STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Horry County Court of Common Pleas

The Honorable Steven H. John, Trial Judge
The Honorable Kristi F. Curtis, PCR Judge

Appellate Case No. 2019-001695

BRUCE A. HILL. ..... Petitioner.

v.

STATE OF SOUTH CAROLINA. ..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General
S.C. Bar # 104191

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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Petitioner's Statement of Issues on Certiorari

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II. Did the PCR Court err in denying the Petitioner's application as Counsel was ineffective when he stipulated to the chain of custody on the blood evidence instead of calling Deidre Faulk as a witness, when Faulk had a prior conviction for breach of trust that she could have been impeached on?

III. Did the PCR Court err in denying the Petitioner's application when Counsel was ineffective when he failed to impeach George Carrick with his prior conviction for breach of trust that was easily found on the public index, even without an NCIC report from the Solicitor?

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I. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective when he did not pursue a third-party guilt strategy when the Court prohibited admission of the third-party's conviction and evidence of third-party guilt was irrelevant to the issue of Petitioner's guilt.

II. Petitioner's allegation that counsel was ineffective for stipulating to the chain of custody report instead of calling Faulk as a witness solely to impeach her based upon a prior conviction was not properly preserved on appeal, but even if it was properly preserved, Petitioner's claim does not require a remand and lacks merit because Counsel did not know about the conviction or her involvement in the chain of custody at trial, articulated a reasonable strategy in deciding to challenge the time frame and security of the chain of custody instead of alleging the chain was tampered with without any evidence to substantiate the claim with and Petitioner was not prejudiced as a result because the witness was not called at the PCR hearing and a baseless objection to the chain of custody would have been overruled.

III. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failing to impeach Carrick with his prior conviction because Counsel had no reason to prepare an impeachment, was blindsided at trial

concerning the importance of Carrick's testimony and Petitioner was not prejudiced by any alleged deficiency because the impeachment proffered was weak, at best, and did not impact the results of the trial proceedings.

IV. The post-conviction relief court properly determined Petitioner failed to establish counsel was ineffective for failing to call an expert witness to challenge the adequacy of the State's processes for the collection, handling, and preservation of evidence where Counsel acted reasonably in deciding to engage in a vigorous cross-examination instead and Petitioner was not prejudiced by this decision because the expert's testimony would contribute nothing substantively new and, thus, would not have changed the trial results.

STATEMENT OF THE CASE

Bruce A. Hill (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its April 2011 term, the Horry County Grand Jury indicted Petitioner for two counts of murder (2011-GS-26-00987 and -00988) and one count of first degree burglary (2011-GS-26-01327). Petitioner was represented by Ronald Hazzard, Esquire (hereafter "Counsel"). Assistant Solicitors Gregory Hembree and Jimmy Richardson, II, from the Fifteenth Circuit Solicitor's Office, represented the State. On September 12-14, 2011, the case proceeded to trial before the Honorable Steven H. John, and a jury. On September 14, 2011 the jury found Petitioner guilty on all charges. Judge John sentenced Petitioner to life without parole on both murders and thirty years' imprisonment for first degree burglary, sentences running concurrently.

Petitioner timely filed a notice of appeal, through Counsel, on September 19, 2011. On appeal, the following issues were raised:

1. Whether the trial judge erred when he granted the State's request to disallow any mention of the conviction of Richard Gagnon for the same crimes for which Appellant stood trial.

2. Whether the trial judge erred when he admitted into evidence a letter sent from SLED to local Horry County law enforcement which indicated Appellant had a criminal record.

3. Whether the trial judge erred when he granted the State a six month continuance of the 180 days it had to bring Appellant to trial under the Interstate Agreement on Detainers Act.

Briefing was completed on September 13, 2013 and the case proceeded to oral argument on February 5, 2014. The South Carolina Supreme Court found:

1. A jury's verdict concerning a third-party is irrelevant to Appellant's guilt and the circuit court did not err in refusing to allow evidence of Gagnon's convictions.

2. The admission of the letter was erroneous but did not entitle Appellant to the reversal of his convictions because the prejudicial impact did not rise above speculation.

3. The decision to grant a continuance did not amount to a prejudicial abuse of discretion, given the complexity of the case and the need for a hearing pursuant to *Schmerber v. California*, 384 U.S. 757 (1966).

The remittitur was issued July 25, 2014.

