STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas
Grace Gilchrist Knie, Post-Conviction Relief Judge
Howard P. King, Trial Judge

Appellate Case No. 2018-001627

JOEY CLARK,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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Petitioner's Statement of Issue Presented

Did the post-conviction relief judge err in refusing to find trial counsel ineffective for asking the investigator about statements made by five jail house snitches, who did not testify at trial, claiming that Petitioner confessed to killing the deceased and then not objecting when the State moved to introduce the written copies of the statements because these decisions by trial counsel cannot be part of a valid, treasonable trial strategy and resulted in prejudice?

Respondent's Counterstatement of Issue Presented

Did the post-conviction relief judge properly deny post-conviction relief where trial counsel strategically drew the sting of five jailhouse informants to first expose to the jury potentially harmful evidence of adverse statements made by Petitioner through a State's witness who was ill-equipped to respond on cross-examination, such that the State thereafter declined to call the inmates in favor of focusing on other aspects of its case against Petitioner?

STATEMENT OF THE CASE

Petitioner Joey Clark is confined in the South Carolina Department of Corrections. During its November 2013 term, the Cherokee County Grand Jury indicted Petitioner for the murder of his former girlfriend, Winter Wingard (2013-GS-11-01167). H. Chase Harbin, Esquire, represented Petitioner. Deputy Solicitor Kimberly L. Leskanic and Assistant Solicitor Jennifer A.J. Jordan of the Seventh Circuit Solicitor's Office prosecuted the case. On March 17, 2014, Petitioner proceeded to trial before the Honorable Howard P. King, circuit court judge, and a jury. on March 20, 2014, the jury convicted Petitioner as indicted. Judge King sentenced Petitioner to imprisonment for a term of forty-five years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense-Office of Appellate Defense with the filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issue:

> Whether the trial court erred in failing to give a correct and complete jury instruction on circumstantial evidence?

The South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Clark, Op. No. 2015-UP-433 (S.C. Ct. App. filed Aug. 19, 2015). The Remittitur was issued on September 9, 2015.

Petitioner, through retained counsel Joel F. Stroud, filed his application for post-conviction relief on July 20, 2016 (2016-CP-11-00509). He alleged the following grounds for relief in his application (summarized and excerpted):

1. Ineffective Assistance of Counsel
    a. Counsel's cross examination of Detective Burgess "sabotaged any chance that [Applicant] had in getting a fair trial."
    b. Counsel's "closing argument reinforced the jury's impression that [Applicant] had confessed to the murder of [the victim]."

c. Counsel failed to move to suppress or object to inmate statements being admitted into evidence.
d. Allowed inadmissible hearsay statements to be admitted during the trial.
e. "[Counsel's] failure to object left [Applicant's] direct appeal attorney no alternative other than to file an Anders brief because no issues were preserved for appellate review."
f. Counsel failed to request a directed verdict.
g. Counsel failed to object to State's improper closing argument.
h. "[Counsel] failed to either request that the State test the fingernail clippings or request funding from the State to have the clippings DNA tested."
i. Counsel "failed to either request that the State DNA test the cigar butts or request funding from the State to have the cigar butts tested."
j. Counsel failed to call a DNA expert to testify.
k. Counsel failed to develop trial strategy or adequately communicate to Applicant the theory of defense.
l. Counsel "failed to request that Judge King add voluntary murder as a lesser included charge to the substantive law, as well as adding voluntary manslaughter, guilty or not guilty, to the verdict form."
m. Counsel failed to present any evidence of manslaughter/heat of passion.
n. Counsel offered improper advice to Applicant "about whether to accept or reject the State's voluntary murder plea offer."
o. Counsel mailed Applicant a letter advising him of the plea offer, but Applicant never received the letter and never discussed the plea offer with Counsel.
p. Counsel failed to request a pre-trial hearing to determine whether sufficient probable caused existed to arrest Applicant for murder.
q. Counsel failed to object to the jury charge that malice could be implied by the use of a deadly weapon.
r. Counsel failed to renew his request to withdraw after Judge Kelly refused his initial request to withdraw, even after receiving a threat of great bodily harm from Applicant.
s. Counsel failed to put on a defense in order to have the last closing argument.
t. Counsel failed to request a mistrial.
u. Counsel failed to object to the excessive use of graphic pictures that went beyond and were not necessary for the proof of the State's case.
v. Counsel failed to request a change of venue based on the highly publicized murder in Cherokee County.
w. Counsel failed to retain a "expert witness soil scientist" to compare and analyze the red dirt found on the victim's body.
x. Counsel failed to request sequestration of the State's witnesses.
y. Counsel failed to request a jury view of the crime scene.
z. Counsel failed to investigate or present mitigating evidence.
aa. Counsel failed to strike juror who Applicant claims was present during his polygraph examination.

