

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jul 11 2022

Certiorari to Greenville County

S.C. SUPREME COURT

Honorable G.D. Morgan, Jr., Circuit Court Judge

RONNIE C. SWOFFORD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001436

PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Was Petitioner denied effective assistance of counsel where counsel failed to challenge the prosecution's claim that Petitioner's fresh blood was splattered on the wall, where SLED found there was no blood on the wall, and where the freshness of the (nonexistent) blood was used to discredit Petitioner's alibi?

STATEMENT

Procedural history

During the November term of 2009, a Greenville County Grand Jury indicted Petitioner, Ronnie Swofford, for first-degree burglary, assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person convicted of a violent crime. During the September term of 2011, a Greenville County Grand Jury indicted Petitioner for assault with intent to kill. App. 1147 – 1154. Petitioner was tried before the Honorable Edward W. Miller from May 14 – 17, 2012. Petitioner was represented by Andrew Johnston and Gerald Wilson. Kris Hodge prosecuted the case. App. 1. The State sought a life without parole sentence for two of the offenses pursuant to S.C. Code Ann. § 17-25-45 based on Petitioner’s prior convictions. App. 728, l. 25 – 729, l. 22.

Petitioner was convicted as indicted. App. 725, l. 23 – 726, l. 18. The court sentenced him to life without parole for first-degree burglary, life without parole for assault and battery with intent to kill, ten years for assault with intent to kill, and five years for possession of a pistol by a person convicted of a violent crime. The court did not impose a sentence for possession of a weapon during the commission of a violent crime. App. 725, l. 23 – 726, l. 18.

Petitioner’s direct appeal was dismissed by the Court of Appeals at his request on June 28, 2013. App. 733 – 736. Petitioner then filed a motion for a new trial based on after-discovered evidence based on the discovery of potential trial witness Terry Stevens.¹ See App. 737 – 740. On December 9, 2013, the circuit court issued an order denying Petitioner’s motion. App. 741 – 745. Petitioner’s appeal of the order denying his motion for a new trial based on newly-

¹ Undersigned counsel was unable to obtain Petitioner’s motion for a new trial based on after-discovered evidence; the Greenville County Clerk of Court’s Office did not have the motion.

discovered evidence was dismissed by the Court of Appeals at his request on June 23, 2014. App. 752 – 753.

On July 8, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 754 – 761. On January 13, 2015, the State made its return. App. 762 – 768. On October 21, 2015, a hearing was held on the matter before the Honorable Perry H. Gravely. Mills Ariail represented Petitioner. Karen Ratigan represented the State. App. 778. On January 7, 2016, the PCR court issued an order of dismissal. App. 858 – 868. On February 2, 2016, PCR counsel filed and served a motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC. App. 869 – 891. On February 8, 2016, the State made a return. App. 892 – 893. On February 19, 2016, the PCR court denied the motion. App. 894 – 895.

On March 3, 2016, PCR counsel filed and served an untimely notice of appeal of Petitioner's PCR denial. App. 896 – 897. On September 27, 2018, the Court of Appeals issued an order dismissing the appeal based on PCR counsel's failure to timely serve notice of appeal. App. 989.

On November 6, 2018, Petitioner filed a second PCR application seeking appellate review of his PCR denial pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 992 – 1004. On December 13, 2019, the State made its return and partial motion to dismiss. App. 1005 – 1011. A hearing was convened via Webex on November 8, 2021 before the Honorable G.D. Morgan, Jr. Susannah Ross represented Petitioner and Taylor Smith represented the State. App. 1012 – 1063. By order filed November 23, 2021, Judge Morgan granted Petitioner a belated appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 1137 – 1142.