Petitioner timely filed a PCR application on April 15, 201 amended on September 1, 2017, September 14, 2017, and October 4, 2017. Respondent made its return on August 2, 2016. The PCR hearing occurred on November 27, 2018, before the Honorable Kristi Curtis. Matthew S. Swilley, Esquire represented Petitioner and Assistant Attorney General Johnny James, Jr. represented Respondent. The PCR Court denied relief, finding that:

1. Counsel was not ineffective for failing to introduce evidence of third party guilt at trial because he articulated a valid strategic reason for not introducing the evidence; namely, that it was irrelevant to Petitioner's own guilt.
2. Counsel was not ineffective for failing to impeach Deidre Faulk at trial because she was not called at Petitioner's trial and, accordingly, Counsel could not impeach her.
3. Counsel was not ineffective for failing to challenge or moving to suppress the chain of custody because no evidence of tampering with the chain of custody was asserted and, as a result, the baseless motion likely would have been overruled.
4. Counsel was not ineffective for failing to impeach Carrick with his prior conviction because Counsel was not made aware of the conviction, was blindsided at trial concerning the importance of Carrick's testimony and Petitioner was not prejudiced by any alleged deficiency because the impeachment proffered was weak, at best, and did not impact the results of the trial proceedings.
5. Counsel was not ineffective for failing to call an expert witness to challenge the adequacy of the State's processes for the collection, handling, and preservation of forensic evidence where Counsel acted reasonably in deciding to forego the expert witness in lieu of presenting a vigorous cross-examination of the State's witness and Petitioner was not prejudiced by this decision because the expert's testimony would contribute nothing substantively new beyond his mere credentials.

The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections on September 6, 2019. Thus, the request for relief was denied. Petitioner appeals from the denial of relief.

STATEMENT OF FACTS

Diane and Charlie Parker, Sr. ("the Victims") were shot to death in their home on April 11-12, 2005. The home was located about seventy-five to one hundred yards from their family glass installation business, Mirror Tech. (App. 114). The Victims' bodies were not discovered until the morning of April 12 when employees of Mirror Tech investigated why Mr. Parker was late for work. (App. 113-14). When police arrived, they found a back door window pane broken. (App. 149-50, 154). Crime scene investigators could not determine if anything was stolen from the home, but no cash was found in the home, Mr. Parker's wallet, or Mrs. Parker's purse. (App. 183-85). Mrs. Parker's jewelry was not taken from her body or from a jewelry box. (App. 177-78, 180). Drawers were opened and papers scattered in the master bedroom. (App. 177-78).

Mr. Parker was shot in the bathroom where he collapsed, and Mrs. Parker was shot or shot at while reclining in bed with the covers up, after which she got out of bed and was murdered in the bedroom while lying on the floor. (App. 165-69, 174-77, 180-81, 337-38, 343). Prior to her murder, Mrs. Parker was hit over her eye and her clavicle broken by being struck with some object. (App. 344, 347-48). Three shell casings were recovered. (App. 183).

Blood from an unknown third party was found in the master and spare bedrooms, from which four samples were collected and used to develop a DNA profile by South Carolina Law Enforcement Division (hereafter "SLED"). (App. 188-89, 193-98, 207-08, 261-64, 311). The DNA from each sample belonged to the same person. (App. 268). This profile was entered into the Combined DNA Information System (hereafter "CODIS") national data base. (App. 274).

Petitioner was arrested on an unrelated charge about one week after the Victims' murders in Horry with Kahlil Moore, who was once employed with the business until about four months before the murders. (App. 317-20, 343).

Two years later, the Horry County Police Department (hereafter "HCPD") was notified of a CODIS hit linking Petitioner, upon which the State petitioned for permission to take a DNA sample from Petitioner. (App. 280-81). The request was granted and a sample taken, matching the DNA to Petitioner. (App. 283-84, 293, 298-99). The likelihood of randomly selecting an unrelated individual with the same DNA profile was one in 3.3 quadrillion. (App. 307).

Pretrial, the State sought guidance concerning how to treat discussion of Richard Gagnon, a person then-convicted[1] for the murders. (App. 13). The State asserted the conviction was irrelevant, that it did not intend to present testimony about him, and affirmed its intent to object to testimony regarding Gagnon's conviction. (App. 13). Counsel replied that the case theory consisted of Gagnon and Petitioner committed the crime together and requested permission to question witnesses about Gagnon, but denied his intent related to third-party guilt. (App. 15-16). The State stressed the sample connected Petitioner to the murder and Gagnon's involvement was irrelevant to Petitioner's guilt. (App. 16-17). The court allowed the attorneys to examine witnesses about whether someone else was present, but disallowed them from bringing up evidence of the conviction. (App. 19). Gagnon was not discussed before the jury.

