

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Sep 22 2020**

On Petition for Writ of Certiorari to Richland County

**S.C. SUPREME COURT**

The Honorable R. Scott Sprouse, Post-Conviction Relief Judge  
The Honorable James W. Johnson, Jr., III, Trial Judge

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Appellate Case No. 2019-000839

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Chris A. Liverman, #308393,

Petitioner,

v.

State of South Carolina,

Respondent,

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**INDEX**

ISSUES PRESENTED ON CERTIORARI.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS..... 4

STANDARD OF REVIEW.....6

ARGUMENT.....8

CONCLUSION.....25

**RESPONDENT’S STATEMENT OF ISSUES PRESENTED ON CERTIORARI**

- I. The PCR court correctly found counsel were not constitutionally ineffective where counsel conducted a reasonable investigation, and counsel were not required to call an expert witness on eyewitness identification and memory, given the expert was unable to comment on the validity of the specific identification at issue in this case, and there was substantial evidence Petitioner was the shooter, which the expert’s testimony could not rebut.
- II. The PCR court correctly found counsel were not constitutionally ineffective for telling jurors during Petitioner’s opening statement that Petitioner had been incarcerated for twenty-six months prior to his trial because counsel had a reasonable strategic reason for doing so.
- III. The PCR court correctly found counsel were not constitutionally ineffective for failing to move for to suppress evidence Petitioner stole the gun used in the murders because counsel made a reasonable strategic decision not to do so, and counsel were able to refute the State’s evidence while also advancing the defense theory of third-party guilt, so counsel were not deficient and Petitioner was not prejudiced.
- IV. The PCR court correctly found counsel were not constitutionally ineffective for not objecting to testimony by Smith that he was scared to testify but was testifying for the victims and their families because Smith never said he was afraid of Petitioner, and the testimony was so brief there is no reasonable probability it had any effect on the outcome of trial.
- V. The PCR court correctly found counsel were not constitutionally ineffective for not objecting to the admissibility of lay or expert testimony regarding Petitioner’s gang membership and asking for a hearing on the reliability of the evidence, when such evidence was relevant to the State’s case and was otherwise admissible, so counsel had no meritorious basis for objection.

- VI. The PCR court correctly found counsel were not constitutionally ineffective because although counsel failed to preserve for appellate review the portion of the State's gang expert witness testimony about possible meanings of Petitioner's hash mark tattoos, Petitioner was not prejudiced because the issue was nevertheless addressed on the merits on appeal and deemed harmless error; therefore, Petitioner was not prejudiced by its admission.
- VII. The PCR court correctly found counsel were not constitutionally ineffective for calling an expert witness to testify about gangs, including the possible meaning of tattoos, because counsel made a reasonable strategic decision to present the testimony, and although the expert agreed with some of the findings and testimony of the State's experts, his testimony was also helpful to the defense.
- VIII. The PCR court correctly found counsel were not constitutionally ineffective for failing to object and move for a curative instruction or mistrial because the State's comments in closing argument were not improper, and counsel had no meritorious basis for objection, nor was Petitioner unfairly prejudiced by the comments.
- IX. The PCR court correctly found counsel were not constitutionally ineffective for failing to object and move for a curative instruction or mistrial due to the assistant solicitor's comments on the credibility of witnesses during closing argument because the comments were not improper, and therefore, counsel had no meritorious basis for objection, nor was Petitioner unfairly prejudiced by the comments.
- X. The PCR court correctly found counsel were not constitutionally ineffective for failing to object on the basis of an improper "Golden Rule" argument during closing arguments, because the State's argument was not improper, and therefore, counsel had no meritorious basis for objection, nor was Petitioner unfairly prejudiced.
- XI. The PCR court correctly found counsel were not constitutionally ineffective for failing to preserve for appellate review lay and expert testimony regarding gang affiliation evidence because the evidence was properly admitted, and therefore, counsel had no meritorious basis for objection and Petitioner was not reasonably likely to succeed on this issue on appeal.
- XII. The PCR court correctly found appellate counsel was not constitutionally ineffective where appellate counsel decided not to argue on appeal that the State's gang experts' opinion about the possible meaning of the tattoos was inadmissible and preserved for appellate review, where appellate counsel raised other issues of arguable merit.
- XIII. The PCR court correctly found appellate counsel was not constitutionally ineffective where appellate counsel decided not to argue on appeal that the State's

gang experts' opinion about the possible meaning of the tattoos was inadmissible and preserved for appellate review, where appellate counsel raised other issues of arguable merit.

