

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Beaufort County  
John C. Hayes, III, Trial Judge  
R. Ferrell Cothran, Jr., Post-Conviction Relief Judge

Appellate Case No. 2019-001338

**RECEIVED**

**Nov 16 2020**

**S.C. SUPREME COURT**

RODNEY GALIMORE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

ISSUE ON PETITION FOR WRIT OF CERTIORARI..... ii

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW .....3

ARGUMENT .....4

The post-conviction relief court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to present an expert in accident reconstruction where trial counsel was able to elicit the same evidence an accident reconstruction expert would have provided through vigorous cross-examination of State’s witnesses and highlighted this information in his closing argument, and where there is no substantial likelihood the result of Petitioner’s trial would have been different had an accident reconstruction expert been presented.....4

CONCLUSION.....12

## **ISSUE ON PETITION FOR WRIT OF CERTIORARI**

### **Petitioner's Issue on Petition for Writ of Certiorari**

Whether the PCR court erred where it found counsel provided effective representation where the State alleged the fatal collision occurred because Petitioner was driving in the oncoming lane, and where the defense offered no expert testimony about the collision even through Martin Schussel, and expert in accident reconstruction, had told counsel that the State's accident investigation and animation were unreliable and that petitioner's car shifted to the left because of the collision, and where Petitioner was prejudiced because such evidence was not otherwise adduced?

### **Respondent's Counterstatement on Petition for Writ of Certiorari**

Did the post-conviction relief court properly find Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to present an expert in accident reconstruction where trial counsel was able to elicit the same evidence an accident reconstruction expert would have provided through vigorous cross-examination of State's witnesses and highlighted this information in his closing argument, and where there is no substantial likelihood the result of Petitioner's trial would have been different had an accident reconstruction expert been presented?

## STATEMENT OF THE CASE

On August 11, 2007, Petitioner Rodney Galimore attended a children's birthday party for his son and the son of his ex-girlfriend, who had ended her relationship with Petitioner earlier that day. At the party, attendees noted Petitioner was visibly intoxicated. Petitioner got into a physical altercation with his ex-girlfriend, wherein he pistol-whipped her in the face. His ex-girlfriend asked Petitioner to leave and called law enforcement. Petitioner, who had a suspended license at the time, placed his two minor sons into his vehicle and drove away. Shortly thereafter, Petitioner's vehicle struck a motorcycle, killing its driver. Witnesses on the scene shortly after the wreck reported Petitioner's vehicle was in the wrong lane. When law enforcement arrived on the scene, officers noted Petitioner was heavily intoxicated and transported Petitioner to the hospital to collect a sample of his blood. An analysis of the sample revealed Petitioner had a blood alcohol content of 0.153 percent. (App. 193-209, 210-220, 223-308, 324-336).

As a result, the Beaufort County Grand Jury indicted Petitioner for reckless homicide, driving under suspension (DUS), child endangerment, and felony driving under the influence (DUI) resulting in death. Petitioner was represented by Beaufort County Public Defender Gene Hood. Deputy Solicitor Angela McCall-Tanner of the Fourteenth Circuit Solicitor's Office prosecuted the case. The State called Petitioner's case to trial on November 17, 2008, and a jury was selected but not sworn. The following day November 18<sup>th</sup>, Petitioner made a motion to quash the felony DUI resulting in death indictment, arguing the indictment failed to specify the requisite act forbidden by law that the State asserted Petitioner had committed. Following a hearing, the Honorable Perry M. Buckner, III, circuit court judge, granted Petitioner's motion and quashed the indictment, concluding the State did not specify the act forbidden by law. Judge Buckner indicated the State would be permitted to re-submit an indictment to the grand jury, and

he continued the trial with respect to the other three charges. Thereafter, on November 20, 2008, Petitioner was re-indicted for felony DUI resulting in death, with the new indictment alleging Petitioner violated the law by failing to drive on the right side of the roadway.

Petitioner proceeded to trial on December 8, 2008, before the Honorable John C. Hayes, III, circuit court judge. The jury convicted Petitioner as indicted. Judge Hayes sentenced Petitioner to imprisonment for a term of twenty-five years for felony DUI resulting in death, a concurrent term of ten years for reckless homicide, a consecutive term of ten years for child endangerment, and a concurrent six month term for DUS.

