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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON WRITE OF CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable William A. McKinnon, PCR Judge

Appellate Case No. 2019–000031

ANDRA B. JAMISON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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COUNTERSTATEMENT OF ISSUES PRESENTED ON CERTIORARI

I. The PCR court correctly concluded Trial Counsels were not ineffective for failing to argue that Petitioner's right to an independent blood test was violated where Trial Counsels did raise and vigorously argue this issue through a motion to suppress; the trial judge admitted the State's blood test results over Trial Counsel's objection; and any subsequent motion to dismiss Petitioner's charges entirely would have been fruitless in light of the trial court's ruling on the suppression issue.

II. The PCR court correctly concluded Trial Counsels were not ineffective for failing to object to the arresting officer's failure to produce the incident site videotape and stipulating to the officer's affidavit regarding his vehicle's lack of video camera equipment where Counsels had no legal basis to challenge the affidavit and an incident site video was obtained from another officer's vehicle recording device.

III. The PCR court correctly concluded Trial Counsels were not ineffective for failing to inform Petitioner that Judge McMahon's daughter was employed by the Eleventh Circuit Solicitor's Office where no conflict of interest existed and the PCR court correctly did not rule on the allegation of trial court error based on Judge McMahon's failure to inform Petitioner of his daughter's employment with the Eleventh Circuit Solicitor's Office because trial court error is not a cognizable PCR claim.

IV. The PCR court correctly concluded Trial Counsels were not ineffective for stipulating to the introduction of certain photographs where Counsels articulated a valid strategy for doing so; where Counsels vigorously argued as to what the photographs depicted; and where Petitioner failed to show he was prejudiced Counsels decision to stipulate to the admission of the photographs.

V. The PCR court correctly concluded that Petitioner's first appellate counsel, Wanda Carter, was not ineffective for failing to file a reply brief addressing the State's harmless error claim because any deficiency in this regard was cured by Petitioner's second appellate counsel, Jeremy Thompson, filing a reply brief directly addressing the harmless error claim.

VI. The PCR court correctly concluded that Petitioner's second appellate counsel, Jeremy Thompson, was not ineffective for failing to argue the independent blood test issue was structural instead of harmless error where the suppression of evidence clearly falls under the purview of harmless error analysis.

VII. The PCR court correctly denied Petitioner's motion for summary judgment where Petitioner was represented by counsel and therefore his *pro se* motion was not properly before the court. To the extent this Court finds the motion was properly raised, the PCR court correctly denied the motion because it raised a direct appeal issue.

STATEMENT OF THE CASE

In August 2008, Andra Byron Jamison (Petitioner) was arrested following an investigation into a vehicle and bicycle collision resulting in a fatality. In January 2009, the Lexington County Grand Jury indicted Petitioner for one count of felony driving under the influence resulting in death (2009–GS–32–5283). (Amended App. 1305–06). On October 12, 2009, Petitioner proceeded to a jury trial before the Honorable R. Knox McMahon. Benjamin Stitely, Esquire, and R. Theo Williams, Esquire (collectively, Counsel) represented Petitioner. Assistant Solicitors Derrick Mobley and Stephen Burn of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Pre–Trial Suppression Hearing

Prior to trial, Petitioner moved to suppress the admission of the test results from the blood alcohol concentration analysis, and the trial judge conducted a pre–trial hearing on Petitioner's motion. (Amended App. 53–55). During the hearing, Officer Stone testified Petitioner was arrested after refusing a field sobriety test and was taken to the police department for a breathalyzer test. (Amended App. 59–61). He indicated Petitioner did not take the breathalyzer test in the allotted time and was then taken to Lexington Medical Center for the drawing of blood samples. (Amended App. 62). He testified a lab technician drew two vials of Petitioner's blood and one vial was placed in Petitioner's shirt pocket. (Amended App. 63). Officer Stone stated Petitioner did not request an independent blood test to his knowledge. (Amended App. 64). He noted he then took Petitioner to the detention center, advised the commanding officer about the blood sample, and left. (Amended App. 64-65). He testified Petitioner did not request additional testing on the way to the detention center or during booking. (Amended App 64–65; 66). He further indicated he explained to Petitioner he would receive a blood sample for testing while at the hospital. (Amended App. 67).

Sergeant Robert Marzol confirmed Petitioner refused a breathalyzer test and was then

transported to the hospital. (Amended App 75–77). He noted the implied consent form presented to Petitioner in the breathalyzer testing room notified Petitioner of the availability of additional testing. (Amended App. 74–75). Sergeant Marzol testified he witnessed the drawing of two vials of blood from Petitioner and observed one vial being given to him. (Amended App. 79). He indicated he could not recall Petitioner requesting additional testing at any time he was in contact with him. (Amended App. 79–80).

Kristen Marzol, the clinic coordinator at the Lexington County Detention Center, also testified during the suppression hearing. (Amended App. 87). She noted Cheryl Smith, a former nurse, was working in the detention center clinic on August 1, 2008. (Amended App. 89). Marzol stated Smith made a notation indicating she placed Petitioner's blood sample in a locked refrigerator, which was consistent with the policies in place at the time. (Amended App. 90–91). Marzol testified she was subsequently unable to locate the blood sample and had no idea what happened to it. (Amended App. 93). She indicated inmates must specifically request blood samples or medications when they are released and those items cannot be released to anyone but the inmate under medical privacy rules. (Amended App. 93–95). She further testified nurses were the only people with access to the blood sample. (Amended App. 128–29).