- XIV. The PCR court did not violate the separation of powers doctrine by adopting the State's proposed order.<sup>1</sup>

### STATEMENT OF THE CASE

Chris A. Liverman (Petitioner) is presently confined in the South Carolina Department of Corrections. The Richland Grand Jury indicted Petitioner for two counts of murder in April 2005. He was represented by Elizabeth Anne Franklin-Best (Franklin-Best); Maxwell Schardt (Schardt); and Carolyn Gripp. On October 30, 2006, Petitioner proceeded to a jury trial before the Honorable James W. Johnson, Jr. On November 9, 2006, the jury convicted Petitioner as indicted, and Judge Johnson sentenced him to life imprisonment without parole on each count, to run consecutively.

Petitioner appealed and raised two issues: (1) whether the trial judge erred in refusing to conduct a hearing on the reliability of Tyrone Smith's identification of Petitioner as the shooter pursuant to Neil v. Biggers, 409 U.S. 188 (1972); and (2) whether the trial judge erred in allowing the State's gang expert to testify about the meaning of Petitioner's tattoos, in violation of Rules 403 and 404, SCRE. The Court of Appeals affirmed the convictions on December 4, 2009. State v. Liverman, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009).

Petitioner then petitioned this Court for a writ of certiorari, raising only the identification issue. This Court affirmed the convictions. State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). The remittitur returned to the circuit court on June 26, 2012.

Petitioner filed an application for post-conviction relief (PCR) on July 17, 2012, with

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<sup>1</sup> Although the Petition lists fifteen issues, this appears to be a typo as the last issue regarding the separation of powers doctrine is listed twice.

amendments filed March 6, 2013, August 7, 2018, and December 11, 2018. An evidentiary hearing into the matter convened December 17, 2018, before the Honorable R. Scott Sprouse, Jr. E. Charles Grose, Jr., and Dayne C. Phillips represented Petitioner. At the close of the evidence, the PCR court took the matter under advisement, and the parties submitted post-trial briefs. The PCR court denied relief by written order filed April 23, 2019. Petitioner filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCF, which the PCR court denied by order filed May 10, 2019.

### **STATEMENT OF THE FACTS**

On the night of August 26, 2004, twelve-year-old Courtney Dixon and sixteen-year-old Terrance Merchant were shot and killed in front of Courtney's house on T.S. Martin Drive. Both victims died from injuries caused by a single gunshot wound to the head. App. pp. 1102-10. The murders resulted from a vendetta by members of the Folk Nation gang against a rival gang, the Bloods. App. pp. 355-59; 244-81, 711-726.

Carl Duane Smith, aka Pooh, testified he and several friends had driven to T.S. Martin Drive earlier that evening. They were looking for a person named Delshawn, a member of the Bloods who had been involved in a confrontation with Pooh's friends earlier that day. Pooh and his friends were wearing black, the color of Folk Nation. They were unable to locate Delshawn, and they left after a girl called Pooh by name. Pooh later saw Petitioner<sup>2</sup>, as well as Petitioner's friend and fellow gang member, Reginald Joyner (also known as Goo<sup>3</sup>), and told Petitioner what happened. App. pp. 325-28, 335.

Petitioner told Pooh someone "from T.S. Martin had run him out from there" several days earlier. Petitioner showed Pooh some bullets Petitioner claimed he had just obtained and

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<sup>2</sup> Petitioner goes by the nickname Baby Jesus. App. pp. 323, 382, 538, 854.

<sup>3</sup> Goo is deaf and communicates through sign language. App. p. 337.

told Pooh he had a .22 caliber gun. However, Pooh did not see the gun. Petitioner told Pooh he was going to T.S. Martin, and he might “go on a lick.” Pooh tried to stop Petitioner from going because Pooh was afraid the girl who had recognized him earlier that day would blame him for any trouble. However, Petitioner refused to listen. App. pp. 335-44.

Petitioner’s friend and codefendant, Diego Thompson (Thompson), testified he knew Petitioner from school and from seeing Petitioner at the Bethel Bishop Apartments, where Petitioner’s grandmother lived. App. p. 382. Although Thompson denied being in a gang, he admitted he knew several gang members. Thompson testified Petitioner was a member of the Folk Nation gang. App. pp. 382-84. Close to dark on the night of the murders, Thompson ran into Petitioner at Bethel Bishop. Petitioner told Thompson he had to “handle something” on T.S. Martin. App. pp. 385-86. Unaware Petitioner had a gun, Thompson agreed to go with Petitioner to the neighborhood. Petitioner, Goo, and Thompson met up with two other associates, Ty and Little Chris, as they were walking. While the group was still in Bethel Bishop, Pooh once again warned Petitioner to be careful “because [Pooh’s group] had pulled some guns on some Bloods.” App. pp. 386-89. On the way to T.S. Martin, Thompson saw Petitioner put a black bandanna around his neck. According to Thompson, this meant Petitioner was representing the gang, which is part of Folk Nation. App. pp. 391-92.