Counsel indicated that on September 9, 2011, he was provided a SLED DNA report and did not have an "opportunity to confer with any expert" after receiving it the Friday afternoon before trial. (App. 68). Counsel moved for a continuance and an ex parte motion for funding. (App. 69). The State replied that the original was provided on April 11, 2011, and the only difference "was the statistical analysis on the percentages of the match." (App. 69-71). After making the motion, Petitioner wished "to withdraw and forego any motion for a continuance"

[1] Gagnon's conviction was vacated on January 7, 2014, based on Robert Taylor's testimony that, that jailhouse informant, Robert Mullins, stated he lied at trial. Gagnon was not re-prosecuted.

and asked that a colloquy on this issue be placed on the record, through which Petitioner confirmed his desire to withdraw the continuance and proceed with trial. (App. 73-75).

In opening, the State clarified the method of laying out the chain of custody:

> Caulder will tell you . . . I collected this blood with a swab, and I put it into this sealed compartment that's made for it; it's a sterile swab; and I sealed it, and then I sealed it again inside of a box, and I sealed both edges of the box, making sure that it wasn't tampered with. . . . [W]hoever touched it [] will say . . . I gave it to so and so, and that person will say, I kept it; nobody tampered with it when it was in my custody. And you will follow that chain all the way till it gets to SLED. . .

(App. 94).

HCPD Investigator John Caulder testified to photographing and swabbing four distinct drops of blood at the crime scene. (App. 186-90). Caulder explained the process of collecting the samples, how the samples were sealed, placed in a box, individually marked, stating the evidence number, where it came from, and who collected it:

> [T]he blood swab was swabbed with the sterile water and the sterile swab. The swab is pulled back down through the ampule. It is sealed. It is placed into this cardboard box that had already been marked on. Then I handed it to another investigator. I would call out the number and he would put it in the box, and at that point in time it was sealed at the scene.

(App. 193-97). Caulder testified he transported the samples back to HCPD. (App. 197). At HCPD, Caulder testified he turned the evidence over to Lori Rabon, the evidence custodian at HCPD. (App 197-98). Counsel pressed Caulder on his collection and transportation of the evidence from the scene and placing it into evidence, and confirmed he documented and placed everything in HCPD. (App. 215). Caulder admitted that "there is no chain between evidence people because it never moves from a secured facility." (App. 216). He continued:

> So if it is signed out to go somewhere other than SLED, or if it is signed out of the vault for whatever reason, there should be a sequence of chains that show it has been exchanged from hand to hand, so if I've turned this evidence in, whoever

> transported it to SLED, there will be a – there will be a chain saying that, yes, it was turned over to SLED, who collected it at SLED, and where it went from in SLED through their chain.

(App. 217). Counsel confronted Caulder with the nine day gap between when the evidence was collected and was relinquished, to which Caulder initially expressed confusion before asserting that during that time "it never leaves me[.]" (App. 218-19).

Rabon testified that Caulder was on scene, collected several items, and that she received that evidence to hold and preserve. (App. 222-23). Rabon identified each blood swabs and Caulder's initials on each exhibit, stating she received the samples on April 19, 2005. (App. 223-26). Rabon stated the samples were in Caulder's custody April 12-19, 2005 and testified the evidence was not tampered with and the seals remained intact while in custody. (App. 226-28). She testified she took the samples to SLED and they were logged in. (App. 228-30).

In cross-examining Rabon, Counsel elicited testimony that although she was the supervisor of the evidence area, she did not supervise Caulder. (App. 233). She testified six people total, including Caulder, had access to the evidence area. (App. 233-34). Counsel asked if there was a protocol by which people had to pick things up and drop them off, and she replied that their computer system maintained a chain of custody "that changes the bin location so we know where items are when we need to find them." (App. 234). Rabon stated investigators typically worked one case at a time, but that the investigators worked different call-outs and were on an on-call status the week of April 12-19. (App. 234-36). She testified her recollection was that Caulder handed the already sealed evidence to her. (App. 236).