Additionally, Petitioner testified in his own defense during the hearing. (Amended App. 103). He testified he was notified of the availability of an independent test by Officer Stone and requested testing from him. (Amended App. 103–04). He stated Officer Stone gave his blood sample to a jailor, and he was never given an opportunity to go to a different hospital or doctor. (Amended App. 104–05). He claimed he asked for his blood sample the day he was released and the staff informed him they had no idea what he was talking about. (Amended App. 107). He indicated he asked Officer Stone for independent testing multiple times and was ignored. (Amended App. 108–09). He also

testified he requested his blood sample on three separate occasions, including at the time of his release, and did not receive the blood sample. (Amended App. 112–13).

Petitioner's wife, Kristy Jamison, also testified during the hearing. (Amended App. 116). She stated she went to the jail to pick up Petitioner's blood sample and never received it. (Amended App. 117–18). She indicated she was informed there was no blood. (Amended App. 122). She further testified Petitioner asked for his blood sample on multiple occasions and was told there was no blood. (Amended App. 123, 127).

At the conclusion of the hearing, Petitioner argued the blood test results should be suppressed because he was denied affirmative assistance in acquiring independent testing and was denied an opportunity to obtain testing when the jail staff lost his blood sample. (Amended App. 129–37). After hearing argument from both sides, the trial judge denied the motion. (Amended App. 146–48).

Subsequently, during trial, the officers and multiple witnesses testified regarding the circumstances of the incident, the condition Petitioner was in at the time, and Petitioner's refusal to submit to a field sobriety test or a breathalyzer test. Additionally, Brandon Landrum, an analyst at SLED and an expert in forensic toxicology, testified regarding his analysis of Petitioner's blood sample over Petitioner's objection. (Amended App. 537, 545; 549–50). Landrum indicated he performed a blood alcohol analysis on Petitioner's blood specimen. (Amended App. 551). The testing revealed Petitioner's blood sample had a 0.225 percent weight per volume of ethanol. (Amended App. 555). Landrum testified an average male would be required to drink approximately ten beers in an hour to reach the level of blood alcohol concentration present in Petitioner's blood sample. (Amended App. 559). He further indicated Petitioner would have experienced significant impairment based on the test results. (Amended App. 560–61).

B. Summary of Petitioner's Crime and Following Events

Petitioner's charges stem from an incident that occurred during the early morning hours on August 1, 2008. Shonda Cheeks was driving across the Blossom Street Bridge on her way home to West Columbia when she observed a vehicle on the other side of the road hit something. R. pp. Amended App. 710–11). Cheeks saw the vehicle veer to the right and drift outside of its lane of travel. (Amended App. 711; pp. 712–713). Cheeks then observed someone in the roadway and realized the vehicle struck a person. (Amended App. 714–715).

Shortly thereafter, Todd Fitzgerald was driving down Knox Abbott Drive while returning to his apartment in Columbia. (Amended App. 698). As he approached the Blossom Street Bridge, he noticed a shoe, then a bicycle, and then a person lying in the roadway. (Amended App. 698). He immediately stopped his vehicle to attempt to offer assistance. (Amended App. 689–99). Several other vehicles also stopped to help, and one of those individuals called 911. (Amended App. 699). Fitzgerald surveyed the scene to see if there were any other vehicles or witnesses in the vicinity and observed a vehicle stopped fifty yards down the bridge with its passenger tires resting on the sidewalk. (Amended App. 699, 702). Petitioner was outside of the stopped vehicle and appeared to be checking the front passenger side for damage. (Amended App. 699; 701–02).

Fitzgerald approached Petitioner and asked him if he hit the victim lying in the roadway. (App. 689–99). Petitioner responded, "Who?" (Amended App. 699–700. Fitzgerald pointed towards the victim, and Petitioner asked, "Did I hit him?" (Amended App. 701–02). Fitzgerald noted Petitioner was very disoriented and appeared intoxicated. (Amended App. 702). Petitioner appeared confused, smelled of alcohol, was staggering, and had glassy eyes. (Amended App. 702). Fitzgerald believed Petitioner was too intoxicated to tell what happened, and he directed law enforcement to Petitioner after they arrived on the scene. (Amended App. 702–03).

Officer Michael Stone of the Cayce Police Department was on patrol around 11:25 p.m. when he noticed traffic backing up on the Blossom Street Bridge. (Amended App. 164; 167–168). As he approached the scene, he observed a person lying in the roadway with a large quantity of blood coming from his head. (Amended App. 168–69). Officer Stone then cleared the crowd and radioed in for assistance. (Amended App. 169). Several other officers and medical personnel arrived on the scene within minutes. (Amended App. 169, 594). Officer Stone discovered Petitioner was the driver of the vehicle that struck the victim, who was later identified as nineteen–year–old Jesse Gamble. (Amended App. 169; p. 225; p. 242). Officer Stone then approached Petitioner and asked him what occurred. (Amended App. 169). Petitioner responded he did not know what happened and did not mean to hurt anyone. (Amended App. 169). Officer Stone noticed Petitioner was unsteady on his feet, was slurring his speech, and had the smell of alcohol on his breath and about his person. (Amended App. 211-212). He then placed Petitioner under investigative detention. (Amended App. 212).