Once they reached T.S. Martin Drive, Little Chris asked a “little boy” who was sitting on the porch of a nearby house if the boy was a “Slob,” which is a disrespectful term for Bloods. App. pp. 384, 392, 1080. The boy replied there was not any gangbanging around there, and he went to a telephone. Thompson told Petitioner they should go because the boy was either calling the police or other boys to come over. Petitioner said that was what he wanted. App. pp. 393-94. At this point, according to Thompson, Petitioner pulled a .22 caliber rifle from his pants

leg. Goo, who was standing next to Petitioner, was armed with a shotgun. Thompson and the others were a slight distance away from the two with the guns. App. pp. 394-96.

Thompson said, "It's time for us to go," and he started to back away. Petitioner then pointed the gun at the house where the boy had been. App. pp. 396-97. Petitioner told Goo in sign language to shoot at the house. As Thompson and the others ran away, Thompson heard "six or seven gunshots." When Thompson briefly turned around, he saw Petitioner throw the rifle down and pick up the shotgun. However, no other shots were fired. App. pp. 396-99. Thompson continued running from the scene, as did the rest of the group. Thompson testified Petitioner eventually followed and disposed of his weapon near the gate to the Colony Apartments. App. pp. 399-400.

Shante Bethel testified she, although with Petitioner, was a member of Folk Nation. App. p. 539. On the night of the shooting, she saw Petitioner and Pooh at Bethel Bishop. According to her, Petitioner said he was going to T.S. Martin "to go ride with some Slobs." She then saw Petitioner leave Bethel Bishop with Goo, Thompson, and another man. App. pp. 540-42. Later, she saw Petitioner return to Bethel Bishop at "full speed." She overheard Petitioner tell a man there that he and the others had just left a shooting at T.S. Martin, "that they were spraying" the gunfire, and two little kids were shot. Petitioner said they did it because "they had gotten in something with some Bloods" earlier in the evening. After this conversation, Petitioner ran to the Bayberry Apartments, taking a "cut" near the apartment complex. App. pp. 543-46.

Tyrone Smith testified he had known Petitioner for about seven years at the time of the shooting. Smith was living on T.S. Martin Drive with his aunt and cousins. Smith saw Petitioner talking to Smith's friend Delshawn at the Bayberry Apartments, on the afternoon of the shooting. According to Smith, Delshawn was a member of the Bloods. Smith and

Delshawn eventually went to Smith's residence, and Delshawn left shortly after 9:00 p.m. App. pp. 874-80.

Smith testified the trouble began after Delshawn left. Courtney called Smith and said "some boys had come to her and asked where the Slobs stayed." App. p. 880. Smith later saw two men get out of a white car. One went to a house two doors away from him. The other, whose face was partially covered by a black bandanna, approached Smith on his aunt's porch. This man pointed a gun at him and said, "I'll kill you." When this person turned around after realizing Smith was not Delshawn,<sup>4</sup> Smith ran into the house and called the police. App. pp. 881-82.

After the police took a report and left to speak with Delshawn, Smith went back onto the porch with his two female cousins and another girl. He then saw Petitioner and four other men walking up the street. Petitioner's face was not obscured by a bandanna, although the others were wearing bandannas. Smith and the girls immediately ran into the house and turned off the lights. Smith ran upstairs and looked out of "the left-hand window." App. pp. 883-84.

From there, Smith saw Petitioner get a long, dark rifle from someone and hand another person a revolver. Petitioner kneeled, aimed at Courtney's house, and opened fire. He continued shooting after he stood up again. Smith testified he heard multiple gunshots.<sup>5</sup> The people with Petitioner ran back the same direction from which they had come as soon as Petitioner began shooting. Smith testified Petitioner tried to re-cock his weapon, but a bullet did not "come up," so Petitioner turned and ran away. App. pp. 885-87, 888-89.

The police returned to Smith's house, and Smith gave a statement to Investigator Joe Gray (Gray) of the City of Columbia Police Department. Smith's statement identified

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<sup>4</sup> Delshawn's sisters lived on the same block of T.S Martin as Smith. App. p. 879.

<sup>5</sup> One of Smith's cousins dialed 911 during the incident. App. p. 887.

Petitioner as the shooter by his nickname, Baby Jesus. Minutes later, Gray told Smith the police had caught someone going through a “cut” nearby. App. pp. 889-90. Gray drove Smith to the location, and Smith remained in Gray’s car while another officer brought Petitioner to the front of the vehicle. Although it was dark outside, both police cars at the show-up had their lights on, and Gray had his high beams on. The other officer shined a light on Petitioner’s face. Smith immediately identified Petitioner as the shooter. App. pp. 630-31, 635-38, 890-91.

