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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Sumter County

George C. James, Circuit Court Judge

NATHANIEL BRADLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001121

BRIEF OF PETITIONER

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ISSUES PRESENTED

I. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by calling Petitioner's brother to testify who harmed Petitioner's alibi defense by contradicting a prior alibi witness and by stating Petitioner was aware of the death prior to the police finding the body?

II. Did trial counsel violate Petitioner's Sixth and Fourteenth right to the effective assistance of counsel by failing to present a telecommunications expert to use the cell phone records to support Petitioner's alibi defense?

III. Did trial counsel violate Petitioner's Sixth and Fourteenth right to the effective assistance of counsel by failing to present an arson expert to establish a timeline for when the car was set afire to enable Petitioner to defeat the testimony of Koenig, the state's only eyewitness?

STATEMENT

In May 2005, Ernest James was in a romantic relationship with Martha Ransom. App. 153, l. 24 – App. 154, l. 11; App. 171, ll. 10-18; App. 182, ll. 14-19; App. 199, ll. 2-4. Also during that time, James and Petitioner were "very close friends." App. 154, l. 23 – App. 155, l. 2; App. 200, ll. 3-5; App. 372, ll. 2-5; App. 563, ll. 11-15.

On May 21, 2005, Leonard McCray, James' brother, saw Petitioner at a nightclub in Rembert. App. 155, l. 22 – App. 156, l. 17. Petitioner was with another man. App. 156, l. 18 – App. 157, l. 5. McCray told Petitioner that James was at their family home. App. 156, ll. 18-20. Thereafter, Petitioner and his friend left the club in Petitioner's blue Chevrolet Beretta. App. 157, ll. 8-23; see also App. 208, ll. 1-9. Petitioner and his friend arrived at the home where James and Ransom were living. App. 183, ll. 1-11; App. 207, ll. 10-16. James walked out of the house, and James and Petitioner talked outside. App. 184, l. 22 – App. 185, l. 3; App. 207, ll. 16-21. Petitioner and his friend drove away. App. 186, ll. 1-3. James then left, driving Ransom's car, a blue Volvo. App. 185, ll. 8-16; App. 208, l. 25 – App. 209, l. 5.

Petitioner's girlfriend's daughter attended her prom on May 21, 2005. App. 837, l. 3 – App. 838, l. 4. Petitioner took her to get her hair done at a beauty shop in downtown Sumter in anticipation for the big event. App. 839, ll. 3-19. When she was finished, Petitioner picked her up from the shop sometime between 6:30 and 7. App. 839, l. 24 – App. 840, l. 2; App. 854, ll. 1-5 (phone records showing 7:37 p.m.). Afterward, she and Petitioner went to the home of Paul, Petitioner's brother, to get some money. App. 840, ll. 11-15; App. 931, l. 16 – App. 932, l. 11; App. 933, ll. 8-15. The pair then went to Food Lion to buy a camera for her to use at prom. App. 840, ll. 12-15. They returned to her grandmother's house so she could get dressed for prom. App. 842, ll. 2-5; App. 856, ll. 12-21. Petitioner was at the grandmother's house in South

Forge Apartments when the daughter left at 8:30 p.m., and he was there when she returned at 1:30 a.m. App. 842, ll. 12-22. According to the grandmother, Petitioner stayed at her apartment with her from the time the daughter left until she returned. App. 857, ll. 15-20. Petitioner allowed the daughter's friend to drive his car – the blue Beretta – to prom. App. 842, l. 10 – App. 843, l. 1; App. 857, ll. 13-14.

Matt Bramlett lived "directly across" from Broad Branch Cemetery in Bishopville. App. 453, l. 23 – App. 454, l. 2; App. 457, ll. 2-13. During the early morning hours of May 22, 2005, his dog woke him up, barking at one spot in the corner of his lot toward the cemetery. App. 454, ll. 3-10; App. 455, ll. 2-11; App. 457, ll. 17-25. More specifically, Bramlett explained the dog was barking between midnight and 1:30 a.m. App. 459, ll. 14-19. The dog barked between forty and fifty minutes. App. 454, ll. 7-15; App. 455, ll. 12-17.