Relevant facts

Curtis Wooten, Complainant, alleged that at approximately 2:30 a.m. on July 27, 2009, a gunman wearing a ski mask entered his home in Greer just after Complainant walked into the house with groceries. Complainant alleged the gunman called Complainant's name and when Complainant turned, the gunman fired two shots, striking Complainant in the abdomen. Complainant returned fire with one shot from his own gun, striking the gunman. Rikki Edwards, Complainant's girlfriend, was home during the shooting but she was not hit by gunfire. Complainant and Edwards called 911 and drove to the hospital. App. 63, ll. 12-22; App. 69, l. 15 -77, l. 8. The 911 operator asked if Complainant knew who had shot him and Complainant did not answer. App. 108, ll. 11-20. Police initially suspected Edwards shot Complainant herself. App. 304, ll. 14-24; App. 340, l. 4 – 341, l. 19.

Complainant was badly injured, and ultimately had to be put on a ventilator for some time and have his spleen and a kidney removed, and he suffered other serious problems. App. 137, l. 18 – 139, l. 23. However, Officer Hayes went to the hospital at 2:45 a.m. and was able to talk to Complainant briefly as treatment was being initiated. Officer Hayes asked Complainant if he knew who had shot him and Complainant said no. Officer Hayes then asked Complainant if he knew anyone who would want to do this to him. Complainant replied that he thought Petitioner would do this to him because Petitioner owed him money. Officer Hayes asked if Complainant was certain that Petitioner was the person who shot him and Complainant said he was not. Nevertheless, Complainant claimed at trial he was 99.9 percent sure Petitioner was the gunman because he saw Petitioner's face through the opening of the ski mask and because he recognized Petitioner's voice. App. 66, l. 21 – 67, l. 17; App. 84, l. 20 – 87, l. 7; App. 111, l. 12 – 115, l. 22; App. 131, l. 5 – 133, l. 11; App. 142, l. 5 – 144, l. 8.

Law enforcement searched Complainant's home for evidence and they found 3 shell casings and a bullet jacket on the floor. They saw a hole in the kitchen wall. A red substance was splattered on the wall around the hole and they thought it might be blood. App. 156, l. 17 – 165, l. 23. (It was not blood. Petitioner would later explain Complainant's home was "dirty and nasty.") App. 793, l. 24. Officers collected the casings and the bullet jacket, and they cut out the section of the wall that had the bullet hole and splattered substance. App. 165, l. 24 – 166, l. 5; App. 177, l. 24 – 179, l. 18; App. 189, l. 9 – 196, l. 13. Officers sent evidence to SLED and asked for a rush on the DNA analysis. Petitioner's DNA was already in the system and was quickly matched to an unspecified piece of evidence from the scene (possibly the bullet jacket). App. 311, l. 1 – 312, l. 9; App. 316, ll. 15-23. A warrant was sought for Petitioner's arrest, and he was apprehended a few weeks later with round, scabbed wounds on his arm. App. 319, l. 15 – 321, l. 10; App. 334, ll. 19-22.

Petitioner testified at his trial, and he denied shooting Complainant. App. 569, ll. 19-21. However, Petitioner explained that he himself had been shot by Complainant about a week prior to this incident when Complainant accidentally shot him in the arm while Complainant was intoxicated. App. 531, l. 20 – 540, l. 18. Petitioner presented the testimony of several witnesses who had seen the gunshot wound or had seen his arm bandaged days prior to the incident date. App. 369, l. 7 – 370, l. 21; App. 377, l. 2 – 380, l. 5; App. 391, l. 15 – 394, l. 6; App. 408, l. 21 – 409, l. 23; App. 498, l. 14 – 499, l. 22.

Petitioner also presented an alibi defense. Petitioner presented the testimony of a friend who had seen him driving home the night of the incident, a neighbor who saw him arrive home that night, and the testimony of Petitioner's fiancée and her daughter who were home with him at the time Complainant was shot. App. 415, l. 9 – 417, l. 12; App. 450, l. 13 – 453, l. 9; App. 463,

l. 25 – 469, l. 1; App. 473, l. 10 – 479, l. 14. Petitioner admitted he had prior criminal convictions and he was cross-examined on his failure to explain his defense to law enforcement prior to trial. App. 501, l. 21 – 502, l. 1; App. 615, l. 8 – 617, l. 12. Several of the defense witnesses had prior criminal convictions. App. 388, l. 22 – 389, l. 2; App. 394, l. 20 – 395, l. 9; App. 419, ll. 4-6. Of note, Petitioner’s fiancée, Shannon Lawter, was further impeached.²