Petitioner gave two statements investigators after his arrest. Petitioner initially denied being at T.S. Martin. App. pp. 651-66. Following the victims’ deaths, Gray spoke to Petitioner again. After serving arrest warrants for murder on Petitioner and obtaining a waiver of rights, Petitioner gave another statement, in which he admitted he shot a .32 caliber automatic rifle during the incident at T.S. Martin, but he claimed he only had two bullets. App. pp. 666-68. Petitioner also said he had shot at a “top window [of a house] with a round hole like an attic,” and another person was shooting “down the street in the dark.” Further, Petitioner claimed he returned the .32 weapon to the person who handed it to him, and he denied that Goo, Thompson, or Pooh had been present at the time of the shooting. App. pp. 673-74. Officers returned to the scene but could not find damage to any house other than Courtney’s, including a nearby house resembling the one Petitioner described. App. pp. 675-76.

Finally, the State presented expert testimony about the significance of the two teardrop tattoos Petitioner put on his face after his arrest for the murders. Investigator Edward O’Cain, an expert in gang activity and gang recognition, testified he viewed the two teardrop tattoos below Petitioner’s eye. O’Cain opined the open teardrop tattoo “can represent quite a few things depending on who you’re talking to.” Under gang rules, however, it is supposed to signify a “family member” – whether a fellow gang member, a relative, or an innocent person

– has died. The filled in teardrop, according to O’Cain, means the wearer has killed someone in retribution, although he admitted it can have other meanings as well. App. pp. 1025-76.

Officer Walter Mahoney, of the City of Columbia Police Department’s gang task force, testified as an expert in gangs in the Columbia area. In his expert opinion, “[t]he open teardrop could represent a lost soldier, [or fellow gang member,] or... some innocent person that might have been killed by mistake. The closed teardrop is the body.” According to Mahoney, Petitioner’s tattoos signify “[h]e is a gang member that took somebody out.” App. p. 1077-95.

### 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)). 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, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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. at 443, 334 S.E.2d at 814. The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial

counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by “reasonableness under professional norms.” Id. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 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 petitioner 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. at 688.

## **ARGUMENT**

- I. The PCR court correctly found counsel were not constitutionally ineffective where counsel conducted a reasonable investigation, and counsel were not required to call an expert witness on eyewitness identification and memory, given the expert was unable to comment on the validity of the specific identification at issue in this case, and there was substantial evidence Petitioner was the shooter, which the expert’s testimony could not rebut.

Petitioner alleges his trial counsel were deficient for failing to call an expert in eyewitness identification and memory to rebut testimony presented by the State. In support of this claim, Petitioner presented the testimony of Dr. Dawn McQuiston, Ph. D., who was qualified as an expert in the same. However, because Franklin-Best vigorously attacked the identification through cross-examination of the State’s witnesses, she was not deficient. Moreover, McQuiston was unable to comment on the reliability of the specific identification in this case, which was made by Petitioner’s acquaintance. Therefore, because Petitioner failed to prove either deficiency or prejudice, the PCR court did not err in denying relief on this ground.

“[W]hile the Constitution requires that a criminal defendant receive effective assistance of counsel, the presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense.” Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995). Moreover, trial counsel’s failure to procure expert witnesses does not render his or her representation deficient when counsel vigorously cross-examines the State’s witnesses and attacks the accuracy of the evidence. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008).

At the evidentiary hearing, McQuiston testified generally to issues that may be present regarding memory and eyewitness identifications. According to McQuiston, memory decays over time, and people’s limited ability for attention can lead to errors in perception which contribute to misidentifications. McQuiston also testified familiarity does not necessarily make an identification more accurate. Finally, McQuiston testified an identification from a line up is more reliable than a show-up identification. However, crucially, McQuiston admitted she could not testify as to the reliability of the specific identification of Petitioner by Smith in this case, nor was she in any better position to say if a particular identification was accurate than a juror.

In this case, Franklin-Best vigorously cross-examined Smith and Thompson regarding their identifications of Petitioner as the shooter. App. pp. 410-81, 900-946. She also argued the show up was suggestive; Smith gave inconsistent statements regarding his prior familiarity with Petitioner; and Smith viewed the shooting from a significant distance. However, Thompson was part of the group that traveled to T.S. Martin on the night of the shooting, and Smith identified Petitioner by his nickname, Baby Jesus, before officers even knew a suspect had been detained and before the show-up occurred. App. pp. 388-99, 891. In addition, Petitioner’s statement to law enforcement acknowledged he was at the scene and firing a gun. App. pp. 666-68. McQuiston’s testimony could do nothing to mitigate such evidence.

Despite Franklin-Best's second-guessing of her own performance in hindsight, the PCR court correctly determined her decision not to call an expert witness on the identification issue did not render her representation of Petitioner constitutionally deficient, as she was able to attack the credibility of the identification in various other ways. See Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999) ("The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive.").

Therefore, because Petitioner failed to prove either deficiency or prejudice regard to the expert witness issue, the PCR court correctly denied relief as to this issue.