Meanwhile, paramedics Barrett Raymond and Daniel Boyce responded to the accident scene. (Amended App. 594, 605). They observed Gamble lying in the roadway and attended to him. (Amended App. 594, 605). Gamble was unresponsive, had a broken leg, and his pupils were fixed, but he was breathing and had a pulse. (Amended App. 659–60). Boyce also checked on Petitioner and spoke with him to gather information about the accident. (Amended App. 606–07). He observed Petitioner sitting on the curb in a sulking position. (Amended App. 671). He noticed Petitioner appeared intoxicated and smelled of alcohol. (Amended App. 608). Petitioner's speech was slurred and Boyce had difficulty understanding him. (Amended App. 607). Petitioner told Boyce he thought he hit a garbage can. (Amended App. 607). The paramedics then quickly transported Gamble to the hospital. (Amended App. 597, 609).

Officer Adam Smith and Detective John Reese also responded to the scene. (Amended App.

276; 383–84). Officer Smith observed Gamble in the roadway with very severe injuries. (Amended App. 277–78). While on the scene, he heard Petitioner asking several witnesses if he hurt someone or did something wrong. (Amended App. 231). Officer Smith noticed Petitioner's vehicle was damaged, his speech was slurred, he had a strong odor of alcohol on his breath and person, and he was unsteady on his feet. (Amended App. 234). Detective Reese observed Gamble, bicycle parts, a shoe, and a sock lying in the roadway. (Amended App. 383–85). He inspected Petitioner's van, which was located farther down the bridge, and noticed significant damage. (Amended App. 387). The hood of the vehicle was dented in, the windshield was cracked and damaged, a front lens was damaged, and there was a long scratch on the passenger side. (Amended App. 387–388). He also discovered Gamble's bicycle was severely damaged, and he found a sock, a shoe, and some hair in the roadway. (Amended App. 388–89). While examining Petitioner's vehicle, Detective Reese located a Killian's Red beer bottle underneath the van next to a tire. (Amended App. 426, 433). Inside of the vehicle, Detective Reese found two twelve–packs of Killian's Red beer, with one package open and missing several bottles. (Amended App. 435–36).

Sergeant Robert Marzol arrived on the scene and spoke to Petitioner with Officer Stone. (Amended App. 172, 305, 314). Sergeant Marzol informed Petitioner of his rights. (Amended App. 172, 175; 314–315; 319). He noticed Petitioner was calm, unsteady on his feet, and had a strong odor of alcohol. (Amended App. 318). Sergeant Marzol then offered Petitioner an opportunity to perform field sobriety tests, and Petitioner refused, stating he would not do anything without speaking to an attorney. (Amended App. 172, 175; 317–18). Petitioner was then arrested and transported to the Cayce Police Department. (Amended App. 175; 318–39).

On the way to the police department, Petitioner stated he did not know what was going on and did not mean to hurt anyone, and he asked why he was under arrest. (Amended App. 176). Once they

arrived, Petitioner was taken to the breathalyzer testing room, and Sergeant Marzol began administering the test around 12:30 a.m. (Amended App. 177; 328–29). He informed Petitioner of his rights, entered his information into the testing machine, and reviewed an implied consent form with Petitioner. (Amended App. 178, 329). Relying on the implied consent form, Sergeant Marzol informed Petitioner he was required to submit to some form of chemical testing, his refusal or obstruction of testing could be used against him, and he had "the right to have a qualified person of [his] own choosing to conduct additional independent tests at [his] own expense, and the officer upon request must provide affirmative assistance." (Amended App. 331–32). Petitioner then refused to sign the implied consent form, insisting he did not know what was going on and wanted an attorney. (Amended App. 178, 332). The officers then observed Petitioner for the statutorily–required period of twenty minutes before allowing him an opportunity to blow into the breathalyzer testing machine. (Amended App. 178, 338). During this period, Petitioner continued to slur his speech, smelled of alcohol, and was unsteady while walking or standing. (Amended App. 334). After the observation period expired, Petitioner continued to state he did not know what was going on and did not take the breathalyzer test. (App. 179–80). The testing machine registered a refusal after two minutes, and Petitioner refused to sign the refusal ticket. (Amended App. 180; 338–40).

Petitioner was then transported to Lexington Medical Center for the drawing of blood samples, and they arrived around 1:30 a.m. (Amended App. 183–84; 341–42). The officers directed a doctor to withdraw blood samples from Petitioner, and two vials of Petitioner's blood were drawn by a phlebotomist. (Amended App. 184–85; 342, 451). The phlebotomist explained to Petitioner and the officers he was going to draw two vials and give one to the officers and one to Petitioner for his own personal testing. (Amended App. 451). The vials were properly drawn, sealed, and labeled. (Amended App. 454). The officers took one sample into evidence, and Officer Stone placed the other

sample into Petitioner's shirt pocket. (Amended App. 186–87; 342–43).

Petitioner was then transported to the Lexington County Detention Center. (Amended App. 187). A corrections officer booked Petitioner into the jail, and Officer Stone then transported the vial of blood taken into evidence to the police department. (Amended App. 187–88). Records at the detention center indicated the other blood sample, which had been given to Petitioner, was collected by a nurse and placed in a locked refrigerator. (Amended App. 357–58). However, Petitioner's booking sheet did not indicate a blood sample was taken from him, and the blood sample was subsequently lost. (R. p. 358; p. 366).

Meanwhile, Gamble was transported to Palmetto Richland Hospital and admitted shortly after midnight. (Amended App. 226). Dr. Raymond Sweet, a neurosurgeon at the University of South Carolina School of Medicine, examined Gamble and discovered he was in a deep coma with a severe brain injury and spinal fractures. (Amended App. 226; pp. 227–228). Due to the severity and extensiveness of the injuries, there were no available treatment options. (Amended App. 230). Gamble was pronounced brain dead at 3:20 p.m. on August 1, 2008. (Amended App. 233). Dr. Sweet determined the cause of death was severe traumatic blunt injury to the brain. (Amended App. 234).