SLED analyzed the forensic evidence in this case, and the relevant evidence presented by the State’s witnesses during its case in chief was as follows. An unspecified type of hair from the cut-out section of the wall was found to match Petitioner’s DNA. The hair had tissue attached to the root. A “380 auto” bullet jacket found on the floor which contained suspected blood tissue was swabbed for analysis. The swab was not tested for the presence of blood but it was tested for DNA. The swab was found to match Petitioner’s DNA. As to both the swab from the bullet jacket and the hair, there was a 1 in 24 quadrillion probability of randomly selecting an unrelated individual having a DNA profile matching these items. App. 167, ll. 5-7; App. 172, l. 17 – 173, l. 2; App. 226, ll. 7-9; App. 269, l. 2 – 274, l. 20. There were also fibers of black fabric stuck to the wall. App. 260, l. 17 – 261, l. 8.

Importantly, SLED found the splattered substance on the wall was **not** blood. State’s Exhibit # 53 was the cut-away section from the wall, which had been sent to SLED. App. 178, l. 3 – 179, l. 13. Verona Gibson, who was an evidence processing technician at SLED and who was qualified as an expert in forensics processing, testified that she swabbed State’s Exhibit # 53 and

² Lawter stated during cross-examination that she did not tell her acquaintance Deborah Martinez Ruiz that Petitioner told Lawter he shot Complainant accidentally. App. 439, l. 13 – 442, l. 17. Martinez Ruiz was called as a rebuttal witness and she claimed that Lawter did tell her Petitioner confessed to shooting Complainant in self-defense. App. 629, l. 25 – 631, l. 13. Martinez Ruiz was admittedly mentally ill and heavily medicated. App. 626, l. 18 – 627, l. 20.

tested it for blood, but the test was negative. App. 246, l. 14 – 247, l. 16; App. 252, l. 6 – 253, l.

9. The following exchange took place between the prosecutor and Gibson.

Q. All right. I think what has now been marked State's No. 53; see if you can identify this.

A. Yes, ma'am. This is a section of the wall that I processed.

...

Q. Okay. And your presumptive test on this one?

A. Was negative.

Q. Was negative for blood. Okay.

App. 252, l. 5 – 253, l. 9. To be clear, the splatter on the wall was not blood and it was therefore not Petitioner's blood. Prior to trial, it appears both the prosecution and the defense received the SLED report which showed SLED's analysis found no blood on the wall. App. 984 – 986.

Nevertheless, in her opening statement, the prosecutor claimed Petitioner's DNA was found splattered on the wall at the crime scene. "[T]he person that was the shooter, the person that was shot by Mr. Wooten left behind his DNA. A splatter on the kitchen wall and body tissue and hair, is the DNA of the Defendant, Ronnie Swofford." App. 48, ll. 5-9. (In fact, as seen, only Petitioner's hair was found on the wall and his DNA was found on a bullet jacket on the floor.) In his opening statement, defense counsel did not correct this critical misstatement of fact. Instead, defense counsel agreed, "The blood and tissue that was found in the home of Curtis Wooten belongs to my client, Ronnie Swofford." App. 49, ll. 18-19. During the State's case-in-chief, Sergeant David Weiner testified the kitchen wall appeared to have blood on it. App. 235, ll. 11-15.

After the defense had rested its case, which included Petitioner's alibi witnesses and his innocent explanation about being shot a week prior to the incident, the prosecution recalled

Investigator Chris Miller in rebuttal to testify about the (nonexistent) blood on the wall. Miller had been a police officer for 18 years and a homicide investigator for 5 years. App. 637, ll. 2-5. The prosecutor attempted to qualify Miller as an expert in gunshot and crime scene reconstruction and she asked Miller whether the substance on the wall would still appear red if it had been deposited several days earlier. App. 637, l. 12 – 638, l. 6. While questioning Miller during voir dire, defense counsel stated that one would not need to be an expert to tell if blood was fresh. App. 639, ll. 18-24. Therefore, the trial court did not rule on Miller’s qualification and simply told the prosecutor that since defense counsel had conceded one need not be an expert to determine whether blood was fresh, the detective could testify to that. App. 642, ll. 2-4. The prosecutor elicited the following testimony from Miller.