On Sunday morning, Petitioner stopped to visit his friend, Calvin Davis, Jr., in Bishopville. App. 862, ll. 17-18; App. 865, ll. 1-8; App. 866, ll. 21-24. When Petitioner left, he indicated he was going to get some paint so he could paint another friend's home. App. 869, ll. 5-16.

Thomas McCutchen lived "on the adjacent side of Broad Branch from the cemetery." App. 348, ll. 16-23. His house was approximately one-fourth of a mile from the cemetery. App. 348, l. 24 – App. 349, l. 1. During the afternoon on May 22, 2005, McCutchen was riding his golf cart around his property. App. 349, ll. 2-7; App. 351, ll. 9-24; see also App. 358, ll. 6-11; App 360, ll. 6-13 (officer received the call for the car at 3:35 p.m.). He found "[a] car that had been burned." App. 349, ll. 8-11. The car was no longer burning when he found it. App. 349, ll. 12-13. McCutchen did not see any smoke or fire when he found the car. App. 353, ll. 5-8.

The officer who responded to McCutchen's call about the car reported that it "appeared to be recently burned" and that it "appeared to be a mid 80's model Volvo." App. 361, ll. 17-21. It was a 240DL model. App. 363, ll. 5-7. The car was "burnt completely up" "inside and out." App. 365, l. 23. "[E]ven the tires were burnt off of it." App. 365, ll. 24-25. "[A]ll the interior was completely burned, dash burned, everything was burned away." App. 366, ll. 1-2. The police used the partial VIN to match it to the blue Volvo owned by Ransom in which James was last seen driving away from her home. App. 701, ll. 3-10.

According to Robert Jones, Petitioner arrived at the house he was building in Sumter after noon on Sunday, May 22, 2005. App. 885, ll. 5-13; App. 887, ll. 5-10; see also App. 892, ll. 4-17. Petitioner worked for Donnie Hawkins who was the builder of the home. App. 884, ll. 8-25. Petitioner looked around the home for approximately forty-five minutes. App. 887, ll. 18-23. Additionally, Petitioner went to visit his friend Cody Kind in Sumter on Sunday afternoon. App. 922, ll. 17-22. Kind and Petitioner watched Kind's son and his friends play basketball for several hours. App. 926, l. 22 – App. 927, l. 25.

On Monday, May 23, 2005, around 10 a.m., Petitioner went to the home of Tina Leon in Sumter to paint the trim around her windows. App. 901, ll. 11-24; App. 909, ll. 19-23; App. 910, ll. 1-7. Leon provided lunch for Petitioner from a nearby fast food restaurant. App. 904, ll. 20-25. Petitioner left around 4 p.m. App. 905, ll. 9-13; App. 905, ll. 22-24; App. 911, ll. 1-4.

Also on May 23, 2005, Walter Lundberg was fishing on Boyle's Pond in Sumter. App. 104, ll. 8-10. He spotted a body in the water and called 911 for help. App. 104, ll. 14-25. The police removed the body from the water. App. 113, ll. 12-25; App. 122, l. 23 – App. 123, l. 2. The police found a wallet in the pocket of the short pants on the body. App. 671, ll. 13-16. Inside the wallet, there was an identification card, which the police used to identify the body as

that of Ernest James. App. 671, ll. 16-19. Thereafter, the police learned that Petitioner was one of the last people to see James alive. App. 682, ll. 2-15. The police then began investigating Petitioner. App. 682, l. 25 – App. 683, l. 12.

On May 24, 2005, Daniel Simon with the Lee County Sheriff's Office read in the newspaper that the Sumter County Sherriff was looking for a Volvo. App. 492, ll. 10-25; App. 493, ll. 14-16. As a result, Simon contacted the Sumter County Sherriff about the burned car found across from the cemetery. App. 493, ll. 2-6; App. 493, ll. 17-23; App. 690, l. 16 – App. 691, l. 9.

