754 S.E.2d 885, 887 (Ct. App. 2014) (citing State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011)). The result of Petitioner's trial would remain unchanged had counsel utilized his mild dementia. The PCR court properly denied relief.

Petitioner's assertions that his mild dementia diagnosis would have been useful in negotiating a plea offer are unpersuasive, as trial counsel testified repeatedly that Solicitor Giese was adamant that no offer would be extended to Petitioner and he could plead "straight-up" to murder if he so wished. (App. 293-738). Petitioner has failed present any evidence or testimony to demonstrate how the Solicitor's stance on plea negotiations would have changed had he been aware of Petitioner's mild dementia. The PCR court properly rejected this claim.

Similarly, Petitioner's argument that his mild dementia diagnosis and expert testimony such as Dr. Maddox and Dr. Brawley would have resulted in suppression of his statement if used at a Jackson v. Denno hearing wholly lacks merit. Critically, Petitioner is **not** alleging that law enforcement did anything coercive in obtaining Petitioner's statements, but rather, is asserting his mild dementia and its interaction with Ativan rendered his statements involuntary. This argument fails because while Petitioner's physical and mental condition might have been relevant factors to be considered in determining his level of susceptibility to law enforcement coercion, his mental and physical condition alone were insufficient to establish that his statement was involuntarily made. See Colorado v. Connelly, 479 U.S. 157, 165 (1986) ("[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind **can never** conclude the due process inquiry." (emphasis added)). Absent evidence establishing Petitioner's statements were the product of a coercive act by law enforcement that overbore his will, Petitioner's statements simply could not be considered to be involuntary. See State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct.

App. 2008) ("Coercive police activity is a necessary predicate to finding a statement is not voluntary."); cf. State v. Hughes, 336 S.C. 585, 594, 521 S.E.2d 500, 505 (1999) ("[T]he only factor [Hughes] relies on as evidence of involuntariness is his mental condition. The statements in question were spontaneously made and there is no evidence of police coercion. Since mental condition alone does not support a finding of involuntariness, the issue is without merit."). Additionally, the record makes it abundantly clear that Petitioner's statement to law enforcement was knowing, voluntary, and free from any threats or coercion. Petitioner—a highly-skilled attorney—even made notation on his statement that he reserved the right "edit, add, or delete" from the statement. (App. 1138-1140; 1227-1241.). There is no reasonable possibility that the experienced trial judge would have excluded the statement or the jury would have believed Petitioner's statements to law enforcement were involuntary based on mild dementia or the interaction of Ativan with this mild dementia based on the overwhelming evidence establishing these statements were voluntary and a complete lack of any coercive police activity. See Colorado v. Connelly, 479 U.S. at 167 ("[C]oercive police activity is **a necessary predicate** to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." (emphasis added)). Petitioner's arguments in that regard must fail.

Petitioner's protestations the result of his trial would have been different had counsel been advised of his mild dementia and advised him not to testify are equally unpersuasive. It was Petitioner's decision whether to testify in his own defense, which the trial court reviewed with him. (App. 1569-70). Counsel testified he and another experienced attorney spent significant time during multiple sessions preparing Petitioner for his testimony at trial and believed he would be a good witness based on this extensive preparation. (App. 2898-2902). Petitioner attempts to use counsel's hindsight statements after Petitioner's poor performance on the witness

stand in his own defense as sufficient proof of deficiency and prejudice are exactly the scenario the United States Supreme Court warned of in Strickland and its progeny. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made 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.").

Finally, Petitioner's argument trial counsel was ineffective for adopting a defense of involuntary intoxication, thereby opening the door to reply testimony of Dr. Garvin, and then failing to adequately object to Dr. Garvin's testimony, also fails. Counsel testified extensively as to why he and Petitioner elected to pursue a defense of involuntary intoxication and the reasons for pursuing such a defense, mainly it was one of the only plausible defenses available to Petitioner because voluntary intoxication was not a defense. The record reveals that this defense was well-reasoned and researched, with counsel calling both fact and expert witnesses to support a defense of involuntary intoxication. After consulting with his client and investigating the case. Counsel reasonable made a strategic decision to present a defense of involuntary intoxication, then called the necessary witnesses, including Dr. Holbrook, to support this defense. Counsel's strategic decisions were reasonable. Cf. Roach v. Martin, 757 F.2d 1463, 1478–79 (4th Cir. 1985) (finding counsel's decisions not to pursue a defense of involuntary intoxication was a reasonable, informed strategic choice based on information supplied his client).

In sum, counsel properly handled Petitioner's mental health and the PCR court properly denied relief on this ground.

II. The PCR court properly found Petitioner failed to establish counsel was constitutionally ineffective in his handling of the crime scene analysis.

Petitioner argues the PCR court erred in denying him relief because counsel was ineffective in handling the crime scene analysis. Petitioner acknowledges trial counsel called an

expert witness, Lawton H. Yates, who was qualified as an expert in firearms and ballistics, and acknowledges Yates highlighted errors or omissions from the State's crime scene investigation (mainly, the lack of any trajectory analysis) and argued it was traffic that caused a reflection rather than a gunshot, but nonetheless still argues trial counsel was ineffective for failing to properly handle the crime scene analysis or properly challenge the State's case. In support of this claim, Petitioner presented evidence through R. Robert Tressel, a former investigator and now private consultant, who was qualified as an expert in crime scene investigation and homicide investigation. Tressel also testified as to flaws or a lack of best practices in the law enforcement analysis of the scene (also mainly focusing on the lack of trajectory analysis) and also presented alternative theories for the flash seen from Petitioner's SUV.

In rejecting this claim and denying relief, the PCR court found, "none of [Tressel's] opinions bear on the undisputed fact that a gun was fired from Applicant's vehicle towards Chastity's; and none of his testimony impacted on the trial testimony given by Yates. Therefore, the Court cannot find that further expert witness testimony at trail would have been necessary or that the failure to retain additional experts rendered him deficient." (App. 3081). These findings are supported by the record and do not amount to errors of law. As the PCR court correctly noted, Petitioner's expert at the evidentiary hearing testified in a manner that was consistent with the defense expert presented at trial. Accordingly, it is not possible that the result of Petitioner's trial would have been different had counsel presented yet another expert like Tressel as he now asserts. Cf. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) ("[C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); see also

Richter, 562 U.S. at 111 ("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense."); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (concluding trial counsel's decision not to present an expert witness to rebut the testimony of the State's expert witness constituted a legitimate trial strategy under the circumstances and reversing a ruling reaching a contrary conclusion), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); Frasier v. State, 306 S.C. 158, 160-161, 410 S.E.2d 572, 573 (1991) ("Petitioner . . . argues that trial counsel was deficient in failing to procure an expert witness to challenge the DNA evidence presented at trial. We disagree. The record reveals that trial counsel vigorously cross-examined the state's DNA experts and attacked the accuracy of the evidence. We cannot say that his performance was unreasonable under prevailing professional norms.").

Additionally, as discussed extensively above, the PCR court properly found Petitioner could not establish the requisite prejudice necessary for relief in light of the strength of the State's case, even discounting any crime scene evidence from the club. See Smalls, 422 S.C. at 188, 810 S.E.2d at 843 ("In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury."). The PCR court properly denied relief.

CONCLUSION

Because the PCR court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari.

Respectfully submitted,

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