II. The PCR court correctly found counsel were not constitutionally ineffective for telling jurors during Petitioner's opening statement that Petitioner had been incarcerated for twenty-six months prior to his trial because counsel had a reasonable strategic reason for doing so.

Petitioner argues counsel were ineffective by informing the jury during Petitioner's opening statement Petitioner had been incarcerated for twenty-six months prior to trial. Shardt, who gave the opening statement, was unavailable to testify at the evidentiary hearing. However, a review of the full context of the opening in conjunction with the defense's overall strategy, reflects Shardt's decision was a reasonable strategic one. The PCR court correctly denied relief.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. Additionally, courts should not "insist counsel confirm every aspect of the strategic basis for his or her actions." Harrington v. Richter, 562 U.S. 86, 109 (2011). Where, as here, a strategic basis can be deduced from the record, trial counsel's performance should not be found deficient. Stokes v. State, 308 S.C. 546,

419 S.E.2d 778 (1992).

Schardt stated during his opening Petitioner had been in jail for twenty-six months, and it was public knowledge Petitioner “was [the State’s] guy,” because law enforcement had been focused on him that entire time, rather than following the evidence. App. pp. 240-41. Schardt concluded by telling the jury Petitioner had been waiting for twenty-six months for them to send him home. App. p. 253. However, a full reading of the opening statement in the context of the entire record, shows Schardt was arguing the police investigation was deficient because law enforcement had jumped to the conclusion Petitioner was the perpetrator and pursued that theory, rather than letting the evidence tell them which suspects to pursue. This argument is consistent with the overall defense theory that Thompson was the shooter, not Petitioner. Accordingly, the PCR court correctly found no deficiency and denied relief.

III. The PCR court correctly found counsel were not constitutionally ineffective for failing to move for to suppress evidence Petitioner stole the gun used in the murders because counsel made a reasonable strategic decision not to do so, and counsel were able to refute the State’s evidence while also advancing the defense theory of third-party guilt, so counsel were not deficient and Petitioner was not prejudiced.

Petitioner alleges counsel failed to object when the State presented evidence showing the gun used in the murders had been stolen because refuting such evidence required the defense to present otherwise inadmissible evidence Petitioner was in jail at the time of the theft. However, the PCR court correctly found this was a reasonable strategic decision and denied relief.

The evidence Petitioner was in jail at the time of the gun theft directly refuted Thompson’s testimony Petitioner stole the gun, putting the credibility of *all* of Thompson’s testimony in doubt. Moreover, the State’s evidence was consistent with the defense theory the shooter was actually Thompson, not Petitioner. The State’s investigator agreed the identity of the person who stole the gun was important to the investigation, and law enforcement knew it

could not have been Petitioner, further supporting the defense argument the investigation was incomplete. App. p. 1461. The defense ably argued in closing the State had not tied the gun to Petitioner, and that plus the fact the gun was not found where Thompson said it was or near where Petitioner was arrested, was evidence Thompson was actually the shooter. App. p. 1460-64.

Thus, because counsel handled the gun evidence in a manner which supported Petitioner's overall defense and the theory Thompson was the shooter, the PCR correctly found trial counsel were not deficient and denied relief. This Court should deny certiorari.

- IV. The PCR court correctly found counsel were not constitutionally ineffective for not objecting to testimony by Smith that he was scared to testify but was testifying for the victims and their families because Smith never said he was afraid of Petitioner, and the testimony was so brief there is no reasonable probability it had any effect on the outcome of trial.

Petitioner alleges his counsel were ineffective for failing to object when Smith testified he was "scared to be on T.V.," but he was testifying for the victims and their families. App. pp. 898-99. Even if counsel were deficient, there is no evidence the testimony had any effect on the outcome at trial. Therefore, because Petitioner failed to prove prejudice, the PCR court correctly denied relief.

To establish prejudice, Petitioner must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. In the exchange at issue, Smith stated he did not want to be on television, because Petitioner "is a brother," but he was comfortable testifying because there were no cameras in the courtroom. App. p. 898. Franklin-Best testified she should have objected to this testimony as bolstering and impermissible character evidence. However, Smith never testified he was afraid of Petitioner. If anything, his testimony implied he was afraid of *other*

community members, not Petitioner. Finally, the reference to Smith being afraid was fleeting, comprising seventeen lines in a transcript of more than one-thousand pages. App. p. 898. The State did not pursue that line of questioning with Smith or any other witness, nor did it argue the point in closing. Accordingly, the PCR court correctly found Petitioner failed to meet his burden of proof as to the prejudice prong and denied relief. Similarly, this Court should deny certiorari.

- V. The PCR court correctly found counsel were not constitutionally ineffective for not objecting to the admissibility of lay or expert testimony regarding Petitioner’s gang membership and asking for a hearing on the reliability of the evidence, when such evidence was relevant to the State’s case and was otherwise admissible, so counsel had no meritorious basis for objection.