Q. In State’s No. 39, the matter that you see as suspected or possible blood, tissue, hair, does that appear to be fresh blood, tissue, hair in your experience?

A. That would be fresh blood, the red.

Q. I need you to say that in the microphone?

A. The blood is red.

Q. And what does that tell you?

A. That it is still fresh.

App. 642, ll. 7-15. State’s Exhibit # 39 was a photograph of the red substance splattered on the wall. App. 164, l. 6 – 165, l. 23; App. 178, l. 3 – 180, l. 1. *See* App. 1132. As seen, Verona Gibson of SLED, who tested the wall for blood, had already testified the substance on the wall was not blood.

On cross-examination, defense counsel only asked Miller one question.

Q. Your testimony is that this is fresh because it’s still in a liquid state? I’m holding No. 39 in my hand. That’s your testimony?

A. Yes, sir.

App. 645, ll. 10-16.

Defense counsel did not address the fact that there was no blood on the wall with Detective Miller, Verona Gibson, or any witness at all. Defense counsel did not argue to the jury that SLED had found there was no blood on the wall. Defense counsel never acknowledged there was no blood on the wall. Instead, in his closing argument, defense counsel said Miller was wrong about the “blood evidence” because fresh blood would be dripping off the wall. App. 654, l. 19 – 655, l. 6. The freshness of the nonexistent blood on the wall was used by the prosecution, to devastating effect, to discredit Petitioner’s alibi defense and innocent explanation that he was shot the week before by Complainant.

In her closing argument, the prosecutor argued the (nonexistent) blood could not have been deposited on the wall days earlier in keeping with Petitioner’s defense since it was still red and fresh. “That’s body tissue and hair and suspected blood would just be on his kitchen wall for six days? And he wants you to say that this is six days old. I don’t think it takes an expert to testify to you that that stuff is fresh, That is fresh body tissue and blood. When blood dries, it turns brown, doesn’t it? It turns a brownish color.” App. 691, ll. 11-17.

The jury deliberated for three hours but it convicted Petitioner of all charges. App. 725, l. 5 – 736, l. 18.

At his PCR hearing, Petitioner testified that defense counsel failed to address the prosecutor’s incorrect claim that Petitioner’s blood was on the wall when it was not.

Ms. Hodge knew that the actual results of this same blood test, and they knew that my blood didn’t exist. And I felt like that since **Mr. Johnston pretty much conceded me being there with this blood in the beginning, never questioning the exerts to refute that ‘hey, this is not his blood.’ And continuing to get in debates with Detective Miller about how fresh the blood is and . . . how**

red the blood is. The solicitor expounded on the same thing . . . she knew it wasn't blood . . . She expounded about how fresh the blood was, How red it was and . . . both attorneys for the State and the Defense knew what did and did not exist and the jury should not have [been told] those things.

App. 812, l. 21 – 814, l. 4 (emphasis added).

At the PCR hearing, defense counsel testified that he did not remember “exactly what all was involved with” the matter of the purported blood splatter. However, defense counsel recalled the prosecutor used a photograph of purported fresh blood splatter on the wall to “refute Mr. Swofford’s claim that he had been shot in the home roughly a week prior.” App. 842, l. 16 – 843, l. 19.