2. Prosecutorial Misconduct
    a. "The Assistant Solicitor committed prosecutorial misconduct when she impermissibly bolstered and impermissibly vouched for the credibility of the crime scene investigators and again told the jury that [Applicant] confessed."
    b. "The State committed prosecutorial misconduct when it impermissibly allowed Detective Burgess to read the inmate statements into evidence.
    c. "The State also committed prosecutorial misconduct in its closing argument when it impermissibly referenced the statements of the inmates, as well as, impermissibly bolstering the credibility of the State's investigators and offering improper state of mind speculations regarding [Applicant's] reasons about why he would cooperate with the police investigators. [Assistant Solicitor] Leskanic offered no foundational support for these improper state of mind speculations."
    d. "The State committed prosecutorial misconduct when it failed to perform DNA testing of fingernail clippings found underneath the fingernails of the victim."
    e. "The State committed prosecutorial misconduct when it failed to perform DNA testing of cigar butts found in the yard at the victim's house, even though neither [Applicant], nor the victim and residents of the house smoked cigars."
3. The trial transcript does not reflect the actual order of testimony of the State's witnesses.

Respondent made its return on May 16, 2017, requesting an evidentiary hearing be convened to resolve these claims. An evidentiary hearing into the matter was convened on June 19-21, 2018, before the Honorable Grace Gilchrist Knie, circuit court judge. Petitioner was present at the hearing and represented by counsel Stroud. At the hearing, testimony was taken from trial counsel H. Chase Harbin, Seventh Circuit Assistant Solicitors Kimberly L. Leskanic and Jennifer Jordan, private investigator Ted Landreth, DNA analyst Meghan E. Clements, soil classifier John H. Thorp. By written order dated August 24, 2018, and filed August 29, 2018, Judge Knie denied and dismissed the application.

Petitioner appealed the denial of relief and submitted a petition for writ of certiorari to the South Carolina Supreme Court pursuant to Rule 243, SCACR. Following the State's submission of a return to the petition, this matter was transferred to this Court pursuant to Rule 243(l),

SCACR. This Court granted certiorari and requested further briefing. Petitioner filed his brief and this brief follows.

STATEMENT OF FACTS

On December 1, 2010, Winter Wingard lived in a doublewide trailer off Songbird Lane in Cherokee County with her mother, Beverley Patrick. (Appx. 124-28). Petitioner, who was Wingard's former boyfriend, had previously lived with Wingard and Patrick but had been asked to move out when the relationship ended a few months earlier. (Appx. 126-28, 134). Despite being asked to move out, Petitioner still frequented the home. (Appx. 128-29). Wingard had begun dating Anna Mooney, a young woman who lived in Georgia, which upset Petitioner greatly. (Appx. 129-30). Petitioner, Wingard, and Mooney all exchanged near constant text messages back and forth, with Petitioner repeatedly trying to interfere in Mooney and Wingard's relationship—including falsely telling Mooney that Wingard had AIDS with the hope that Mooney and Wingard would break up (Appx. 178-204).

Petitioner and Patrick worked together at a construction company and had worked together on December 1st. (Appx. 124, 135-36). After work, Petitioner and Patrick went to their friend's house to pick up a quart of moonshine and pizza before heading back to the trailer on Songbird Lane. (Appx. 136-37, 162). When they arrived, Wingard was sick with bronchitis and had a fever of 104-degrees. (Appx. 138-39). Wingard was upset that Petitioner was imbibing in moonshine for fear of how he would behave while intoxicated. (Appx. 138). After eating pizza and drinking approximately three shots of moonshine, Patrick left Wingard on the couch and went to bed around 10 p.m., expecting Petitioner would not be spending the night. (Appx. 138-40). Text messages from Petitioner, Wingard, and Mooney revealed that the three were exchanged in a near constant texting argument throughout the evening. Wingard attempted to send a text message to Mooney at 2:14 a.m. that was interrupted, likely by her phone losing power or having the battery removed. (Appx. 379-82). This was the last text message attempted

from Wingard's phone. (Appx. 379-82).