Subsequently, Sergeant Steven Breland and Corporal Charles Coats, who were members of the South Carolina Highway Patrol collision reconstruction team and experts in accident reconstruction, investigated the accident scene. (Amended App. 616, 622, 625, 665, 671, 673). They discovered tire scuff marks on the curb and noted the damage to Gamble's bicycle indicated a significant impact. (Amended App. 635–636; 640). They also discovered red paint on the bumper of Petitioner's van, which was consistent with the red paint on the bicycle, and scuff marks on the front tire consistent with the scuff marks on the curb. (Amended App. 476, 641, 644). Sergeant Breland concluded Petitioner's van struck Gamble in the bicycle lane on Knox Abbott Drive and continued

travelling on before running into the curb, leaving scuff marks. (Amended App. 643). He noted Gamble was discovered approximately 164 feet from the point of impact, and his bicycle was located 150 feet from the point of impact. (Amended App. 660). The officers noted the road was clear and straight with no visibility obstructions, and the posted speed limit was thirty–five miles per hour. (Amended App. 645, 749). Corporal Coats estimated Petitioner's speed was between forty–seven and fifty–seven miles per hour at the time of the accident. (Appended App. 685–686). Based on Gamble's location, he concluded Gamble was either thrown to that position or carried there by Petitioner's van. (Amended App. 688).

C. Verdict & Subsequent Proceedings

On October 15, 2009, the jury found Petitioner guilty as indicted. Judge McMahon sentenced Petitioner to eighteen years' imprisonment and imposed a $10,000 fine.

Petitioner filed a timely notice of appeal, which was perfected on his behalf by Chief Deputy Appellate Defender Wanda Carter. After the final briefs were filed, Petitioner retained Jeremy Thompson, Esquire, to represent him for the remainder of the appeal. (Amended App. 1246). The sole issue before the Court of Appeals was whether the trial judge erred in denying Petitioner's motion to suppress the State's blood test results based on the denial of Petitioner's statutory right to obtain an independent blood test pursuant to section 56–5–2946. Following oral argument, the Court affirmed Petitioner's conviction, finding (1) the trial court erred in admitting the results of the State's blood test analysis; but (2) the error was harmless in light of the overwhelming evidence of Petitioner's guilt. *State v. Jamison*, Op. No. 2012–UP–58 (S.C. Ct. App. filed Feb. 1, 2012). Petitioner and the State's subsequent petitions for rehearing and for writ of certiorari to this Court were denied. (Amended App. 965). The case was returned to the circuit court on August 27, 2013.

Petitioner timely commenced this PCR action on July 10, 2014, and filed an amended

application on March 15, 2018. (Amended App. 965–90; 1019–23). The State submitted its return requesting an evidentiary hearing on June 24, 2015. (Amended App. 993–98). An evidentiary hearing convened before the Honorable William A. McKinnon on April 20, 2018. (Amended App. 1101–303). Petitioner was present and represented by Glenn Walters, Esquire. Assistant Attorney General Al Simon represented the State. On September 7, 2018, after reviewing the entire record and testimony presented, the PCR court issued an order denying relief and dismissing the action with prejudice. (Amended App. 1056–71). Petitioner, through PCR counsel, thereafter filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, and the State filed a return. (Amended App. 1072–77; 1082–89). Petitioner then attempted to file a *pro se* motion to alter or amend pursuant to Rule 59(e), SCRCP, which was stricken from the record by the PCR court for violating Rule 11, SCRCP. (Amended App. 1447–48). The PCR court denied Petitioner's properly filed Rule 59(e) motion on December 13, 2018. (Amended App. 1090–92). This appeal follows.[1]

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

[1] Appellate Defender Adam S. Ruffin was initially appointed to represent Petitioner. Petitioner filed a motion to proceed pro se and requested Mr. Ruffin serve as "standby" counsel. After advising Petitioner of the dangers of self-representation pursuant to *Faretta v. California*, 422 U.S. 806 (1975), this Court granted Petitioner's motion to proceed pro se and denied Petitioner's request for Mr. Ruffin to serve as standby counsel, advising that Appellate Defense shall remain associated with Petitioner's case only for the purpose of providing Petitioner with copies of the transcript and any other records necessary for preparing the Petition and Appendix, and to notify this Court of the date of mailing.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

ARGUMENT

I. The PCR court correctly concluded Trial Counsels were not ineffective for failing to argue that Petitioner's right to an independent blood test was violated where Counsels did raise and vigorously argue this issue through a motion to suppress; the trial judge admitted the State's blood test results over Counsels' objection; and any subsequent motion to dismiss Petitioner's charges entirely would have been fruitless in light of the trial court's ruling on the suppression issue.

In an attempt to re–litigate his unsuccessful direct appeal, Petitioner contends Trial Counsels were ineffective "for failing to move to dismiss within the motion to suppress." (Pet. 3). Petitioner inexplicably links the meaningful opportunity to present a complete defense with the opportunity to obtain an independent blood test pursuant to section 56–5–2946. (Pet. 3). On that basis, Petitioner concludes that the lost blood sample "prohibited the defense from placing the State's case to any meaningful adversarial testing, and therefore counsel should have moved to dismiss the indictment." (Pet. 3).