Betty Butler, SLED forensic technician, testified to receiving the samples intact and sealed, that she sealed the exhibits in additional packaging in the presence of the deliverer, and that the evidence was not tampered with while in her custody. (App. 237-43). Butler testified the

evidence was stored in a locked refrigerator and retrieved by forensic technician Sheree Brown. (App. 243). She confirmed only authorized persons could retrieve evidence once dropped in the refrigerator. (App. 245). Counsel did not challenge in detail the processes followed at SLED pertaining to the secure retention and transfer of evidence, but elicited testimony from Steven Lambert, former DNA Analyst at SLED, indicating he had no personal knowledge about the swabs provided to him, as he did not work the crime scene in the case. (App. 270). Brown stated she brought the samples from the lockbox to the lab, and the samples were not tampered with in her custody. (App. 246-52). Lambert retrieved and tested the swabs and stated that there was no sign of tampering. (App. 260-62). The State established a chain of custody of Caulder → Rabon → Butler → Brown → Lambert.

Counsel, in closing, argued the State had failed to establish a proper chain of custody:

> [W]hen Mr. Caulder got on the stand . . . [he] told you initially was yes, I went to the crime scene, I obtained all of the samples, I marked everything. I did it all myself, even though there were a couple of other crime scene folks there, and then I went back and I logged it into evidence, and I asked him, I said, okay, did you put it in the car at some point, you know? He said yes, I put it in the car, took it back, put it into evidence. I said, well, yes, sir, but what if I'm looking at this document that says it didn't make it to evidence until seven to nine days later . . . [He] went through a lot of different things as far as how the evidence department works, and the investigative side works, and how the investigative folks are kind of like the evidence folks, and they've got free run of the evidence area, and they can come in and go as they please, and they take what they need, and drop stuff off . . .
>
> Deputy Solicitor Richardson then put Ms. Rabon up . . . and he tried to save the situation. He asked her, well, you know, you've got some paperwork there. When did this stuff get in evidence, and what did Ms. Rabon say, straightforward and upright, April 19th, seven days later.. . .
>
> [W]e believe that some samples from a different case were taken and that they were . . . changed out or put in the wrong box, or possibly just thrown into the wrong pile . . .

(App. 391-93). Counsel compared the SLED evidentiary process to the witnesses' descriptions of "bins" and "buckets" at HCPD, and argued HCPD was an unsecure, sloppy facility, where staff "just take stuff and you throw it in the bucket, say here, we need this to go up the road and have it tested, you know" and were incorrectly catalogued and mixed with dozens of other items destined for SLED. (App. 393-95). Counsel described the evidence as "riding around in his car for a week, being intermingled with other stuff, or maybe just intermingling when it's all tossed in the bucket[.]" (App. 401-02). Counsel advised the jury to look closely at the labels applied and their simplistic descriptors. (App. 395-96). Counsel observed that no blood matching Petitioner was found on the Victims. (App. 396-97). He stated that no African-American hair was found on scene and that Petitioner's hair, "tied up in the back so that it doesn't hang as long as it actually is," and that he "probably hasn't had a haircut literally since his childhood[.]" (App. 397-98). Counsel again condemned the investigators, who just "threw it in the bucket, said fine, let's charge him and go with it" and, in closing stated "I'm hoping that you don't just take it and throw it in the bucket, too." (App. 402-03).

At the PCR hearing, Counsel stated that he discussed a plea offer to cooperate against Gagnon with Petitioner, but that he "don't know those crackers, man." (App. 593-95). Counsel explained that he did not pursue a third-party guilt strategy that Gagnon was responsible because the court forbade any mention or intimation that Gagnon was convicted, and even if they could, Gagnon's guilt would not rule out Petitioner's involvement. (App. 611).

Counsel testified he could not recall if he received a chain of custody form or who took the samples from the scene. (App. 596-97). Counsel stated he came to believe after the trial that the chain of custody as presented at trial differed from Gagnon's trial; namely that an officer was terminated after Gagnon's trial and was replaced by Rabon who "testified that she did everything

because possibly he was no longer employed or under a cloud of suspicion or something of that nature[.]" (App. 598-99). Counsel stated he would have brought up that a person involved in the chain was fired had he known. (App. 599-600). Counsel confirmed he reviewed the chain provided, developed a strategy of challenging the relevant law enforcement processes, which he executed at trial. (App. 615-16). Counsel declined to speculate on whether he might have been successful on a motion to suppress for want of an adequate chain of custody. (App. 621).