At approximately 4 a.m. the following morning (December 2nd), Patrick was awoken by her alarm and found Petitioner standing at the foot of her bed, which was unusual because Petitioner was usually not awake at that time. (Appx. 140-42). Petitioner told Patrick that Wingard, who was sick with a 104-degree fever, had left the house in the middle of the night in Patrick's car to get cigarettes but never returned home and that he suspected she had really left to visit Anna. (Appx. 139, 141, 150). Patrick tried to call Wingard numerous times without success and eventually rode to work with Petitioner. (Appx. 142-43).

Patrick received several text messages from Petitioner throughout the day, including a message that indicated Petitioner left work early but would be back to pick Patrick up when she finished working. (Appx. 143). Petitioner later returned to pick up Patrick, and after visiting the house where Petitioner was supposed to be living, both returned to the trailer on Songbird Lane. (Appx. 143-44). Petitioner was helping Patrick dispose of old tomato plants when he suddenly announced that he noticed Patrick's car parked down the road at a neighbor's home. (Appx. 145). Petitioner and Patrick went to the vehicle and discovered Wingard's purse was in the front seat; however, Wingard's cell phone and keys were not in the vehicle. (Appx. 145-46, 152). Patrick asked a neighbor when the car appeared there, and the neighbor said it was there when he woke up that morning. (Appx. 146). Another neighbor later reported he noticed Patrick's vehicle parked in this location when he returned from work around 2:20 a.m. on December 2nd (Appx. 215-18). Patrick called 911 and law enforcement arrived shortly thereafter. (Appx. 146, 163, 172-73).

A few hours earlier on December 2nd, James Wilkerson was driving on Mikes Creek Road when he saw what he thought was a blow-up doll. (Appx. 221-22). When he got closer, he

discovered it was not a doll but Wingard's nude body. (Appx. 222, 228). Wilkerson did not have cell phone service, so he left the scene to get assistance. (Appx. 223) Wilkerson found Clarence Taylor, who went to the scene at Mikes Creek and confirmed what Wilkerson had reported—the discovery of Wingard's lifeless, nude body with sweatpants pulled around her ankles and her legs folded back. (Appx. 228). Wingard's body and sweatpants were smeared with reddish colored soil inconsistent with the soil at Mikes Creek. (Appx. 243-45, 252).

Taylor called 911 and waited for law enforcement to arrive. (Appx. 229). Investigator Jimmy Henson of the Cherokee County Sherriff's Department arrived and began processing Wingard's body and the scene at Mikes Creek. He noticed the reddish soil on Wingard's body and clothing, as well as blood. (Appx. 242-46). It appeared as though someone had dragged Wingard's body to its final resting place near a barbed wire fence. (Appx. 242-52, 258). Wingard had been stabbed thirteen times. (Appx. 13). Investigator Henson collected several various items for testing, including briars and tree limbs near Wingard's body. (Appx. 253-56).

Investigator Henson and other law enforcement officers also processed the trailer at Songbird Lane. Investigator Henson noted the soil at Songbird Lane was reddish colored, much like the soil smeared on Wingard's body and clothing. (Appx. 292). Officers recovered Wingard's cell phone with the battery removed, the cell phone battery separate from the phone, and the keys and remote to Patrick's car in the vegetation surrounding the trailer. (Appx. 292-94, 304, 308). Officers processed various areas of the trailer and found no signs of any struggle inside. (Appx. 300-01).

Law enforcement also processed Patrick's car. (Appx. 309). Fingerprints of reddish soil were found on the driver's side, passenger's side, and steering wheel. (Appx. 311-12). The car was dusted for fingerprints; Petitioner's print was identified on the rear quarter panel of the car.

(Appx. 318). Other fingerprints recovered did not match Petitioner, Wingard, or Patrick. (Appx. 327-28, 373, 498). Spatter of Wingard's blood was discovered on the passenger door and dashboard. (Appx. 320-22).

Petitioner was arrested on December 6th for an unrelated traffic violation. (Appx. 398). While he was in the detention center, several inmates housed with Petitioner reported to law enforcement that Petitioner had made incriminating statements implicating himself in Wingard's murder. (Appx. 404-14, 435-44). Many of these statements had internal inconsistencies and did not fully comport with the evidence and investigation underway. Regardless, Petitioner was charged with Wingard's murder shortly thereafter. (Appx. 404, 444).