In its order of dismissal, the PCR court found counsel’s representation was not ineffective regarding the purported blood evidence. “Applicant has failed to meet his burden of proving trial counsel should have challenged the blood and hair evidence. While the Applicant argued the blood evidence was not actually blood . . . this Court does not find these arguments persuasive.” App. 864. “The SLED expert witness testified a swab of tissue from the victim’s kitchen floor and a hair taken from the victim’s wall both matched the Applicant. App. 864. “Trial counsel’s defense theory was that this genetic material was from a prior accidental shooting (of the Applicant) at the victim’s house and that he had an alibi for the time when the victim was shot.” App. 864. “In presenting this defense at trial, this Court finds trial counsel properly questioned the State’s expert witnesses and then argued to the jury in closing argument that the State’s forensic evidence was not dispositive. The Applicant has failed to prove trial counsel was deficient.” App. 864. The court further found Petitioner had failed to prove prejudice. App. 866.

As seen, the Court of Appeals dismissed Petitioner's appeal of the denial of PCR based on untimely service of the notice of intent to appeal. After Petitioner filed a second PCR application, that PCR court granted Petitioner belated appellate review pursuant to *Austin*.

This petition for writ of certiorari pursuant to *Austin v. State* follows.

ARGUMENT

Petitioner was denied effective assistance of counsel where counsel failed to challenge the prosecution's claim that Petitioner's fresh blood was splattered on the wall, where SLED found there was no blood on the wall, and where the freshness of the (nonexistent) blood was used to discredit Petitioner's alibi.

Defense counsel's failure to respond to the prosecution's factually incorrect claim that Petitioner's blood was splattered on the wall of Complainant's home was ineffective assistance of counsel. The State's forensic expert from SLED testified there was no blood on the wall. App. 252, 1. 5 – 253, 1. 9. It appears that prior to trial both the prosecution and the defense had received the SLED report which concluded there was no blood on the wall. App. 984 – 986. Nevertheless, the prosecutor argued that Petitioner's fresh blood was splattered on the wall, and she elicited from Investigator Miller that there was "fresh" blood on the wall. Counsel never corrected these misstatements, and, in fact, he conceded Petitioner's blood was present. The prosecutor used the nonexistent blood evidence to devastating effect in nullifying Petitioner's alibi.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. am. VI. A two-pronged test for determining effective assistance of counsel was set forth in *Strickland*. The first prong requires an applicant show that counsel's performance was deficient; the second prong requires a showing that the deficient performance prejudiced the applicant to the extent there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989).

The PCR court's finding of effective representation here was error. *See Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018) (We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo). The State argued Petitioner's fresh blood was splattered on the wall, an argument that, if believed, negated Petitioner's alibi defense. The prosecutor elicited from her own expert witness that the witness tested the wall for blood and the test was negative. App. 252, l. 5 – 253, l. 9. The claim that Petitioner's fresh blood was on the wall was factually incorrect. At best, there was an inference that Petitioner's blood was on the bullet jacket (which was on the floor and was not tested for blood) since his DNA was on the jacket. However, any DNA on the jacket was not wetly splattered on the wall effectively negating Petitioner's defense.

Counsel had valid objections he could have made to the prosecutor's elicitation from Investigator Miller that there was "fresh," "red," "blood" on the wall and from her elicitation from Sergeant Weiner that there appeared to be blood on the wall. Counsel could have objected under Rule 403, SCRE, since the evidence was likely to mislead the jury. Counsel could have objected to facts not in evidence. *See, e.g., State v. Tyner*, 273 S.C. 646, 654–55, 258 S.E.2d 559, 564 (1979) (trial court properly sustained objection to question that assumed facts not in evidence). Counsel could have objected on due process grounds, since "the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)) (internal quotations removed); U.S. Const. am. XIV. *See also Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 835 (1996) (even where it does not solicit false evidence, State may not allow it to go uncorrected when it appears). Counsel also had valid objections to the prosecutor's argument about the "blood." Counsel could have objected on the grounds that the argument was

not confined to the evidence and reasonable inferences from the evidence. *See State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (solicitor's closing argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it).

Counsel could have moved to strike and asked for a curative instruction. Counsel could have moved for a mistrial. *See State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 480 (1997) (instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced); *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021) (trial court has discretion to grant a mistrial when prejudice can be removed in no other way). However, instead of clarifying that Petitioner's blood was not on the wall, counsel conceded Petitioner's blood was at the scene during argument and counsel quibbled with Investigator Miller over the freshness of the nonexistent blood.