Private Investigator Peter Wade testified as an expert in crime scene analysis and investigation. (App. 626-32). He testified "the chain of custody was seriously breached" and stated he concluded this by comparing the investigation to instructions from the South Carolina training course for crime scene investigators, standing operating procedures for HCPD, and guidelines from the International Association for Property and Evidence. (App. 632-33). Wade noted that thirty-eight people logged into the crime scene, but only eleven logged out. (App. 633-34). He observed that while three crime scene investigators worked the scene, only Caulder's name or initials appeared on evidence recovered. (App. 634-35). Wade testified that although instructions called for evidence to be turned in at shift's end, the evidence collected was not turned in until April 19, 2005. (App. 635-36). He stated he could not tell where Caulder kept the evidence, and that "the only thing we have is the word of a CSI with four months of experience that he took this evidence and held onto it and for whatever reason" before turning it in a week later. (App. 639-40). Wade complained that HCPD told him they do not have logs older than ten years old. (App. 636-37). Wade opined that HCPD could only show the sample was collected on or before April 19, 2005, not specifically on April 12, 2005. (App. 637). Wade noted the discrepancy between Faulk's signatures where evidence was turned in and Rabon's testimony that she received the evidence and stated the evidence was not properly marked. (App. 637-38).

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 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In a PCR action, the petitioner bears the burden of proving allegations in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner asserts ineffective assistance of counsel as a ground for relief, they must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the petitioner so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

I. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective when he did not pursue a third-party guilt strategy when the Court prohibited admission of the third-party's conviction and evidence of third-party guilt was irrelevant to the issue of Petitioner's guilt.

On appeal, Petitioner argues the PCR court erred in denying relief because Counsel was ineffective for failing to argue a third-party guilt defense involving Gagnon. However, the PCR court properly rejected this argument, finding Counsel was precluded by the Court from bringing Gagnon's conviction into evidence and, even if not precluded, Gagnon's guilt was irrelevant to the issue of Petitioner's guilt. These findings are not controlled by an error of law and are supported by probative evidence in the record. Thus, this Court should deny certiorari.

Whether Counsel was deficient hinges on if a valid trial strategy was used. *See Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel"). "[E]vidence of third-party guilt that only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime should be excluded." *State v. Cope*, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) (citing *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941)). "Furthermore, to be admissible, evidence of third-party guilt must be limited to such facts as are inconsistent with the defendant's own guilt, and to such facts as raise a

reasonable inference or presumption as to his own innocence." *Id.* (internal quotations omitted).

Counsel was not deficient. As a threshold matter, two observations bear mentioning about the Supreme Court's opinion in the direct appeal. First, is the Court's admonition that Petitioner misunderstood the trial court's ruling appears largely directed at Petitioner as he argued on appeal—namely, appellate counsel. Appellate counsel initially represented Petitioner in this PCR proceeding, and raised the allegations upon which he ultimately proceeded. Appellate counsel, in his capacity as prior PCR counsel, appears to have imputed his own misunderstanding of the trial court's ruling to trial counsel. Trial counsel's testimony reflects no such misunderstanding, but rather reflects his recognition of the limited value of insisting on Gagnon's guilt where the State's theory involved multiple perpetrators. Second, the Supreme Court's remark that Petitioner *could* have presented evidence of third-party guilt does not appear to be a firm ruling that such evidence would have been appropriate, but rather that the trial court's ruling did not prohibit it. These observations are important because the facts provide that Counsel correctly concluded and advised Petitioner that introducing evidence of Gagnon's guilt was of little to no value because such evidence was not inconsistent with Petitioner's own guilt.

Though Counsel was permitted to question witnesses about the presence of others, evidence concerning another individual's convictions was prohibited. (App. 19). Further, because the State's theory involved multiple perpetrators, arguing that Gagnon was present would have had no bearing on the issue of Petitioner's guilt, especially because the DNA matched to Petitioner. (App. 16-17). At the PCR hearing, Counsel testified that he did not pursue a third-party guilt strategy that Gagnon was responsible because the court forbade any mention or intimation that Gagnon was convicted, and even if they could, Gagnon's guilt would not rule out Petitioner's involvement. (App. 611). Refusing to explore a line of defense both prohibited

and irrelevant is reasonable and, accordingly, Counsel should not be found deficient.