As an initial matter, Petitioner cannot show prejudice where the Court of Appeals reviewed the trial court's ruling on the suppression motion involving this exact issue and determined the error

to be harmless in light of overwhelming evidence of Petitioner's guilt. While a finding of harmless error during a direct appeal review does not entirely foreclose an applicant's ability to establish the requisite prejudice for relief on the same or a related issues, it would be an exceedingly rare case in which an applicant could do so. *Compare State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Error is harmless when it could not reasonably have affected the result of the trial."), *with Smalls*, 422 S.C. 188, 810 S.E.2d at 843 ("To satisfy the prejudice prong [under *Strickland*], an applicant must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different."). Indeed, "the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal." *McFadden v. State*, 342 S.C. 637, 641, 539 S.E.2d 391, 393 (2000); *see also Vaughn v. State*, 362 S.C. 163, 171 n.3, 607 S.E.2d 72, 76 n.3 (2004) (In deciding the prejudice prong of a PCR action, the PCR court "is to examine the same factors as those analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt.").

At the PCR hearing, Counsel Stitely testified that the biggest problem with Petitioner's case from day one was his 0.226 blood alcohol content on the night of the incident. (Amended App. App. 1188). Counsel Stitely stated, however, that they had an opportunity to challenge the admissibility of the State's toxicology report because Petitioner's blood sample was lost. (Amended App. App. 1188). Counsel Williams explained that Petitioner actually had a strategic advantage at trial based on the lost blood because the defense had the State's report and therefore knew the results were incriminating. (Amended App. 1216–17). This strategy required waiting until the trial had already began and the jury had been sworn to raise the issue of the lost blood sample because the "last thing [they] wanted was a full out investigation into finding the sample." (Amended App. 1188).

Counsel Williams explained that, had they filed a motion to dismiss based on Petitioner's

right to obtain an independent blood test *before* the trial, the second vial of blood may have been recovered. (Amended App. 1168). Trial Counsels would have then gotten the blood analyzed, received an incriminating report similar to the State's, and foregone the possibility of suppressing any report of Petitioner's BAC altogether. (Amended App. 1168–69). Counsel Stitely testified that, had the trial court suppressed the State's report, he would have filed a motion to dismiss. (Amended App. 1216–17). Moving to dismiss the charges on the same grounds the trial judge had just denied the suppression motion would have been both unsuccessful and potentially damaging to his attorneys' credibility with the judge.

Petitioner's contention that he is entitled to a new trial because counsel failed to contemporaneously move to dismiss the indictment is without merit, as he has failed to show any reasonable likelihood the trial court would have dismissed Petitioner's charges even if the State's blood test results had been suppressed. Petitioner ignores throughout his petition the fact that the felony DUI statute does not require a defendant have a specific blood alcohol concentration. [2] At Petitioner's trial, the State presented testimony of multiple police officers and other witnesses unaffiliated with law enforcement regarding Petitioner's impaired condition, confused demeanor, slurred speech, and incriminating smell, testimony and evidence was presented during trial establishing Petitioner was unable to operate his motor vehicle in his lane of travel on a straight road; Petitioner was confused and belligerent with law enforcement officers while awaiting a breathalyzer test; Petitioner had a still–moist bottle of the same brand of beer found inside his van concealed

[2] *Compare* S.C. Code Ann. § 56-5-2933(A) ("It is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more."), *with* S.C. Code Ann. § 56-5-2945(A) ("A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence[.]").

underneath his van on the middle of a bridge; and Petitioner refused to submit to field sobriety tests or a breathalyzer test after he collided with the victim.

Therefore, in light of the overwhelming evidence collectively and conclusively establishing Petitioner was under the influence of alcohol at the time he fatally struck the victim, Petitioner cannot show any reasonable likelihood that his charges would have been dismissed even had the trial court suppressed the State's report. *See State v. Wilson*, 296 S.C. 73, 76, 370 S.E.2d 715, 716 (1988) (finding any error in the admission of blood test results was harmless because it was cumulative to other evidence of Wilson's intoxication); *State v. Degnan*, 305 S.C. 369, 372, 409 S.E.2d 346, 348 (1991) ("In light of the overwhelming evidence of her intoxication, Degnan has shown no prejudice in admission of her refusal to submit to the breathalyzer.").

II. The PCR court correctly concluded Trial Counsels were not ineffective for failing to object to the arresting officer's inability to produce the incident site videotape and stipulating to the officer's affidavit regarding his vehicle's lack of video camera equipment where Counsels had no legal basis to challenge the affidavit and an incident site video was obtained from another officer's vehicle recording device.

Subsection (A) of section 56–5–2953 requires videotaping an individual who operates a vehicle under the influence of alcohol at the incident site, and the recording "must include that individual being advised of his *Miranda* rights prior to the administration of field sobriety tests." *State v. Henkel*, 413 S.C. 9, 11, 774 S.E.2d 458, 460 (2015). A violation of this section may result in dismissal of the DUI charges unless an exception applies under subsection (B). Crucially, however, subsection (G) provides that the videotaping requirements and other provisions contained in subsections (A), (B), and (C) take effect for each law enforcement vehicle used for traffic enforcement **only** "once the law enforcement vehicle is equipped with a video recording device."