The pathologist performed the autopsy on the body on May 24, 2005. App. 408, ll. 8-10. According to the pathologist, the deceased suffered three gunshot wounds, one of which caused his death. App. 411, ll. 21-22; App. 435, ll. 17-22. He recovered two bullets from the body. App. 422, ll. 10-12. Additionally, he found signs of decomposition. App. 432, l. 18 – App. 433, l. 19. However, the pathologist was unable to determine the exact time of death. App. 434, ll. 9-14. The pathologist explained that he put the date of death as May 23, 2005, based upon information he received from the coroner, and not information gleaned from the autopsy. App. 438, l. 4 – App. 441, l. 18. Later, the coroner contacted the pathologist requesting he change his report to indicate the date of death was May 22, 2005. App. 441, l. 23 – App. 442, l. 3. Therefore, on the final autopsy report, the pathologist indicated the date of death was May 22, 2005. App. 443, ll. 5-14. The pathologist explained that the deceased could have died anytime between May 21 and May 23. App. 446, ll. 10-23.

On January 3, 2008, a Sumter County grand jury indicted Petitioner for murder of Ernest James and possession of a firearm during the commission of a violent crime (2007-GS-43-390).

App. 1826-1827. The state, represented by Catherine Fant, called the case to trial before the Honorable R. Ferrell Cothran, Jr. App. 1. Ernest Finney represented Petitioner. App. 1.

During the trial, the lead investigator explained he did not have any eyewitness who saw Petitioner kill the deceased. App. 729, ll. 14-16. No one saw Petitioner with a gun. App. 729, ll. 17-18. There was no evidence from the scene or from the body of the deceased to indicate Petitioner killed him. App. 729, ll. 19-21. The investigator could not tell the jury "a precise date" when the deceased died." App. 729, ll. 22-23. He could not even tell the jury what county in which the deceased died. App. 729, ll. 24-25.

Ultimately, the jury found Petitioner guilty of murder, but not guilty of possession of a weapon. App. 1065, l. 21 – App. 1066, l. 4. Judge Cothran sentenced Petitioner to thirty years incarceration. App. 1079, ll. 7-10; App. 1828.

Petitioner filed a notice of appeal, which was perfected by Joseph L. Savitz, III. App. 1081-1090. On appeal, Petitioner challenged the trial judge's erroneous refusal to grant a directed verdict of acquittal. App. 1081-1090. On November 8, 2010, this Court affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Bradley, 2010-UP-494 (S.C. Ct. App. filed Nov. 8, 2010); App. 1122-1123. Subsequently, Petitioner filed for rehearing. App. 1124-1125. On December 30, 2010, this Court denied the petition for rehearing. App. 1126. Thereafter, Petitioner, represented by Tristan M. Shaffer, filed a petition for writ of certiorari asking the Supreme Court to review his case. App. 1127-1139. TheCourt denied the writ on June 21, 2012. App. 1170. Remittitur was issued on July 5, 2012. App. 1171.

On July 27, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 1172-1178. On September 19, 2013, Petitioner filed an amendment to his application for PCR. App. 1184. Thereafter, on April 9, 2015, Petitioner filed a second amendment to his application

for PCR. Supp. App. 1-4. On April 15, 2015 and July 5, 2016, the Honorable George C. James, Jr., convened an evidentiary hearing regarding Petitioner's application. App. 1185. Daniel F. Gourley and Julie Amanda Coleman represented the state, and Bradley Myers Kirkland represented Petitioner. App. 1185. By an order filed September 5, 2017, Judge James denied relief to Petitioner. App. 1745-1790. On September 22, 2017, Petitioner filed a motion to alter or amend the judgment. App. 1791-1824. On May 15, 2018, Judge James denied the motion. App. 1825.