Petitioner contends counsel were not constitutionally ineffective for not objecting to the admissibility of lay or expert testimony regarding Petitioner’s gang membership and asking for a hearing on the reliability of the evidence. PWC pp. 13-16. The theory of the State’s case was based on this shooting being a gang-related retaliation, and multiple witnesses testified to this motive; thus Petitioner’s membership in the Folk Nation gang was clearly relevant. See Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

Petitioner’s counsel objected to the testimony of the State’s expert witnesses on multiple bases, during the pre-trial hearing and at trial. The defense argued the gang testimony, including testimony about the meaning of Petitioner’s tattoos, was improper “propensity” evidence, overly prejudicial, and based on inadmissible hearsay. App. pp. 5-9, 112-17, 135-47, 1023-76. Nonetheless, Franklin-Best testified she should have objected based on character, and she should have argued the evidence did not meet the Council test for admissibility. State v. Council, 335

S.C. 1, 515 S.E.2d 508 (1999) (holding when admitting scientific evidence, the trial judge must find the evidence will assist the trier of fact, the expert is qualified, and the evidence is reliable).

However, Council applies to scientific evidence, and at the time of Petitioner's trial, was not the standard for non-scientific expert testimony, which was governed instead by State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). The testimony at issue here was not based on scientific data and testing, but instead on the observations and experience of the testifying experts. In those instances, Morgan instructs the reliability of the testimony goes to the weight of the evidence, not its admissibility. 326 S.C. at 513, 485 S.E.2d at 118. Morgan was not overruled until 2009, thus it was the law at the time of Petitioner's trial, and any argument counsel made for use of the Council standard would not have been supported by then-current case law. Counsel were therefore not deficient for failing to object to on that basis, and the PCR court correctly denied relief on this issue. This Court should deny certiorari.

- VI. The PCR court correctly found counsel were not constitutionally ineffective because although counsel failed to preserve for appellate review the portion of the State's gang expert witness testimony about possible meanings of Petitioner's hash mark tattoos, Petitioner was not prejudiced because the issue was nevertheless addressed on the merits on appeal and deemed harmless error; therefore, Petitioner was not prejudiced by its admission.

Petitioner argues counsel were constitutionally ineffective for failing to preserve for appellate review objections to the State's gang experts' testimony, including testimony about the meaning of Petitioner's teardrop and hash mark tattoos. The defense's main argument at trial was that the State was unable to establish what the tattoos meant to Petitioner, specifically. App. p. 142. Although the initial objections were overruled, Franklin-Best made multiple motions for a mistrial based on the testimony actually elicited, arguing the portion of the experts' testimony attributing "bodies" to the tattoos was "inflammatory," irrelevant, improper "propensity"

evidence, and based on hearsay which violated Petitioner's rights under the Confrontation Clause. App. pp. 1042-64, 1094-96.

Before a post-conviction relief court can grant relief on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial. McHam v. State, 404 S.C. 465, 475-76, 746 S.E.2d 41, 47 (2013). Appellate counsel raised the issue of the expert testimony regarding "bodies" being attributed to the tattoos on appeal. Although the Court of Appeals found the issue of the meaning of the hash mark tattoos was not preserved (but the objection to testimony about the teardrops was preserved), the Court of Appeals addressed the testimony as a whole on the merits and deemed its admission harmless error due to other substantial evidence of Petitioner's guilt, including Smith's identification of Petitioner as the shooter and Petitioner's statement admitting he was on the scene, firing shots. Liverman, 386 S.C. at 243-44, 687 S.E.2d at 80-81.

"Harmless error review looks to the basis on which the jury actually rested its verdict." Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). "From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" Id. (citing Yates v. Evatt, 500 U.S. 391, 403 (1991)). Because the Court of Appeals already determined the admission of tattoo evidence was harmless error not contributing to the verdict, counsel cannot be deemed ineffective. See Clark v. Goose, 16 F.3d 960, 964 (8th Cir. 1994) (concluding even if evidence is erroneously admitted but it constitutes at most harmless error, no ineffective performance is shown); LePage v. Idaho, 851 F.2d 251, 257 (9th Cir. 1988) (concluding that since admission of

statements obtained in violation of Massiah was harmless error beyond a reasonable doubt, LePage suffered no prejudice from his counsel's failure to object to the statements).

Therefore, Petitioner cannot meet his burden as to prejudice, and the PCR court correctly denied relief. This Court should deny certiorari.

- VII. The PCR court correctly found counsel were not constitutionally ineffective for calling an expert witness to testify about gangs, including the possible meaning of tattoos, because counsel made a reasonable strategic decision to present the testimony, and although the expert agreed with some of the findings and testimony of the State's experts, his testimony was also helpful to the defense.