Petitioner cites *City of Greer v. Humble*, 402 S.C. 609, 742 S.E.2d 15 (Ct. App. 2013), in support of his contention that Officer Stone's affidavit was facially deficient because it "did not give a valid reason . . . for failing to videotape the incident." (Pet. 4). Petitioner also cites *City of Rock Hill*

v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007), claiming that Cayce's failure to equip Officer Stone's vehicle with the required video recording devices in violation of section 56–5–2953 warrants dismissal of the DUI charges. However, Petitioner's reliance these cases is misplaced.

As an initial matter, in both *Humble* and *Suchenski*, **no recording** of the incident or arrest was obtained although arresting officers in both cases drove vehicles equipped with the proper video recording devices in compliance with section 56–5–2953. In *Humble*, the Court of Appeals found that officer's affidavit to be facially deficient because it "did not provide *which* reasonable efforts were made to maintain the video recording equipment in an operable condition," which is required under subsection (B). 402 S.C. at 615–16, 742 S.E.2d at 18 (emphasis in original). In *Suchenski*, this Court affirmed the circuit court's reversal of the defendant's DUI conviction, finding the City's claim of exigent circumstances was not preserved for review, and in the absence of an exception, subsection (A) of 56–5–2953 required dismissal of the charge. 373 S.C. at 15–16, 646 S.E.2d at 880; *see also State v. Manning*, 400 S.C. 257, 265, 734 S.E.2d 314, 318 (Ct. App. 2012) (noting that the Court in *Suchenski* only considered subsection (A) of 56–5–2953 because the applicability of subsection (B) was not considered by the lower court and thus not preserved for appellate review).

Two key distinctions are present in Petitioner's case. First, Officer Stone's vehicle was not equipped with the video recording device—thus, the provisions of subsections (A), (B), and (C) were not implicated. (Amended App. 1307). Second, Officer Smith's vehicle recorded Petitioner being advised of his *Miranda* rights, Petitioner's refusal to take a field sobriety test, and Officer Stone placing Petitioner under arrest—which is in substantial compliance with the recording requirements in subsection(A)(1)(a) and comports with the purpose of the statute. (Amended App. 175–176, 283–285); *see Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011) (finding the purpose of section 56–5–2953 is to create direct evidence of a DUI arrest).

Petitioner has failed to show any deficiency on the part of Trial Counsels for failing to pursue the issue regarding Officer Stone's affidavit and lack of video recording equipment in his vehicle. As noted by the PCR court, both Counsel Williams and Counsel Stitely testified there was no legal basis to challenge the affidavit because it was sufficient to meet the requirements of section 56–5–2953. *See Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Counsel Stitely further explained that Petitioner's 2008 arrest and 2009 trial both occurred before this Court considered circumstances where DUI charges may be dismissed based on a municipality's noncompliance with the statute. (Amended App. 1193–95); *e.g.*, *Roberts*, 393 S.C. 332, 713 S.E.2d 278. This Court has never required trial counsel to "foresee successful appellate challenges to novel questions of law." *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Thus, the PCR court correctly determined Trial Counsels were not ineffective in this regard.

III. The PCR court correctly concluded Trial Counsels were not ineffective for failing to inform Petitioner that Judge McMahon's daughter was employed by the Eleventh Circuit Solicitor's Office where no conflict of interest existed and the PCR court correctly did not rule on the allegation framed as trial court error based on Judge McMahon's failure to inform Petitioner of his daughter's employment with the Eleventh Circuit Solicitor's Office because trial court error is not a cognizable PCR claim.

At the PCR hearing, Petitioner testified he was never notified by counsel that Judge McMahon's daughter worked for the Eleventh Circuit Solicitor's Office. (Amended App. 1117). Petitioner stated he found out about their relationship after trial, which is when he found out about Judge McMahon's recusal policy. (Amended App. 1118).

Counsel Stitely testified he did not recall having any discussions with Petitioner about the existence of a potential conflict of interest with Judge McMahon. (Amended App. 1197). Counsel Stitely noted Judge McMahon had obtained a subsequent opinion from the Judicial Advisory Committee that indicated he no longer needed to request a waiver from the parties. (Amended App.

1197). Counsel Stitely further testified he had no concern about there being a conflict of interest because Judge McMahon was honest, and had recused himself in the past. (Amended App. 1199).

Counsel Williams also testified that they did not discuss the alleged conflict of interest with Applicant because there was no conflict. (Amended App. 1232). Counsel Williams noted that two opinions had been issued regarding the alleged conflict, and they did not indicate there would be an actual conflict of interest. (Amended App. 1224). Further, Counsel Williams was aware that Judge McMahon's daughter practiced only in Family Court. (Amended App. 1224). He also noted that Judge McMahon was an honorable man, and if there had been a conflict of interest, Judge McMahon would have recused himself. (Amended App. 1234).

Petitioner now complains, as he did at the PCR hearing, that the judge did not follow his own policy in Petitioner's case. (Amended App. 1117–18, Pet. 5). The PCR court referenced the Judicial Advisory Committee Opinion issued November 28, 2011—specifically addressed Judge McMahon's situation—which states the following:

> [I]t is the opinion of this Committee that a circuit court judge may preside over criminal matters where the judge's daughter and son-in-law are employed by the Solicitor's office within separate branches of that office whose cases do not appear before the circuit court. Furthermore, **the inquiring judge here does not need to disclose the relationship** because independence of the two branches within the solicitor's office and the fact that none of the family court or transfer court cases appear before the circuit court . . .

(Amended App. 1063–64). While this opinion was issued two years after Petitioner's trial, it nonetheless supports Trial Counsel's conclusion that no conflict of interest existed. Trial Counsels therefore had no reason to advise Petitioner of Judge McMahon's daughter's employment with the solicitor's office.