After receiving written notice of the order on May 21, 2018, Petitioner served his notice of appeal on June 15, 2018. Petitioner filed a petition for writ of certiorari on March 12, 2019, raising seven issues. The state filed its return on June 4, 2019. By an order dated June 17, 2019, the Supreme Court transferred the case to this Court pursuant to Rule 243(l), SCACR. On April 15, 2022, this Court granted certiorari as to Questions 2, 3, and 4, and ordered briefing. Petitioner now files this brief.[1]

[1] For ease of reference, Petitioner has re-numbered the issues presented so that Questions 2, 3, and 4 are now Questions 1, 2, and 3 respectively.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

ARGUMENT

I. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by calling Petitioner's brother to testify who harmed Petitioner's alibi defense by contradicting a prior alibi witness and by stating Petitioner was aware of the death prior to the police finding the body.

Relevant facts

Petitioner defended against the charges by presenting an alibi. In light of the state's inability to pinpoint when or where the deceased was killed, Petitioner presented numerous witnesses who testified regarding Petitioner's whereabouts between May 21, 2005, and May 23, 2005 – the last time James was seen alive and when his body was found. One of the witnesses presented was Paul Bradley, Petitioner's brother. App. 930, ll. 20-22. Paul claimed he saw Petitioner on Monday, May 23, 2005. App. 933, ll. 23-25. He claimed Petitioner went to him about 1 p.m. crying because his friend had been killed. App. 934, ll. 1-5. This testimony *directly contradicted* the testimony of Tina Leon and Terrell Johnston who said Petitioner was at a painting job on Monday from 10 a.m. until 4 p.m. App. 901, ll. 11-24; App. 905, ll. 9-13; App. 905, ll. 22-24; App. 909, ll. 19-23; App. 910, ll. 1-7; App. 911, ll. 1-4.

The solicitor seized on defense counsel's error in closing. According to the solicitor, Paul "provided one of the most important pieces of evidence in this case." App. 1034, ll. 19-21. She even noted that it was defense counsel, not her, who asked Paul what time it was on Monday afternoon when Petitioner was crying about his friend's death. App. 1034, ll. 21-23. The solicitor explained that Paul claimed Petitioner was upset at 1:00 in the afternoon, but the body was not found until 1:45 p.m. App. 1034, l. 24 – App. 1035, l. 1.

Trial counsel called Paul as a witness because he "was the leader of the family," "an older gentleman," "very stable," and the man who "hired" trial counsel. App. 1471, ll. 7-10. He showed the jury "that the Bradley family was a solid family." App. 1471, ll. 10-12. Trial counsel claimed he was unaware that Paul "was going to testify that [Petitioner] sa[id] that he was dead before the police got there." App. 1472, ll. 7-10. When questioned about the impact of Paul's testimony that Petitioner knew of James' death prior to the police finding his body, trial counsel refused to admit the testimony from "this outstanding pillar of the community virtually destroyed [the] case" because trial counsel understood Paul to be testifying to an "estimation of time." App. 1519, ll. 4-10. Trial counsel admitted he did not know Paul would estimate the time as 1 pm, and that if he knew Paul would testify accordingly, he would *not* have called Paul as a witness. App. 1520, ll. 6-11.

The PCR judge rejected Petitioner's claim, finding that Paul testified to an estimated time of "around 1:00." App. 1777. According to the PCR judge, Petitioner "ignore[d] the reality that time-of-day estimates are just that – estimates." App. 1777. Ultimately, the judge found trial counsel's calling of Paul was not deficient, and even if it were deficient, then the content of his testimony "did not likely play an important part in the jury finding [Petitioner] guilty." App. 1777.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether 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. To prove ineffective assistance of counsel, "the

defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

The South Carolina Supreme Court granted relief to Ingle where his trial counsel called a witness to the stand without interviewing her. Ingle v. State, 348 S.C. 467, 471, 560 S.E.2d 401, 403 (2002). Ingle was charged with criminal sexual conduct of a minor. Id. at 470, 560 S.E.2d at 402. The minor was the daughter of Ingle's girlfriend, Jean Afify. Id. At trial, Ingle denied molesting Afify's daughter and claimed his semen was transferred to her shorts because she sat on the bed he shared with Afify shortly after the two had sex. Id. at 470, 560 S.E.2d at 402-403. Ingle's counsel called Afify as his first witness and asked if she and Ingle had sex the morning daughter alleged she was molested. Id. at 471, 560 S.E.2d at 403. Afify denied having sex with ingle that morning. Id.