An autopsy of Wingard's body revealed she died from blunt force trauma to the head that caused internal bleeding to the brain. (Appx. 464-66). The pathologist who performed the autopsy opined the blunt force trauma to the left side of Wingard's head likely caused her to lose consciousness and she was later stabbed thirteen times in the neck area. (Appx. 462,466-68). Petechiae was also noted in Wingard's eyes, indicating Wingard was strangled but this was not the cause of death. (Appx. 463-64). The pathologist estimated Wingard died between 2 a.m. to 3 a.m. on December 2nd, but she could not conclusively determine a time of death or the location where she was killed. (Appx. 470-71)

Fibers recovered from the scene at Mikes Creek were determined to be consistent with fibers on Wolverine boots similar to those owned by Petitioner. (Appx. 500-510). Additionally, DNA analysis determined Petitioner could not be excluded as a contributor to a DNA mixture recovered on a briar from Mikes Creek or a DNA mixture recovered from a tree limb at Mikes Creek. (Appx. 561-63). Petitioner was also a major DNA contributor to a DNA mixture recovered from an oral swab of Wingard's mouth, identified as semen. (Appx. 566-69, 572-74).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief 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); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). 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 post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

THE POST-CONVICTION RELIEF COURT PROPERLY DENIED POST-CONVICTION RELIEF BECAUSE COUNSEL ARTICULATED A REASONABLE AND COMMON TRIAL STRATEGY TO "DRAW THE STING" OF FIVE JAILHOUSE INFORMANT STATEMENTS ADVERSE TO PETITIONER, AND BECAUSE THE RECORD REFLECTS COUNSEL EXECUTED A DEFENSE CONSISTENT WITH THE STRATEGY ARTICULATED IN HIS QUESTIONING OF DETECTIVE BURGESS, AND IN HIS CLOSING ARGUMENTS.

On appeal, Petitioner argues this Court must reverse the post-conviction relief court's denial of post-conviction relief because Counsel employed a trial strategy that "[n]o lawyer of ordinary training and skill in criminal law would consider . . . competent strategy." (BOP 14). Despite Counsel's well-formulated and thoughtful articulated strategic reasons accounting for his specific actions in this case, Petitioner is essentially asking this Court to disregard Counsel's reasonable professional judgment and to supplant Counsel's strategic thinking with a constrictive model of how a trial defense *must* be strategically conducted, in direct contravention to Strickland and its progeny.

However, Petitioner cannot prevail with this argument, as the post-conviction relief court's decision to deny relief as to this ground is legally sound and well-supported by the record. Counsel deliberately and daringly shocked the prosecution by tearing down potentially damaging jailhouse informant evidence during the cross-examination of a witness who was not prepared to answer such questions, evidence that would have otherwise been introduced through multiple other witnesses. Counsel articulated his thinking and reasoning which led him to do so, and the trial record reflects performance consistent with the strategy so articulated. Because Counsel articulated his strategic reasoning and compellingly executed his strategy, the post-conviction relief court properly denied relief. As this finding is not premised on any error of law or fact, this Court should affirm the denial of relief.

Well-established precedent demands the post-conviction relief court's findings must be upheld. Petitioner, like every other criminal defendant tried in South Carolina, has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is constitutionally ineffective only when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

As the applicant in a post-conviction relief action, Petitioner bore the burden of proving his allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a post-conviction relief caapplicant 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. Id. at 687–88; Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. Id.

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of

reasonably professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " Dunn v. Reeves, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting Burt, 571 U.S. at 22–23). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen*." Id. (alteration in original) (emphasis added) (quoting Titlow, 571 U.S. at 23–24).

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough, 540 U.S. at 5 (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington, 562 U.S. at 109–10. "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how

best to represent a criminal defendant. Strickland, 466 U.S. at 688–89; see id. at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn, 594 U.S. ___, 141 S. Ct. at 2410 (quoting Harrington, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. To prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see id. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. Id. at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold

issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory.").

Appellate courts such as this Court, in turn, must give great deference to the post-conviction relief court's findings of fact and must affirm these findings if there is any evidence in the record to support them. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). However, pure questions of law are reviewed de novo and appellate courts will reverse the post-conviction relief court's decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 436 (2018). The post-conviction relief court's findings regarding prejudice are based on a thorough review of the record as a whole, and, accordingly, are inherently fact-based and must be afforded deference by a reviewing appellate court. See Briggs v. State, 421 S.C. 316, 334, 806 S.E.2d 713, 723 (2017) ("The PCR court found the case 'came down to the victim's believability and credibility.' The PCR court found the most damaging testimony to Briggs . . . was not reliable because [the witnesses'] 'credibility is highly suspect.' Finally, the PCR court found 'there is a reasonable probability that the result of the Applicant's trial would have been different' if Singleton had not allowed Arroyo-Staggs to improperly bolster the victim. Giving to the factual findings by the PCR court the deference we are required by law to give, we affirm the court's finding that Briggs proved prejudice, satisfying the second prong Strickland.").