Petitioner nonetheless testified that he had "had a right to have [Judge McMahon] recused." (Amended App. 1118). However, Petitioner has failed to show any personal bias Judge McMahon

allegedly would have had as a result of his daughter's employment, and his underlying claim is entirely without merit. A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Canon 3(E)(2)(a) of Rule 501, SCACR. It is not enough for a party seeking disqualification to simply allege bias or prejudice. *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 5034 S.E.2d 311 (1998). Petitioner's claim that "if the petitioner had an impartial judge, he may have ruled correctly in suppressing the State's blood at the suppression hearing . . ." is nothing more than speculation. (Pet. 5). *Cf. Christensen v. Mikell*, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996) ("To compel recusal, the alleged bias of the judge must be personal, as distinguished from judicial, in nature.").

Petitioner attempts to raise the same argument in issue number seven, alleging Judge McMahon committed reversible error for failing to inform Petitioner of his daughter's employment with the Eleventh Circuit Solicitor's office—which Trial Counsels were clearly aware of. This allegation of trial court error is procedurally barred by section 17–27–20(b) of the Uniform Post Conviction Procedure Act. *See generally Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) ("Allegations of trial court error are not cognizable on PCR.").

IV. The PCR court correctly concluded Trial Counsels were not ineffective for stipulating to the introduction of certain photographs where Counsels articulated a valid strategy for doing so; where Counsels vigorously argued as to what the photographs depicted; and where Petitioner failed to show he was prejudiced by the photographs.

Petitioner's argument that Trial Counsels should have moved to suppress the crime scene photographs is meritless. As noted by the PCR court, Trial Counsels had no legal basis to challenge the admissibility of the photographs, and the record clearly indicates that Trial Counsels vigorously argued as to what the photographs depicted and what they meant for Petitioner's case. Petitioner simply ignores the fact that the jury was made aware of the circumstances surrounding the introduction of each photograph, and therefore certiorari should be denied as to this issue.

Petitioner has failed to demonstrate that Trial Counsels' performance fell below the *Strickland* standard of "reasonable professional judgment," or that his attorneys' decision not to file a motion to suppress was "outside the wide range of professionally competent assistance." *Id.* at 690. Counsel Williams and Counsel Stitely both testified that they decided to stipulate to the crime scene photographs because they did not see any legal basis to object or challenge their admissibility. (Amended App. 1192, 1241). *Cf. Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) ("A lawyer's zeal on behalf of his client does not require him to file a motion which he knows to be meritless on the facts and the law.")

As the PCR judge noted at the hearing, "all that is necessary for the photo to be admitted is, is this a true and accurate depiction of what it purports to show?" (Amended App. 1270). *See State v. Campbell*, 259 S.C. 339, 344, 191 S.E.2d 770, 773 (1972) (explaining that "[n]ormally it is sufficient to justify admittance of photographs into evidence if a person familiar with the scene can say that the pictures truly represent the scene involved"). Counsel Stitely explained that the photographs laid a foundation for what the officers were testifying to regarding the crime scene. (Amended App. 1190–91). Counsel Williams further explained that agreeing to stipulate to certain photographs that, in his opinion were not particularly harmful, helped him negotiate with the solicitor to keep other harmful photographs out. (Amended App. 1242). *See Smith v. State*, 386 S.C. at 567, 689 S.E.2d at 632 ("When counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

While accusing the fire department of "manipulating" the crime scene and causing "undue prejudice," Petitioner specifically complains about the photographs taken after the bridge was sprayed down to wash off all the blood. At trial, Detective Reese acknowledged the bridge where the accident occurred was sprayed by the fire department after the initial photographs were taken, and the jury was

made aware of which photographs were taken before and after the scene was sprayed. (Amended App. 400). During closing argument, Counsel Williams pointed out several inconsistencies in the before and after photographs that were indicative of reasonable doubt. (Amended App. 761–62). However, as Counsel Williams stated, "you don't get to object to stuff just because you don't like it," and further noted that making frivolous objections can weaken their credibility with a jury. (Amended App. 1241).

Petitioner has failed to provide any legitimate basis Trial Counsels would have had for moving to suppress these photographs. Petitioner has further failed show prejudice, or "establish that had the motion been filed, there was a reasonable probability that the evidence would have been suppressed, and the outcome of the trial would have been different had the evidence been suppressed." *Lowry*, 21 F.3d at 346–47 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). Therefore, the PCR court properly denied relief as to Petitioner's allegation Trial Counsels were ineffective in this regard.

V. The PCR court correctly concluded that Petitioner's first appellate counsel, Wanda Carter, was not ineffective for failing to file a reply brief addressing the State's harmless error claim because any possible deficiency in this regard was cured by Petitioner's second appellate counsel, Jeremy Thompson, filing a reply brief directly addressing the harmless error claim.

Petitioner contends his first appellate counsel, Chief Appellate Defender Wanda Carter, was ineffective for failing to file a reply brief addressing the State's harmless error claim. The PCR court correctly found this claim to be without merit. Petitioner did not present any testimony from Counsel Carter at the PCR hearing. Counsel Thompson, however, filed a reply brief on Petitioner's behalf. Counsel Thompson testified that he focused on refuting the State's argument that the evidence of guilt was overwhelming. (Amended App. 1248). Therefore, Petitioner cannot show prejudice because any possible deficiency on the part of Counsel Carter was cured by Counsel Thompson filing a reply brief.