Petitioner appealed his convictions and sentences, arguing the trial court erred in denying his motions for directed verdict on the felony DUI and child endangerment indictments and for granting the State a continuance. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Galimore, 396 S.C. 471, 721 S.E.2d 475, 476 (Ct. App. 2012). Petitioner sought rehearing *en banc*, and following the denial of rehearing, sought certiorari review from the South Carolina Supreme Court. The Supreme Court denied his certiorari petition. The remittitur was returned to the circuit court on November 14, 2013.

Petitioner filed a timely application for post-conviction relief, alleging various claims of ineffective assistance of counsel. On August 28, 2018, an evidentiary hearing was convened before the Honorable R. Ferrell Cothran, Jr., circuit court judge. Petitioner was present and represented by counsel Tristan Shaffer. Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office appeared on behalf of Respondent. Petitioner testified and presented accident reconstruction expert Martin Schussel. Prosecutor McCall-Tanner also testified. By order filed June 13, 2019, Judge Cothran denied and dismissed the application. Petitioner filed a motion to reconsider, which was summarily denied by the court.

## STANDARD OF REVIEW

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

## ARGUMENT

**The post-conviction relief court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to present an expert in accident reconstruction where trial counsel was able to elicit the same evidence an accident reconstruction expert would have provided through vigorous cross-examination of State's witnesses and then highlighted this information in his closing argument, and where there is no substantial likelihood the result of Petitioner's trial would have been different had an accident reconstruction expert been presented.**

Petitioner asserts trial counsel was constitutionally ineffective for failing to present an accident reconstruction expert to rebut the State's evidence that Petitioner was driving in the oncoming lane and the PCR court erred by denying relief on this ground. Specifically, Petitioner argued the testimony of accident reconstruction expert Martin Schussel, whom trial counsel had consulted with prior to trial but did not present as a witness at trial, was necessary to establish that the State's accident investigation and resulting animation were not reliable. Petitioner also contends Schussel's testimony was necessary to argue Petitioner's vehicle was in the correct lane at the time of the fatal crash and would have created reasonable doubt for acquittal had Schussell testified. However, the PCR court properly considered the record in its entirety, listened to the evidence presented including Schussel's testimony, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective, finding counsel thoroughly attacked the State's case through cross-examination. This finding is supported by ample probative evidence and not premised on any errors of law, and accordingly, this Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging

counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687. Harrington, 562 U.S. 86.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–

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

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

In support of his assertion trial counsel should have presented an accident reconstruction expert, Petitioner presented Martin Schussel, who was admitted as an expert in accident reconstruction. Schussel testified trial counsel asked him to review Petitioner's file prior to trial but that he was never formally retained to work on Petitioner's case until the post-conviction relief proceeding. He testified based on his review of Petitioner's case, the animation presented by the State was unreliable because it was based on too many unknown factors, such as the speed

of Petitioner's vehicle and the motorcycle, the direction of Petitioner's vehicle and the motorcycle, the speed or radius of Petitioner's turn. He elaborated the investigation and resulting animation were all based on assumptions, rendering it inaccurate. (App. 586-606).

At the time of Petitioner's post-conviction relief evidentiary hearing, trial counsel had passed away and therefore, could not defend his performance or respond to Petitioner's allegations. In light of the lack of testimony from trial counsel as to why Schussel or a similar expert was not presented, Petitioner improperly assumes because no trial strategy was presented for why trial counsel elected not to present Schussel at trial, the post-conviction relief court should have accepted the testimony of Schussell and granted relief. However, the post-conviction relief court properly considered the trial record and found Petitioner failed to establish that counsel was constitutionally ineffective in light of trial counsel's thorough cross-examination of the State's witnesses. There is ample evidence to support this finding, as the record clearly establishes trial counsel thoroughly and efficiently cross-examined the State's witnesses to elicit the same evidence that could have been presented through an accident reconstruction expert like Schussel.