Further, omission of admission of irrelevant evidence at trial did not prejudice Petitioner. *See Putnam v. State*, 417 S.C. 252, 266, 789 S.E.2d 594, 601 (S.C. Ct. App. 2016) (finding that petitioner was not prejudiced when the testimony in questions was irrelevant to the petitioner's guilt and was inappropriate under a third-party guilt approach). Here, admission of third party guilt evidence was not inconsistent with Petitioner's own guilt, given the State's multiple perpetrators theory. Accordingly, a campaign against Gagnon, since relieved of his convictions, would have been utterly irrelevant to Petitioner's own guilt, which appears to be why Counsel denied any desire to pursue a third-party guilt strategy in the first place. *Had* Counsel pursued the subject of third-party guilt, the trial court would have been required to exclude the evidence. *Cope*, 405 S.C. at 341, 748 S.E.2d at 206 (finding that third party guilt evidence should be excluded if it "only tends to raise a conjectural inference that the third party, rather than the defendant, committed the crime). Thus, Petitioner was not prejudiced by any alleged deficiency because of lack of probative value of third-party guilt evidence in this case. Thus, no prejudice has been demonstrated and, accordingly, certiorari should be denied.

II. Petitioner's allegation that counsel was ineffective for stipulating to the chain of custody report instead of calling Faulk as a witness solely to impeach her based upon a prior conviction was not properly preserved on appeal, but even if it was properly preserved, Petitioner's claim does not require a remand and lacks merit because Counsel did not know about the conviction or her involvement in the chain of custody at trial, articulated a reasonable strategy in deciding to challenge the time frame and security of the chain of custody instead of alleging the chain was tampered with without any evidence to substantiate the claim with and Petitioner was not prejudiced as a result because the witness was not called at the PCR hearing and a baseless objection to the chain of custody would have been overruled.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel erroneously stipulated to the chain of custody report instead of calling Faulk to testify to impeach

her based on a prior conviction. However, the PCR court properly rejected this argument, finding that Counsel did not know about the conviction or Faulk's involvement in the chain of custody at the time of trial, he articulated a reasonable strategic decision in deciding to challenge the time frame and security of the chain of custody instead of alleging the chain was tampered with without any evidence to substantiate the claim with, and Petitioner was not prejudiced because the witness was not called at the PCR hearing and a baseless objection to the chain of custody would have been overruled. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

At the PCR hearing, Petitioner alleged Counsel was ineffective for failing to investigate the prior conviction of a State's witness in Gagnon's trial and use the conviction to impeach him. However, on now on appeal, Petitioner argues Counsel was ineffective for failing to call the State's witness at trial instead of stipulating to the chain of custody report. Because the current claim was never raised in PCR court, it is not preserved for this Court's review.

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure, *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004), ensuring the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). For an issue to properly be preserved for appellate review, it must be raised to and ruled upon by the trial court, raised by the appellant, raised in a timely manner, and raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); *see* JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). Although our courts have recognized the somewhat

relaxed procedures in PCR cases and will excuse procedural defaults in extraordinary cases, "[i]n most PCR cases, however, [appellate courts] have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases." *Mangal v. State*, 421 S.C. 85, 97, 805 S.E.2d 568, 574 (2017). In *Mangal*, our Supreme Court noted:

> [T]here are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims. Such flexibility is consistent with the purpose and spirit of our Rules of Civil Procedure. These considerations should guide PCR courts when struggling to balance procedural requirements against the importance of the issues at stake in PCR proceedings. We encourage trial courts in PCR cases to use the discretion we grant them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.
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> *Mangal*, 421 S.C. at 99–100, 805 S.E.2d at 575–76.

Petitioner never raised the claim that Counsel was ineffective for failing to call Faulk as an adverse witness. However, Petitioner now attempts to bypass preservation requirements by weaving this argument into the assertion that Counsel was ineffective for stipulating to the chain of custody and to impeach Faulk, who never testified at the trial. This issue is not properly and this is not an extraordinary case where preservation deficiencies should be overlooked.

Even if this issue was preserved, Petitioner is not entitled to relief on this ground. "In most PCR cases in which the petitioner seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). Counsel's performance is not ineffective if he decided not to present a witness because it was unlikely to make a difference at trial. *See e.g. Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding counsel was not ineffective when petitioner failed to establish prejudice);

Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding counsel was not deficient for failing to call an alibi witnesses when the two proffered witnesses did not establish the alibi).