In the present case, the post-conviction relief court's denial of relief is legally sound and supported by the record. Accordingly, this Court should affirm the denial of relief.

a. The Strickland Court Warned Against Trials-After-Trials to Second Guess the Strategic Reasoning of Defense Attorneys

The United States Supreme Court, in setting forth the test for measuring constitutionally effective performance of counsel, recognized the innumerable ways in which attorneys may seek

to defend those accused of crimes. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S.at 688-89. "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 689 (citing United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1976)). "Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Id.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Id. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id.

The Supreme Court thereafter thoughtfully opined on what might come to pass if it did not afford attorneys broad deference:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id. at 690. Thus, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally

competent assistance." Id. "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Id. "At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id.

Petitioner's three day proceeding, and the relief demanded, represents exactly what the Supreme Court hoped to avoid. Notwithstanding the rapidly sprawling mechanism of applying Strickland, the appellate courts of this state have *repeatedly* recognized the Strickland court's mandate of deference, and held that where defense counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Edwards v. State, 392 S.C. 449, 456 710 S.E.2d 60 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)); Vail v. State, 402 S.C. 77, 89, 738 S.E.2d 503, 509 (Ct. App. 2013) (citing Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006)).

b. Counsel's Strategic Treatment of the Jailhouse Informants Reflects Extraordinary Performance of Counsel, And He Succeeded in Accomplishing His Stated Goals of Dissuading the State from Calling the Informants, Which He Then Used as a Point of Argument In Closing.

Petitioner excerpts portions of Counsel's explanation of his strategic reasoning, but excludes the uniquely rich details showing precisely how it was Counsel reached his decisions. At the PCR hearing, Counsel explained how he discussed the inmate statements with Petitioner prior to trial, how Petitioner denied making them, and their collective theory that the details of the statements "were kind of implanted either into the general population or specifically to these guys." (Appx. 948, ll. 14-22).

Either personally or through a private investigator, Counsel managed to locate and contact three of the informants. (Appx. 949-51). One inmate, housed in North Carolina, "was not going to be a witness that we wanted to put on the stand[,]" and warned the investigator to that effect. (Appx. 950, ll. 3-10). Counsel located the trailer home of a second informant, and went to visit him, only to encounter belligerence and shouting through the door that Counsel was somehow committing a crime by attempting to speak with him; Counsel determined he would not be helpful. (Appx. 950, ll. 12-20). Counsel visited a third informant at his parents' home, and initially found him helpful, but determined his only usefulness would be to craft a conspiratorial narrative of police misconduct, and that he was too reluctant, inconsistent, and "wishy washy" to rely upon for so bold a strategy. (Appx. 950-51).

Counsel then considered the substance of the statements, and noted that they were all inconsistent with one another and with the provable facts of the case. (Appx. 951-52). For example, Counsel noted, one of the inmate statements "basically said [Petitioner] said he killed his wife, and he stabbed her in the kitchen." (Appx. 951, ll. 18-20). The detective similarly asserted as much at a preliminary hearing, relying upon the statement, but absolutely no forensic evidence existed to support such a theory of the case. (Appx. 951-52). Counsel then considered that if the informant had no opportunity to rehabilitate himself, "that particular informant would look like just a flatout liar 'cause he was provably a liar because even . . . the State, at that point, admitted that nothing occurred, at least not a violent stabbing, inside the house." (Appx. 952, ll. 3-10). Following that line of thinking to the other informants, Counsel assessed: "if I could pick apart their words on a statement, and avoid the ability for them to rehabilitate themselves, that that might be the biggest win that we could get." (Appx. 952, ll. 11-14).

Counsel preferred the prospect of challenging the written statements over live testimony, and the shock he could impose on the prosecution:

> So, it puts me in the position of doing something that the State would completely not, not, not expect at all. And I, and I remember. I went to law school with Jennifer. I, I didn't know Kim, but I, I got to know her over the course of us – and I think they were as shocked as anybody in the courtroom that I opened the door. And, and I'll admit, if it's something wrong, then, you know, the Court can tell me I did it wrong, but I did it on purpose.
>
> I baited them . . . into putting those statements in so that that's all I had to deal with. They were boxed in. I knew what their statements were. I could pick it apart. I had it ready for closing. This guy was a liar. This guy didn't tell the [same] story as this guy didn't tell the same story as this guy.