Ingle's counsel admitted he did not interview Afify prior to calling her as a witness. Id. Ingle's counsel claimed "he relied solely on [Ingle] who had 'convinced' him Afify was honest and would admit to having intercourse with [Ingle] on the morning of the alleged assault." Id. He also "presumed her testimony would be favorable to [Ingle]" because the state did not call her as a witness. Id.

The Supreme Court held Ingle's counsel "clearly was deficient in presenting Afify as a defense witness without first interviewing Afify to ascertain whether she would support [Ingle]'s theory of the defense." Id. Further, the Court held Ingle's counsel's reliance on Ingle's assertions that Afify would be honest and his assumption her testimony would be favorable

based on the state not calling her did "not amount to reasonable strategy for calling Afify." Id. The Court held "it was objectively unreasonable for counsel to ask such a crucial question of the sexual assault victim's mother without first ascertaining her response." Id.

Furthermore, the Supreme Court held Ingle's conduct was prejudicial. The Court observed that "Afify was **the first witness**" called in Ingles' defense. Id. at 471, 560 S.E.2d 403 (emphasis in original). The Court also explained how "the state was able to capitalize on trial counsel's error, and elicit additional damaging testimony on cross-examination." Id. at 472, 560 S.E.2d at 403. According to the Court, "the effect of Afify's testimony, which totally contradicted [Ingle]'s defense, was heightened by the fact that Afify was called as [Ingle]'s first witness." Id. The Court decreed that "[i]t simply cannot be overstated how damaging Afify's testimony was since it came in as part of what was supposed to be [Ingle]'s defense." Id.

The Supreme Court also explained that Ingle's theory of how the semen was transferred to daughter's shorts from the bedsheets was not implausible, and, therefore, without Afify's denial that they had sexual intercourse on the morning in question, reasonable doubt could have been established. Id. This was particularly true where other evidence called into question the credibility of daughter. Id. Ingle testified that daughter was angry with him for not buying her certain things, and that Afify did not report the alleged assault immediately after daughter informed her of it. Id. Instead, Afify waited ten days and only reported the allegation after a neighbor contacted DSS and after Afify's Myrtle Beach vacation. Id. The Supreme Court held there was no probative evidence to support the PCR court's finding that Ingle failed to establish prejudice from his counsel's unreasonable strategy. Id. at 472, 560 S.E.2d at 403-404.

In another case, the South Carolina Supreme Court held it was unreasonable for counsel to present a single expert witness during the defendant's second trial when counsel knew the expert witness's testimony had benefited the state's case during the first trial. McKnight v. State, 378 S.C. 33, 43-45, 661 S.E.2d 354, 359-360 (2008). McKnight was charged with homicide by child abuse after her child was stillborn. Id. at 39, 661 S.E.2d at 356-357. At the first trial, the state presented testimony from two pathologists that the death of the child was due to cocaine use by McKnight. Id. at 40-41, 661 S.E.2d at 357-358. McKnight called two expert witnesses to testify as to possible alternative causes of death. Id. at 41, 661 S.E.2d at 358. The first expert, Dr. Steven Karch, opined the child died as a result of conditions separate from McKnight's cocaine use. Id. McKnight also called Dr. Sandra Conradi, a pathologist. Id. at 42, 661 S.E.2d at 358. She testified that she could not rule out cocaine as a cause of death. Id. During closing argument, the state concentrated on Dr. Conradi's testimony, emphasizing repeatedly that McKnight's own expert had eliminated all potential causes of death except cocaine exposure. Id. Ultimately, the judge declared a mistrial due to juror misconduct. Id.