Prejudice is usually found if the testimony was significant enough to change the trial proceedings. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding prejudice when witnesses would have corroborated petitioner or bolstered his credibility enough to change the trial proceedings); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding prejudice when uncalled witness' testimony would have cast doubt on the sole witness' identification). To show prejudice, the witness(es) testimonies must be produced at the PCR hearing, consistent with the rules of evidence. *Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540. Mere speculation regarding the testimony is insufficient. *Clark v. State*, 315S.C. 385, 434 S.E.2d 266 (1993).

Concerning the chain of custody, the Supreme Court "has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Sweet*, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." *Id.* (quoting *Benton v. Pellum*, 232 S.C. 26, 33-34, 100 S.E.2d 534 (1957)). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." *Id.* "Where other evidence establishes the identity of those who have handled the

evidence and reasonably demonstrates the manner of handling the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." *Id.*

"Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." *Id.*, 392 S.C. at 92, 708 S.E.2d at 753 (quoting *State v. Carter*, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the substance was not established at least as far as practicable." *Id.* (emphasis omitted). "Minor discrepancies in the chain of custody implicates the credibility of the evidence, but does not render the evidence inadmissible." *State v. Patterson*, Op. No. 5611 (S.C.Ct.App. filed Jan. 1, 2019) (Shearouse Adv.Sh. No. 1 at 67) (citing *State v. Taylor*, 360 S.C. 18, 24-25, 598 S.E.2d 735, 738 (Ct. App. 2004)); *see also State v. Smith*, 326 S.C. 39, 41-42, 482 S.E.2d 777, 779 (1997) (affirming admissibility of blood tests event though the arresting officer stored the blood sample in his home refrigerator prior to testing, noting that there was no evidence of tampering); *State v. Kahan*, 268 S.C. 240, 244, 233 S.E.2d 293, 294 (1977) (ruling the ballistics test results of a nightgown worn by the deceased and placed in the evidence locker in a plastic bag were admissible even though there was no testimony as to the care and handling of the plastic bag containing the gown during the time it was in the evidence locker).

Counsel was not deficient for failing to call Faulk as a witness instead of stipulating to the chain of custody. Though Petitioner challenges the conclusion that the blood samples taken from the house are the same as those tested and profiled, no claim was raised indicating that the chain of custody was ever tampered with. Instead, each person in the chain was identified at trial and the chain of custody was properly established at trial. Petitioner argues there is an inconsistency between the chain of custody as presented in his and Gagnon's trials. However,

this would not be a basis for suppressing the evidence, but could only implicate the evidence's credibility. Instead of asserting a defense built on a baseless foundation, Counsel developed a different strategy concerning the chain of custody, highlighting the extended period of time between when the samples were taken and when they were put in the evidence locker and how the evidence may not have been properly secured at that time. (App. 600-01). This strategy was seemingly stronger and could only be raised if the chain was admitted. Even if the objection was not baseless, Counsel made a strategic decision in pursuing this defense because calling a witness loosely related to the case only to admit evidence of their prior conviction is an unreasonable request. Accordingly, no deficiency can be found.

Petitioner was not prejudiced by any deficiency. Petitioner was required to call Faulk as a witness at the PCR hearing to meet his burden of proof. *See Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (to show Petitioner was prejudiced by counsel's deficiency for failure to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or the testimony must otherwise be presented, consistent with the rules of evidence). Petitioner did not do this. Additionally, because the objection would be baseless, the judge likely would have overruled it, rendering the objection non-consequential to the trial proceedings. Accordingly, because Petitioner was not prejudiced by any deficiency, relief should be denied on this ground.

III. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failing to impeach Carrick with his prior conviction because Counsel had no reason to prepare an impeachment, was blindsided at trial concerning the importance of Carrick's testimony and Petitioner was not prejudiced by any alleged deficiency because the impeachment proffered was weak, at best, and did not impact the results of the trial proceedings.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failing to impeach Carrick for a prior conviction. The PCR court properly

rejected this argument, finding that Counsel had no reason to prepare to impeach Carrick, was blindsided by the testimony while at trial, and no prejudice found because the impeachment proffered would not have impacted the trial. These findings are not controlled by an error of law and are supported by probative evidence in the record. Thus, this Court should deny certiorari.