(Appx. 952-53). Thus, Counsel reasoned that if he could surprise the prosecution by engaging with and dismantling the potentially damaging evidence on his own terms, before they could bring it out, he could potentially limit the scope of the evidence put the State on its back foot.

Counsel's reasoning came into applicable play during the testimony of Detective Richard Burgess. (Appx. 389-423; Appx. 434-55). Counsel kindly described the detective's testimony as "not the best direct testimony I've ever heard from an officer[,]" and described it as bumbling and lacking in confidence. (Appx. 953-54). Having already considered that he wanted to bring in the inmate statements before the State could, Burgess presented the opportunity to do so with a faltering law enforcement witness, and roll out the theory that "the cops had already made up their mind that [Petitioner] killed her . . . and really didn't bother to do any significant investigation thereafter[.]" (Appx. 954, ll. 5-15). Counsel did so, cast doubt on the inmates either explicitly or implicitly as not credible, framed Burgess' trust of the inmates as misplaced, framed the investigation as sloppy, and argued the same in his closing argument. (Appx. 954-61).

Counsel explained that he wanted the inmate's statements to come in because he did not want them to testify, and because the statements represented a known quantity he could confront and address, whereas he could not know what the inmates would fabricate on the witness stand. (Appx. 961-62). Counsel further explained that he endeavored to make the point that Detective Burgess failed to talk to the people that Phillips identified as witnesses, which seemed to Counsel "to be a pretty gaping hole in his, in his investigation." (Appx. 962, ll. 6-13). He very much did so both throughout his questioning of Detective Burgess, and thereafter in closing arguments.

In closing arguments at trial, the State briefly touched on the statements, framing them as confessions. (Appx. 624-25; Appx. 628, ll. 22-24; Appx. 633, ll. 11-15; Appx. 636, ll. 20-22). Most of the argument was spent discussing the circumstantial evidence: text messages, motive, the personal nature of the killing, the prints, and the DNA evidence. (Appx. 624-638). This is consistent with the State's theory of the case, as the prosecutor testified to at the evidentiary hearing. (Appx. 1142).

Counsel, in the latter part of his own closing, drew attention to the absence of the informants: "If the State's [sic] honestly believed that these were reliable people, wouldn't they have put them on the stand? Why didn't they put them on the stand?" (Appx. 646, ll. 11-17). Counsel then questioned how Detective Burgess could have possibly forgotten how "Skeet" came to inform law enforcement of the supposed statement, and all but characterized the detective as a liar. (Appx. 646-47). Counsel opined the statement did not read like an informant's statement, but rather read 'like a newspaper report or a police officer[,]" and strongly implied the statements were fabricated by law enforcement and the informant, speculating that "[m]aybe everybody wasn't on the same page initially about how much information was being given out to informants[.]" (Appx. 647-48). He further noted how Detective Burgess, after

supposedly receiving "this earth shattering piece of news," failed to locate and interrogate the other three persons who supposedly witnessed the statement by Petitioner. (Appx. 648, ll. 4-15). Counsel then discredited all of the informant statements, pointing out that the coroner had already published a press release "that contained almost every detail that the statements had, except the stabbing[,]" and argued based on Detective Burgess' testimony that he may have let the stabbing detail slip. (Appx. 648-49); see also (Appx. 482-83) (testimony showing the local news reported on a press release from the coroner issued prior to any of the statements). Counsel summarily dispensed with three of the statements as lacking in any substance, and then further noted how one of them indicated that "Skeet Phillips came in here screaming he stabbed her up[,]" such that all of the statements were irreparably tainted. (Appx. 649, ll. 8-21). Dealing with the fifth statement, that of Michael Stillwell, Counsel explained how the specific details he provided failed to match the known facts of the case, and how Detective Burgess agreed that Stillwell was wrong, but then attempted to explain the error away. (Appx. 649-51). Counsel again suggested the detective planted information with the informants to support and otherwise unsupported theory. (Appx. 652, ll. 12-19). Summarizing his treatment of the statements, Counsel argued:

> In sum total, the informants at the jail, their testimony is entirely without merit. And if it was, they would have put them on the stand. You don't know whether they got the oath, whether they didn't. We don't know that. They didn't put them on the stand. You don't know how they sounded, whether or not they were intelligent enough to put two words together. You don't know. You do know that the statements sounds [sic] suspicious somewhere along the way, especially with the police type.