VI. The PCR court correctly concluded that Petitioner's second appellate counsel, Jeremy Thompson, was not ineffective for failing to argue the independent blood test issue was structural instead of harmless error where the suppression of evidence clearly falls under

the purview of harmless error analysis.

Petitioner next contends Counsel Thompson was ineffective for failing to argue that the trial court's admission of the State's blood test results was structural as opposed to harmless error. As the PCR court noted, Counsel Thompson clearly rebuts the State's harmless error argument in the reply brief. (Amended App. 866–75). Petitioner nonetheless insists that Counsel Thompson should have instead argued that the denial of the opportunity to obtain independent blood testing was "structural error because it affects 'the framework' upon which a trial can proceed fairly. . ." (Pet. 8). Petitioner claims he was thereby "depriv[ed] of the only defense provided by statute." (Pet. 8).

At the PCR hearing, Counsel Thompson testified he was retained after the final briefs had been submitted. (Amended App. 1246). Counsel Thompson filed a motion to file a reply brief out of time, which was granted. (Amended App. 1246). Counsel Thompson testified he focused on arguing against the strength of the evidence presented in the State's case. (Amended App. 1248). Specifically, Counsel Thompson argued in the reply brief that none of the prongs of felony DUI had been established beyond a reasonable doubt or with overwhelming evidence. (Amended App. 1251). Counsel Thomson testified that, at oral argument, the Court of Appeals appeared to agree with Petitioner's position that the State's blood test evidence should have been suppressed. (Amended App. 1250–51). However, the Court's main focus was on the contention that any error in admitting the State's blood test results was harmless in light of the overwhelming evidence of Petitioner's intoxication. (Amended App. 1251).

Counsel Thompson further testified he filed a petition for writ of certiorari after the petition for rehearing was denied. (Amended App. 1252–53). He spoke with Petitioner at length, and Petitioner provided a great deal of input regarding the issues presented in the petition. (Amended App. 1253–54). Counsel Thompson specifically recalled speaking with Petitioner prior to filing the reply to the State's return to the petition. (Amended App. 1209). At that point, Petitioner was concerned

why the suppression issue had not been presented. (Amended App. 1257). Counsel Thompson explained to him that he was only going to argue the harmless error issue. (Amended App. 1257).

Counsel Thompson testified that Petitioner wanted him to argue throughout the course of the entire case that the charge should be dismissed because in *Town of Fairfax v. Smith*, dismissal was the remedy given due to the violation of that defendant's reasonable opportunity to obtain an independent blood test. (Amended App. 1254–55). Counsel Thompson explained that in a regular DUI case, the main evidence of intoxication is usually the blood sample. What Counsel Thompson tried to convey to Petitioner, "and I don't know that it ever sunk in, is that there's a difference between a regular DUI case and a felony DUI case." (Amended App. 1255). As discussed above, Petitioner continues to acknowledge this reality.

Petitioner cannot show he was prejudiced by Counsel Thompson's failure to raise this issue because a trial court's decision on the admissibility of evidence is a fundamental "harmless-error" issue, which in no way "affect[s] the framework within which the trial proceeds." *State v. Rivera*, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013). The United States Supreme Court has found "an error to be 'structural,' and thus subject to automatic reversal only in a very limited class of cases." *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). In fact, "[m]ost trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis." *Rivera*, 402 S.C. at 246, 741 S.E.2d at 705. The complete deprivation of counsel and trial before a biased judge are examples of structural errors which "deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8–9. The statutory right to obtain independent blood testing simply does not fall in this category.

VII. The PCR court correctly denied Petitioner's motion for summary judgment where Petitioner was represented by counsel and therefore his *pro se* motion was not properly

before the court. To the extent this Court finds the motion was properly raised, the PCR court correctly denied the motion because it raised a direct appeal issue.

Petitioner—while represented by PCR counsel—filed a pro se motion for summary judgment on April 9, 2018. (Amended App. 1024–27). This motion is erroneously included as part of the lower court record in violation of Rule 210(c), SCACR, which prohibits appellant from including in the record matter not presented to the lower court. *See generally State v. Stuckey*, 333 S.C. 56, 57–58, 508 S.E.2d 564, 564 (1998) (finding there is no right to "hybrid representation" under either the United States or South Carolina Constitutions and refusing to consider substantive documents filed pro se by person represented by counsel); *State v. Devore*, 416 S.C. 115, 120, 784 S.E.2d 690, 692 (Ct. App. 2016) ("[If] the pro se letter is a substantive document filed while [the defendant] was represented by counsel, such that his representation is partially pro se and partially by counsel, it would be improper and could not be accepted. Rather, it would be considered a nullity."); *see also Whelchel v. Bazzle*, 489 F. Supp. 2d 523, 531–32 (D.S.C. 2006) (discussing South Carolina's valid ban on "hybrid" representation and holding PCR court properly ignored represented petitioner's pro se amendments to his PCR application).

Petitioner nonetheless argues—as he did in his improperly filed summary judgment motion—that the State failed to prove all elements of felony DUI resulting in death beyond a reasonable doubt. (Pet. 10). Notwithstanding preservation issues, this argument is not a cognizable PCR claim because it goes to sufficiency of evidence, and therefore could only have been raised on direct appeal. *See, e.g.*, *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("[PCR] is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.). To the extent PCR counsel attempted to argue the *pro se* motion at the beginning of the hearing, the PCR court correctly denied the motion. (Amended App. 1111–12). Thus, certiorari should be denied as to this issue.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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