Counsel's failure to challenge the incorrect assertions that there was blood on the wall and that it was fresh was not strategic. Counsel presented a defense that Petitioner had an alibi and that any of his DNA left at the scene was left a week earlier when Petitioner was shot by Complainant. Petitioner's fresh blood being on the wall was inconsistent with this defense. Counsel could have effectively represented Petitioner if he had pointed out to the jury that there was no blood on the wall and therefore it could not be fresh.

Because no objections were made to this presentation of factually incorrect evidence and improper argument, the testimony was not stricken. No curative instructions were given. The jury was not instructed to disregard the improper argument. Additionally, the judge did not

instruct the jury that the attorneys' arguments were not evidence. Nevertheless, the jury deliberated for three hours.

Counsel's deficient performance was devastatingly prejudicial to Petitioner. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* The prosecutor elicited incorrect testimony from Detective Miller and Sergeant Weiner that there was blood on the wall. Detective Miller was a highly experienced police officer and homicide investigator and he said the "blood" looked "fresh," which surely would have been compelling to the jury. In contrast, the testimony that there was no blood on the wall came out during complicated testimony about multiple exhibits where the prosecution and its witnesses referred to single exhibits using multiple identification numbers. "DNA evidence is well known as a powerful and accurate evidentiary tool for the State to solve crimes and obtain convictions. Nevertheless, DNA evidence has also come to be known for its potential to confuse and mislead jurors." *State v. Phillips*, 430 S.C. 319, 329, 844 S.E.2d 651, 656 (2020).

The failure to object to improper testimony by Sergeant Weiner and Detective Miller prejudiced Petitioner. The impact of these errors was to allow the jury to believe that Petitioner's defense was invalid because if he had been home at the time of the shooting like he claimed, his fresh blood would not have been on the wall. Petitioner has demonstrated *Strickland* prejudice as to these errors alone and he should be granted a new trial. *Strickland*, 466 U.S. at 695-96.

In *Phillips*, *supra*, this Court concluded that misstatements and wrong statements by the solicitor and SLED analyst about complicated DNA concepts required a new trial, especially

where solicitor's incorrect statements in closing argument all but guaranteed the jury was confused and misled. *Phillips*, 430 S.C. at 342, 844 S.E.2d at 663. Here, the manner in which the correct testimony about the actual evidence came out was confusing and the prosecutor's misstatements during closing argument all but assured the jury was confused and misled.

The prosecutor's improper argument provides an additional basis which supports granting post-conviction relief. "A review of a solicitor's closing argument is based upon the standard of whether his comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004); see also *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016). The presentation of false evidence results in a trial that offends due process because such is incompatible with the rudimentary demands of justice. *Giglio v. United States*, 405 U.S. at 153. The prosecutor's argument that Petitioner's fresh blood was on the wall was factually incorrect and it capitalized on misstatements of fact by Detective Miller and Sergeant Weiner that there was blood on the wall. The comments impugned Petitioner's alibi, which was testified to by two witnesses who were home with him and corroborated by two others who saw him heading home and arriving home. Petitioner provided an innocent explanation for the actual forensic evidence found. There is a reasonable likelihood the result of the trial would have been different had counsel properly responded to the improper argument.

Counsel failed to challenge the incorrect testimony and argument that Petitioner's fresh blood was on the wall when there was actually no blood on the wall. The (nonexistent) presence of Petitioner's fresh blood decimated his alibi defense. Petitioner has proven error and prejudice. *Strickland*, 466 U.S. at 686; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari pursuant to *Austin v. State* and permit full briefing on the issue presented.

s/ Joanna K. Delany
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ATTORNEY FOR PETITIONER

This 11th day of July, 2022.

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Jul 11 2022

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari pursuant to Austin v. State complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/ Joanna K. Delany

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This 11th day of July, 2022.