Petitioner argues counsel were deficient for calling a defense expert (Walker) regarding the tattoos, claiming his testimony only served to reinforce the opinions of the State's experts. However, although Walker agreed with portions of the State's experts' testimony, his testimony was helpful to the defense in other ways. Therefore, because a clear strategic reason for calling Walker is evident in the record, the PCR court correctly denied relief.

There is a strong presumption that counsel's decisions are 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)). When the record reveals a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Moreover, whether a challenged action constitutes ineffective assistance is a question for the court to determine, so admissions of deficient performance by attorneys are not controlling. See Harrington v. Richter, 562 U.S. 86, 109-10 (2011) ("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. . . . Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

Walker had extensive law enforcement credentials and testified there were multiple possible meanings for the teardrop tattoos other than signifying “bodies,” including that a friend or family member had died, serving time, or simply being a copycat. App. pp. 1287, 1292. He pointed to multiple celebrities with teardrop tattoos including the rapper Lil Wayne and the basketball player Larry Hughes. App. p. 1319. Walker also testified the hash mark tattoos signified rank, not “bodies.” App. p. 1296. Finally, Walker helped build the defense’s argument that only Petitioner could definitively say what the tattoos meant. App. pp. 1297-98. Thus, calling Walker was a reasonable strategic decision to counter the presentation of the State’s expert witnesses. The PCR court correctly denied relief, and this Court should deny certiorari.

VIII. The PCR court correctly found counsel were not constitutionally ineffective for failing to object and move for a curative instruction or mistrial because the State’s comments in closing argument were not improper, and counsel had no meritorious basis for objection, nor was Petitioner unfairly prejudiced by the comments.

Petitioner alleges counsel should have objected to the State’s argument in closing, “There is not a single witness, or any evidence in this case, that points to anyone other than [Petitioner] as being the shooter, the murderer.” App. p. 1442. Petitioner contends this argument was both burden shifting and an impermissible a comment on the Petitioner’s right not to testify. PWC p. 19. However, because the comment was permissible argument about the evidence presented at trial, it was not objectionable. The PCR court correctly found no deficiency and denied relief.

“If a solicitor’s closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a solicitor may argue the State’s version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.” State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). “The relevant question is whether the solicitor’s [allegedly improper]

comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

Here, the statement there were no witnesses or evidence pointing to anyone other than Petitioner as the shooter is within the bounds of permissible argument. The State did not argue “the defendant” or “the defense” failed to present such evidence; the assistant solicitor was merely commenting on her view of the evidence presented at trial. App. p. 1442. This is permissible, as the State has a right to argue its version of the facts and credibility of the witnesses. Moreover, the comment was not so prejudicial as to amount to a denial of due process, particularly in the context of the whole trial. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record).

Therefore, because Petitioner failed to prove either deficiency or prejudice, the PCR court correctly denied relief, and this Court should deny certiorari.

- IX. The PCR court correctly found counsel were not constitutionally ineffective for failing to object and move for a curative instruction or mistrial due to the assistant solicitor’s comments on the credibility of witnesses during closing argument because the comments were not improper, and therefore, counsel had no meritorious basis for objection, nor was Petitioner unfairly prejudiced by the comments.

Petitioner counsel were constitutionally ineffective for failing to object to improper vouching and bolstering of two witnesses, Bethel and Thompson. App. pp. 1442-43. However, this argument by the assistant solicitor was not objectionable because she was responding to a defense argument. Therefore, because counsel were not deficient, the PCR court correctly denied relief on this issue.

The defense called Thompson and Bethel “liars” during its closing, and the State had a right to respond to the defense’s characterization of those witnesses. App. p. 1460; see section

VII, supra. Additionally, the trial court instructed the jury it was their duty to judge the credibility of witnesses, and they should not consider statements by counsel as evidence. App. pp. 1526-28; see State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995) (holding the solicitor's comments did not so infect the trial with unfairness so as to deprive McFadden of due process where there was "ample other evidence of guilt in the record").

Therefore, because Petitioner failed to prove either deficiency or prejudice, the PCR court correctly denied relief, and this Court should deny certiorari.

- X. The PCR court correctly found counsel were not constitutionally ineffective for failing to object on the basis of an improper "Golden Rule" argument during closing arguments, because the State's argument was not improper, and therefore, counsel had no meritorious basis for objection, nor was Petitioner unfairly prejudiced.

Petitioner also alleges trial counsel should have objected to improper Golden Rule and burden-shifting arguments during the State's closing, comparing the juror's community to gang turf. App. pp. 1515. However, the PCR court correctly denied relief.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). The relevant inquiry is whether the challenged comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Humphries, 351 S.C. at 373, 570 S.E.2d at 166. Petitioner presented no evidence this fleeting comment had any effect on the outcome, especially given the trial judge's thorough instructions on the role of the jury. See section VIII, supra. Accordingly, the PCR court correctly denied relief, and this Court should deny certiorari.