For the second trial, the state again called its experts to testify that the child died due to cocaine use. Id. McKnight only called Dr. Conradi, who again ruled out other causes of death. Id. at 43, 661 S.E.2d at 358. The state also focused its closing argument on how Dr. Conradi really helped the state's case by eliminating all other relevant causes of death. Id. at 43, 661 S.E.2d at 359. The jury found McKnight guilty. Id.

During the PCR hearing on McKnight's claim that counsel was ineffective in calling an expert whose testimony undermined the defense, McKnight's counsel testified that when she learned Dr. Karch would be unable to testify due to travel abroad, counsel believed Dr. Conradi's testimony alone would be sufficient. Id. The Supreme Court held counsel performed

unreasonably by calling Dr. Conradi as a witness at the second trial because she knew the state benefited from Dr. Conradi's testimony. Id. "[C]ounsel should have reasonable concluded [that Dr. Conradi's] testimony went to the heart of the state's case, and that substitute and/or additional testimony was needed." Id. Thus, the Court held counsel's decision to call Dr. Conradi alone to testify at the second trial was unreasonable. Id. at 45, 661 S.E.2d at 360.

Further, the Court held there was a reasonable probability counsel's deficient performance was prejudicial to McKnight. Id. The Court explained, "[t]he methodology used by the *only* expert witness for the defense in determining the cause of fetal death mimicked that of the state's star expert and, in this way, Dr. Conradi's testimony primarily served to bolster the state's theory of the case excluding all other potential causes of death in order to conclude that cocaine called the stillbirth." Id. (emphasis in original).

Trial counsel's failure in this case to interview his witness, Paul, properly so that he would avoid eliciting harmful testimony – or not call the witness altogether is akin to countless cases in which courts throughout the country have deemed counsel's failure to investigate constituted ineffective assistance. See e.g., Rompilla v. Beard, 545 U.S. 383-385 (2005) (concluding counsel's failure to examine Rompilla's prior conviction file was prejudicial deficient performance); Wiggins v. Smith, 539 U.S. 510, 523-533 (2003) (counsel's abandonment of investigation of Wiggins' background for purposes of mitigation); Williams v. Stirling, 914 F.3d 302, 314-315 (4th Cir. 2019) (holding counsel provided ineffective assistance by failing to present readily available evidence that Williams suffered from fetal alcohol syndrome); Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986) (holding counsel provided ineffective assistance by failing to cross-examine the state's gunshot residue expert and/or retain an independent expert in gunshot residue and by failing to investigate the co-

defendant's background); Martin v. State, 427 S.C. 450, 456-457, 832 S.E.2d 277, 280-281 (2019) (failure of trial counsel to elicit the precise timing of an event from a witness called at trial in order to establish an alibi was ineffective assistance of counsel); Weik v. State, 409 S.C. 214, 235, 761 S.E.2d 757, 768 (2014) (reversing a death sentence where counsel failed to present evidence of Weik's background despite abundant social history evidence available); Walker v. State, 407 S.C. 400, 406, 756 S.E.2d 144, 147 (2014) (concluding trial counsel's investigate was inadequate where counsel failed to interview Walker's girlfriend, who could have provided an alibi); Ard v. Catoe, 372 S.C. 318, 334-335, 642 S.E.2d 590, 598-599 (2007) (holding trial counsel's decision to not cross-examine the state's gunshot residence expert was not an objectively reasonable strategy that prejudiced Ard); Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004) (holding counsel's investigating concerning Von Dohlen's mental state was not reasonable);

Here, trial counsel violated one of the basic rules of lawyering when he asked Paul what time Paul had the conversation with Petitioner regarding James's death – do not ask a question to which you do not know the answer. Trial counsel called Paul to testify because he considered Paul a credible witness who would impress the jury. However, trial counsel elicited harmful testimony from Paul that contradicted an alibi witness and attributed knowledge of James's death prior to the police find the body. Trial counsel was simply unprepared to present Paul as a witness.