At Petitioner's trial, the State argued Petitioner was driving on the wrong side of the road when his vehicle fatally collided with the motorcycle, killing its driver instantaneously. In support of this theory, the State presented Trooper Nicholas Sprouse of the South Carolina Highway Patrol, the investigating officer. On cross examination, trial counsel vigorously questioned Trooper Sprouse and was able to draw out numerous inconsistencies or flaws in his investigation. Specifically, trial counsel elicited the following from Sprouse: that neither Sprouse nor any other officer recorded the scene despite having the capabilities to do so; that there were several inconsistencies between his report and trial testimony; that he failed to verify the

information he included in his report; that he failed to get statements from or interview any witnesses on the scene; that he did not know the speed Petitioner's vehicle or the motorcycle were traveling and he guessed speeds; that he did not know whether Petitioner's vehicle was four-wheel-drive or two-wheel-drive; that he failed investigate or review Petitioner's vehicle after it was towed from the scene; that he inferred the impact point of Petitioner's vehicle and motorcycle; that he inferred Petitioner's vehicle had not moved and was immovable after the impact point, that it was physically impossible for Petitioner to have completed or be in the process of completing a legal U-turn but also have illegally crossed into the wrong lane; that he failed to measure or otherwise analyze the tire tracks; that Petitioner was not charged with driving left of center for more than a year following the accident until his motion to quash was granted; and that he did not know how far the motorcycle would have travelled following impact.(App. 259-306).

Trial counsel similarly attacked the credibility and accuracy of the investigation and resulting animation during his cross-examination of Trooper Russell Ashe of the South Carolina Highway Patrol. During cross-examination, trial counsel elicited the following from Trooper Ashe: that he did not know the specifications of Petitioner's vehicle; that he improperly listed the make and model of Petitioner's vehicle and he was not sure how this impacted his calculations; that he assumed the speeds of Petitioner's vehicle and the motorcycle; that he assumed Petitioner's vehicle traveled in a straight line; that he never reviewed or examined Petitioner's vehicle or the motorcycle; that law enforcement did not use a mechanical specialist or engineer to assist with this investigation; and that he did not know the impact location or if the vehicles moved after impact. (App. 364-399).

Trial counsel elicited similar information from Corporal Johnny Rosano, including that he failed to review the vehicles and that all the information for the State's animation came from Troopers Sprouse and Ashe without any personal knowledge. (App. 400-408).

After eliciting this damaging testimony regarding the State's investigation and animation, trial counsel then argued these flaws and inconsistencies rendered the State's conclusions as to the accident unreliable and amounted to reasonable doubt requiring acquittal. Trial counsel highlighted all the deficiencies in the investigation and resulting animation, including that the resulting animation and conclusions of law enforcement were illogical and failed as a matter of common sense. (App. 423-436).

As demonstrated above, Petitioner cannot establish any deficiency of trial counsel because the very testimony he asserts should have been introduced through Schussel or a similar expert in accident reconstruction was elicited through trial counsel's thorough, deft, and vigorous cross-examination of the State's witnesses. Trial counsel's decision to use cross-examination rather than presenting an expert witness was a reasonable decision, as evidenced by the trial transcript. Cf. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (“[C]ounsel's failure to procure expert witnesses did not render her representation deficient given she vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence.”), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); see also Richter, 562 U.S. at 111 (“Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense.”); Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (concluding trial counsel's decision not to present an expert witness to rebut the testimony of the State's expert witness constituted a legitimate trial strategy under the circumstances and reversing a ruling

reaching a contrary conclusion), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Frasier v. State*, 306 S.C. 158, 160-161, 410 S.E.2d 572, 573 (1991) (“Petitioner . . . argues that trial counsel was deficient in failing to procure an expert witness to challenge the DNA evidence presented at trial. We disagree. The record reveals that trial counsel vigorously cross-examined the state’s DNA experts and attacked the accuracy of the evidence. We cannot say that his performance was unreasonable under prevailing professional norms.”). This Court should reject Petitioner’s assertions that failure to call Schussel at trial was based on sheer neglect. See *Yarborough*, 540 U.S. at 8 (holding there is a “strong presumption” that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect.”).

Additionally, because the testimony of Schussel was cumulative to the testimony already presented to the jury through trial counsel’s cross-examination, Petitioner cannot establish a substantial likelihood that the result of the proceeding would have been different had an accident reconstruction expert been presented. See *Harrington*, 562 U.S. 86 (noting that to establish the necessary prejudice to prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate a substantial likelihood the result of the proceeding would have been different but for counsel’s error). Accordingly, the post-conviction relief court properly denied relief and this Court should deny certiorari.

**CONCLUSION**

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

Respectfully submitted,

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