- XI. The PCR court correctly found counsel were not constitutionally ineffective for failing to preserve for appellate review lay and expert testimony regarding gang affiliation evidence because the evidence was properly admitted, and therefore, counsel had no meritorious basis for objection and Petitioner was not reasonably likely to succeed on this issue on appeal.

Petitioner argues counsel were constitutionally ineffective for failing to properly preserve for appellate review defense objections to lay and expert testimony regarding Petitioner's gang affiliation. However, the State's theory of the crime was that the shooting was gang-related retaliation, and therefore, the State needed to prove Petitioner was a gang member. See Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). The evidence presented regarding Petitioner's gang affiliation was admissible as part of the res gestae of the crimes charged because it was “so intimately connected with and explanatory of [the murder and related crimes for which Petitioner was on trial] and [was] so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story” of the indicted offenses. See Adams, 322 S.C. at 122, 470 S.E.2d at 370-71. Simply put, evidence of Petitioner's gang affiliation was an integral part of the offenses for which he was on trial and was necessary to aid the jury in understanding the context in which these crimes occurred.

Moreover, Petitioner's counsel objected to the gang testimony on multiple bases, both during the pre-trial hearing and at trial, and argued the testimony was improper “propensity” evidence, overly prejudicial, and based on inadmissible hearsay. Accordingly, the PCR court correctly found counsel was not deficient and denied relief, and this Court should deny certiorari.

XII. The PCR court correctly found appellate counsel was not constitutionally ineffective where appellate counsel decided not to argue on appeal that the State's gang experts' opinion about the possible meaning of the tattoos was inadmissible and preserved for appellate review, where appellate counsel raised other issues of arguable merit.

Petitioner alleges appellate counsel was ineffective because he failed to argue on appeal the testimony of the State's gang expert witness about the possible meaning of the teardrop tattoos was inadmissible and preserved for appellate review. As an initial matter, the State notes

Petitioner has alleged both trial counsel was ineffective in failing to preserve these issues and appellate counsel was ineffective in failing to raise them. It cannot be both ways, as appellate counsel cannot be deficient for failing to raise an unpreserved issue. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002). Further, Petitioner did not present any testimony at the evidentiary hearing regarding appellate counsel's performance, and therefore the PCR court correctly found he was unable to overcome the presumption in favor of appellate counsel that appellate counsel's decisions regarding which issues to raise were based on strategy rather than neglect. Accordingly, the PCR court correctly denied relief.

Notwithstanding the procedural objection, Petitioner cannot meet his burden on the merits of this allegation. Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is **not** required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Generally, in analyzing a claim of ineffective assistance of appellate counsel, the PCR court applies the Strickland test just as it would to a claim of ineffective assistance of trial counsel, asking first whether appellate counsel's performance was deficient, and then whether Petitioner was prejudiced by the deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). See section VI, supra. The PCR court therefore correctly denied relief. This Court should deny certiorari.

XIII. The PCR court correctly found appellate counsel was not constitutionally ineffective where appellate counsel decided not to argue on appeal that the State's gang experts' opinion about the possible meaning of the tattoos was inadmissible and preserved for appellate review, where appellate counsel raised other issues of arguable merit.

Petitioner alleges appellate counsel was constitutionally ineffective because he declined to appeal the portion of the Court of Appeals' opinion regarding the admissibility of the State's gang expert witnesses' testimony to this Court. However, appellate counsel was not under any obligation to appeal that issue further, appellate counsel cannot be deficient. See Jones v. Barnes, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."). Moreover, Petitioner was not prejudiced by the decision because he was not reasonably likely to have succeeded on this issue given the Court of Appeals deemed the admission of the challenged evidence harmless. See section VI, supra. The PCR court therefore correctly denied relief. This Court should deny certiorari.

XIV. The PCR court did not violate the separation of powers doctrine by adopting the State's proposed order.

Petitioner alleges the PCR court violated the separation of powers doctrine by adopting the State's proposed order. This claim is without merit.

Both parties provided memoranda in support of their respective arguments to the PCR court, and after review, the PCR court directed the State to draft an order denying relief. Once the PCR court signed the order and it was filed, the order was no longer that of an advocate, but that of the court. See Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019) ("We recognize the prevailing party often prepares a proposed order for the PCR court. . . . Once a proposed order is finalized... the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed...."). In this case, Petitioner in fact filed a motion

pursuant to Rule 59(e), and the PCR court, presumably after again reviewing its original order, denied the motion without amendment. App. p. 2446. Because the PCR court did not err by adopting the State's proposed order of dismissal, this Court should deny certiorari.

**CONCLUSION**

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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