(Appx. 651-52). Counsel concluded his treatment of the informant statements by decrying the absurdity of Petitioner's being jailed for want of a driver's license, and the greater absurdity that he would immediately confess to murder to multiple informants immediately after being so jailed. (Appx. 652-53).

Ultimately, Counsel successfully performed on a grand scale a universally understood and encouraged trial strategy: he "drew the sting" and framed evidence in a light most favorable to his client. Where an attorney knows that potentially harmful evidence or information is likely or certain to be introduced later in trial, he or she may choose, if not be obliged, to elicit the information at an earlier point in the trial in an effort to ameliorate its prejudicial effect. See State v. Campbell, 629 S.E.2d 345 (N.C. Ct. App. 2006) (finding no deficiency where defense counsel "shared with the jury the fact [Campbell] lied to his defense counsel" to draw the sting from damaging evidence to show he lied to everyone, and convert his lies into a basis for a conviction for a lesser-included offense); see also L. Timothy Perrin, Pricking Boils, Preserving Error: On the Horns of a Dilemma After Ohler v. United States, 34 UCDLR 615, 616-17 (2001) (describing the advice to disclose weaknesses before the other side as "ubiquitous for at least three reasons: (1) the trier of fact is more likely to trust and respect an advocate or a witness who 'volunteers' harmful information; (2) the disclosure avoids the risk that the trier of fact will believe that the party or witness concealed the damaging material; and (3) the advocate retains a measure of control over the disclosure of the perceived weaknesses and can couch the disclosure as sympathetically as possible."); Thomas A. Mauet, Trial Techniques 114 (Vicki Been et. al. eds., 8th ed. 2010) (in the context of single witnesses, explaining the conventional wisdom that weaknesses should be volunteered before the other party can effectively use them); Reyes v. Missouri Pac. R. Co., 589 F.2d 791, 793 n. 2 (5th Cir. 1979) (in the context of resolving an issue preservation question, concluding a plaintiff had no choice but to elicit information regarding his own prior convictions on direct examination in an effort to ameliorate its prejudicial effect). Petitioner's sole complaint is that Counsel should have instead silently waited for the State to run him over with each of the informants in turn, and attempted to impeach each of them in turn

without truly knowing ahead of time the substance of their testimony. Instead, Counsel impeached them collectively while cross-examining a lead detective caught unawares, limited the State to statements that he was able to show were flawed, and then pursued arguments in closing that could have been diminished by the informants taking the stand: frame the informants as plants and condemn the State for not calling them.

c. Petitioner's Complaints of Prejudice Are Short-Sighted, and Fail to Recognize Either the Value in How Counsel Managed to Save "Last Word," or How Non-Legal Questions May Influence the Course of a Trial.

Petitioner complains that Counsel's treatment of the informant statements and the State's subsequent introduction of the statements in their entirety was harmful and prejudicial, but he fails to recognize that he actually benefited from the prosecution's use of them. First, by bringing up the statements through cross-examination of Detective Burgess, and by not introducing the statements themselves, Counsel pushed the "burden" of introducing the statements onto the State, such that he did not have to introduce evidence and risk the advantage of speaking to the jury last. Counsel fully availed himself of "last word". Had Counsel waited until the informants took the stand and testified, Counsel likely would have been obliged to introduce the prior statements himself in an effort to impeach them, losing his right to "last word." See State v. Beaty, 423 S.C. 26, 42, 813 S.E.2d 502, 510-11 (2018) (citing State v. Brisbane, 2 S.C.L. (2 Bay) 451 (1802); State v. Garlington, 90 S.C. 138, 72 S.E. 564 (1911)) (explaining the "patchwork" governing the order of closing arguments, including that where a defendant introduces no evidence, he or she has the right to open and close in closing arguments); (Appx. 619, ll. 10-13) (the trial court's ruling granting "last word" to Counsel because he introduced no evidence). Had the prosecution known the full substance of Counsel's closing argument before its own closing, the State almost certainly would have had more to say

on the subject of the informants' statements than it did in its summary treatment of the subject in the closing given.