In its return, Respondent claimed "[t]he PCR court found trial counsel articulated valid strategic reasons for calling Paul Bradley as a witness" and that "[e]vidence support[ed] the PCR court's decision." Ret. at 6. Yet, the PCR court's order contained no indication of a finding of a valid strategic reason for calling Paul. Instead, the order simply recited trial counsel's testimony

as to why he called Paul to testify and concludes trial counsel was not deficient for doing so. App. 1777. In short, the PCR court did not find that trial counsel's decision to call a witness to testify to incredibly damaging testimony to be a valid strategic decision.

The harmful testimony prejudiced Petitioner where the state's case was a weak circumstantial evidence case. See Lounds v. State, 380 S.C. 454, 462-463, 670 S.E.2d 646, 650-651 (2008). Contrary to the PCR court's view that Paul's testimony did not play an important role in the jury's decision, the prosecutor considered Paul's testimony regarding *when* Petitioner was upset to be one of the "most important pieces of evidence in this case." App. 1034, ll. 19-21. Akin to the prejudice analysis in Ingle, supra, where the Supreme Court placed heavy emphasis on the fact that the damaging testimony was presented through the defendant's *first* witness, here, the damaging testimony was presented through the defendant's *last* witness. See Miller, N., & Campbell, D.T., Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements, The Journal of Abnormal and Social Psychology, 59(1), July 1959 (explaining through empirical study that people remember the first and last things they hear). Not only did the jury hear from a *defense* witness that Petitioner was aware of the death prior to the body being discovered, but the jury heard this devastating evidence from the *last* witness *called by the defense*. See Ingle, 348 S.C. 467, 472, 560 S.E.2d 401, 403 (2002) (holding "[i]t simply cannot be overstated how damaging Afify's testimony was since it came in as part of what was supposed to be [Ingle]'s defense.").

II. Violating Petitioner's Sixth and Fourteenth right to the effective assistance of counsel, trial counsel failed to present a telecommunications expert to use the cell phone records to support Petitioner's alibi defense.

Relevant facts

During the trial, defense counsel introduced Petitioner's cell phone records through the lead investigator, Clarence McMillan. App. 768, ll. 14-22. The records indicated that Petitioner's first phone call on Sunday morning was made from a tower in Sumter. App. 774, ll. 2-13. At 7:16 a.m. on Sunday morning, the phone used a tower in Bishopville. App. 775, ll. 9-19. In fact, during the entire morning, Petitioner's phone used two towers in Bishopville and one in Camden. App. 775, l. 20 – App. 778, l. 14. According to McMillan, one of the towers indicated in the records that was used by Petitioner between 9 a.m. and 11 a.m. on Sunday morning was "[m]ore than 10 miles" from Boyle's Pond, where the deceased's body was recovered and where Darrell Koenig claimed he saw Petitioner. App. 786, l. 22 – App. 788, l. 6. McMillan claimed that he had no proof that Petitioner was the one using his phone, however. App. 788, ll. 2-6; App. 815, ll. 9-16. Additionally, in response to an open-ended question from defense counsel, McMillan claimed that Petitioner's phone used a tower "near Boyle's Pond" on Sunday afternoon at 3:23 p.m. App. 789, l. 1 – App. 790, l. 9.

When defense counsel presented McMillan with a map for him to show the jury where the phone towers were, McMillan was unable to do so. App. 784, ll. 3-11. In fact, McMillan had not investigated the towers associated with phone calls made by Petitioner. App. 787, ll. 6-11. It was clear McMillan was wholly unprepared to testify regarding Petitioner's phone records.

At the PCR hearing, trial counsel admitted the cell phone records were "the strongest" evidence he had to show Petitioner's innocence. App. 1464, ll. 3-12. Nevertheless, he did not retain an expert. App. 1464, ll. 3-18. Instead, trial counsel, as stated, merely cross-examined McMillan on the records. Trial counsel admitted McMillan was not prepared to testify to the contents of the records. App. 1465, ll. 6-15; App. 1498, ll. 22-24.