Here, Counsel was not deficient. Counsel asserted he was blindsided by the connection Carrick drew between the Victims and Moore. (App. 612-13). Counsel could not know of the role Carrick would ultimately play in connecting Moore to both the victims and to Petitioner until it was too late to meaningfully prepare to impeach him because any connection between Moore and Petitioner was not divulged until Carrick took the stand a second time as a rebuttal witness and after he was not properly sequestered between the two testimonies given and after an order of sequestration was in effect. (App. 612-13). Concerning the impeachment material, Counsel testified he could not recall impeaching Carrick about any prior felony conviction and stated that if he did not impeach Carrick on prior convictions, it would be because he was not made aware of prior convictions. (App. 590-91). Additionally, Counsel could not recall whether he received NCIC reports from the State regarding any of the witnesses. (App. 591). Counsel asserted that if he was aware of a prior conviction he would have used it to impeach the witness. (App. 591-92). Thus, Counsel was not deficient in failing to impeach Carrick.

Petitioner was not prejudiced by any alleged deficiency. The impeachment material does not deal directly with the issue and would, at most, conservatively decrease the State witness' credibility. It would not weaken the case as a whole, particularly given that there is no evident motive for Carrick to have lied in testimony pertaining to the discovery of the body or Moore's prior employment, nor would it have impacted the trial proceedings. Accordingly, by itself a prior conviction would have provided for very weak impeachment, at best that would not have

impacted the case itself. Thus, even if Counsel was deficient, Petitioner was not prejudiced.

IV. The post-conviction relief court properly determined Petitioner failed to establish counsel was ineffective for failing to call an expert witness to challenge the adequacy of the State's processes for the collection, handling, and preservation of evidence where Counsel acted reasonably in deciding to engage in a vigorous cross-examination instead and Petitioner was not prejudiced by this decision because the expert's testimony would contribute nothing substantively new and, thus, would not have changed the trial results.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failing to call an expert witness to challenge the adequacy of the State's processes for the collection, handling, and preservation of forensic evidence. However, the PCR court properly rejected this argument, finding that Counsel's decision to forego the expert witness in lieu of presenting a vigorous cross-examination was reasonable and Petitioner was not prejudiced because the expert would not have contributed anything substantively new and or changed the results of the proceedings. These findings are not controlled by an error of law and are supported by probative evidence in the record. Thus, this Court should deny certiorari.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. However, expert testimony cannot be used solely to undermine a witness's credibility. *See United States v. Allen*, 716 F.3d 98, 105-06 (4th Cir. 2013) ("Essentially, Allen wanted to introduce expert testimony solely for the purpose of undermining the credibility of codefendant witnesses. This is not the function of an expert."). Assessment of witness credibility is within the exclusive province of the jury and a witness may not opine on whether he believes them or comment on a witness' veracity. *State v. Smith*, 411 S.C. 161, 170, 767 S.E.2d 212, 217 (Ct. App. 2014).

An attorney is not ineffective for failing to procure expert witnesses where he or she

vigorously cross-examines the State's witnesses and attacks the accuracy of the evidence on the points to which the expert would have testified. *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991)). *See Id.* (finding that Counsel was not ineffective for failing to call an expert witness when he thoroughly cross-examined the State's witnesses and posted objections, when appropriate); *Frasier*, 306 S.C. at 160-61, 410 S.E.2d at 573 (finding that counsel was not deficient in failing to call an expert witness to testify when counsel vigorously cross-examined the State's expert).

Here, Counsel articulated a reasonable strategy. At the PCR hearing, Counsel testified he did not attempt to procure an expert witness because he did not perceive a problem with how the samples were collected and did not believe an expert would have significantly aided Petitioner's case. (App. 601). Instead, Counsel's theory was that HCPD had issues with management of the evidence when moving from person to person and, accordingly, the defense chosen was to create doubt concerning whether the sample matching Petitioner was the one taken from the crime scene or if "two samples got crossed over somehow and his got substituted into that crime scene." (App. 603-05). Counsel noted no issue existed on if the DNA matched Petitioner, but that the issue was "how his DNA got to the point where it was collected." (App. 614-15). Counsel's decision to pursue this strategy was reasonable and his performance not deficient.

Petitioner was not prejudiced by any alleged deficiency. Wade did not present testimony beyond the scope of Counsel's argument. Instead, Wade's function was only to impeach the State's witnesses' testimonies with their own materials, not to actually incorporate or apply additional scientific, technical, or other specialized knowledge. Beyond the credentials following his name, Wade offered nothing new that Counsel did not explore at trial. Thus, this testimony would not have changed the results of the proceeding and, thus, Petitioner was not prejudiced.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
Chelsey F. Marto

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0386

ATTORNEYS FOR RESPONDENT

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