Petitioner is correct that the admission of the written statements did not foreclose the possibility that the State might call the witnesses who made the statements, but fails to recognize that Counsel's gambit fundamentally changed the State's calculus in making that decision, despite prosecutor Leskanic's testimony explicitly stating as much:

> Detective Burgess had testified first, one of our first witnesses. And, frankly, Mr. Harbin had done a very effective cross-examination on him, and had shown some inconsistencies – not so much inconsistencies, but had been able to lead Detective Burgess, I guess, down the road he wanted to lead him on.
>
> He was able, also with Detective Burgess, to get in to the statements, and point out inconsistencies in these statements. And we were not anticipating that. We have – you know, when you prosecute a case, you have sort of a roadmap. Ms. Jordan and I met numerous times to say what's the order of our witnesses, how do we want to present our case. And so, when that came up in that way, that was not how we had planned on presenting the State's case.
>
> So we were then faced with the statements have to come in. Do we still want to call the inmates to testify?
>
> And, frankly, Mr. Harbin had been able to point out their inconsistencies. Although we would have possibly, and if they testified they, they told me, gained additional information, he would have had yet another opportunity, right after our lead investigator had not done great on cross-examination, have an opportunity to point out the inconsistencies again in these inmates' statements. We felt that the strongest part of our case had to do with the DNA, the crime scene, and the forensics. And we decided to just head down that road in our case.

(Appx. 1141-42). Petitioner argues that the inmate statements must not have needed rehabilitation or the State would have called them as witnesses, but that (1) runs contrary to Leskanic's explicit testimony that Counsel wrecked the credibility of the statements, (2) runs contrary to Leskanic's explicit testimony that the State scuttled an entire prong of its prosecution

strategy in light of Counsel's daring gambit,[1] and (3) simultaneously presumes and speculates a rigid "if-then" structure to the conduct of criminal trials that does not and has never existed. Petitioner's argument also ignores the repeated thrust of Counsel's closing argument taking advantage of their absence: that the State must not have called the informants because they were not credible.

Petitioner repeatedly insists that Counsel should have endeavored to suppress the statements, but offers no reason to exclude their admission into evidence. As Counsel noted, three of the statements were objectionable on hearsay grounds as they were derived in whole or in part from Skeet Phillips. (Appx. 1064, ll. 11-19). But the statements to which Counsel could have objected were the less substantive ones, such that they did not offer much to hurt Petitioner, whereas their admission despite their hearsay character permitted Counsel another means of arguing that all of the informant statements were derived in whole or in part from Skeet Phillips, who Counsel argued was a plant. Put another way, Counsel let bad apples come in alongside the fresher fruit and argued the whole bushel was rotten to the core. No basis for objection and exclusion existed for the statements of either Skeet Phillips or Michael Stillwell.

Petitioner also argues that *if* the jailhouse snitches had taken the stand and testified, he could have had another opportunity to impeach them. First, the informants would have only taken the stand but for Counsel's questioning of Detective Burgess, and so they would not have represented "another" opportunity for impeachment, but rather the only opportunity to impeach. Second, Petitioner's assertion that Counsel could have impeached them with their pending

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[1] Petitioner takes issue with the State's reasoning in deciding not to call the witnesses, but whether Petitioner agrees with Leskanic's reasoning or not is wholly immaterial. The fact is that it was her reasoning, and it was reasoning predicted by Counsel in making his strategic determinations.

charges ignores that explicitly doing so would be a double-edged sword. The record is devoid of any information to show the reason for the incarceration of the five men—their charges could have been most severe or petty and minor. Counsel instead enjoyed the benefit of leaving the detail to the jury's imagination, and broadly imply that they were planted by law enforcement. Third, Petitioner presumes Counsel would have achieved a perfect impeachment had the informants taken the stand, but as Counsel noted at length, he had no way of knowing what additional information the informants might have brought in around the statement.

Cross-examination is indeed a standard tool to show bias and challenge the reliability and credibility of the testimony of an adverse witness. Counsel utilized the tool of cross-examination by dumping an entire class of evidence onto a witness who was unprepared to address it, and performed so capably that the persons who could have done better were never called to testify. Furthermore, a witness may be discredited while not on the stand. Evidence, including statements, may be impeached by the introduction of contradictory facts, and evidence of bias or motive through other witnesses and argument thereupon. Counsel so challenged the statements. Counsel employed a reasonable trial strategy and the post-conviction relief court properly denied relief. This Court should affirm.

CONCLUSION

Petitioner has already received all that which the Court in Strickland opined should never come to pass: a trial after a trial. Petitioner still demands more that should never come to pass: that this Court simply toss aside the extraordinarily thoughtful and researched strategic determinations of original trial counsel simply because another attorney would do things differently without any evident overarching theory to do things differently. The law is clear that the Court must not so cast aside the thoughtful judgment of attorneys in the trenches.

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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