During the PCR hearing, Petitioner called Ben Levitan, an expert in the historical analysis of cell phone records. App. 1244, ll. 19-25. Levitan explained that individuals who attempt to use the cell phone records and plot them on a map generally do not have "any knowledge of how the cell phone networks actually work[], or without the background and experience to actually make those opinions." App. 1240, ll. 7-22. Levitan explained that the request made by the sheriff's department for the cell tower location information was done poorly. App. 1257, ll. 11-14. Specifically, the records only showed the first cell tower that was used by the cell phone, and did not show if the cell phone changed towers during the call. App. 1258, ll. 2-18. He noted that at Petitioner's trial, McMillan had "a typed list of 20 cell towers" and "some maps" from an unknown origin. App. 1260, ll. 10-18. The list was incomplete as it failed to include all the towers in the area, which were necessary to "make a plan." App. 1260, l. 20 – App. 1261, l. 11.

Levitan was able "to fill in the gaps." App. 1262, l. 3. Levitan then plotted the locations for Petitioner's phone based on the cell tower location information on a map. App. 1264, ll. 9-16. Thereafter, Levitan provided lengthy and detailed testimony that showed how the cell tower information supported Petitioner's alibi witnesses. App. 1270, l. 7 – App. 1301, l. 24; <u>see</u> Applicant's Exhibit #3. Even the PCR judge's summary of the testimony acknowledged that Levitan's testimony established that Petitioner's alibi was supported by the phone records and

could have been presented to the jury in such a way had trial counsel employed an expert. See App. 1766-1767. One of the most important pieces of corroborative evidence from the phone records was that between the hours of 8:34 and 10:32 on Sunday morning, Petitioner's phone was using a tower that was "23 and a quarter miles from where the witness Mr. Koenig said he witnessed the Volvo." App. 1285, ll. 5-15. Expert Levitan explained the phone records were "absolutely conclusive that the phone is excluded from being in the area of [Boyle]'s Pond and Cobblestone Road between 9:30 a.m. and 10:15. The phone in my opinion, is 23 miles away from that." App. 1302, ll. 8-14. Furthermore, the expert used the phone records to show that between the hours of 9:30 a.m. and 3 p.m. on the day the burnt Volvo was found, Petitioner's phone was nowhere near the cemetery. App. 1302, l. 25 – App. 1303, l. 13.

Despite Levitan providing critical evidence during the PCR hearing to refute the state's case, the PCR judge held Petitioner was not entitled to relief where trial counsel failed to retain a cell phone expert to establish Petitioner's alibi and discredit the state's key witness. App. 1771. According to the PCR judge, "[t]rial counsel's cross-examination of Investigator McMillan was thorough and created a substantial question as to whether [Petitioner] was in the area where Mr. Koenig claims to have seen him driving the Volvo on Sunday morning." App. 1771. The PCR judge asserted that "[t]rial counsel thoroughly addressed the cell tower issues in his closing argument, referring not only to the inconsistency between [Petitioner's] phone being used 24 miles away from where Koenig claims he saw [Petitioner], but also to the fact that the cell tower records confirmed [Petitioner]'s phone was being used in areas where [Petitioner] and other witnesses claimed they saw [Petitioner] at certain relevant times." App. 1771-1772. Thus, the PCR court denied Petitioner relief despite trial counsel's failure to retain an expert witness who would have established his alibi and destroyed the credibility of the state's star witness.

Discussion

As mentioned previously, the Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 686. In other words, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

In Strickland, 466 U.S. at 691, the United States Supreme Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." See McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (providing that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State."); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (holding that "[w]ithout a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'") (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)).

The United States Supreme Court also held that "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527 (2003). Specifically, "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty

to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Lounds v. State, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (internal quotations omitted).

Admittedly, attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant; however, the decision not to investigate must be reasonable. See e.g., Hinton v. Alabama, 571 U.S. 263, 274 (2014) (requiring strategic choices to be made after a thorough investigation); Wiggins, 539 U.S. at 533 (holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004) (holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "'major depressive episodes with severe symptoms of anxiety and possible prepsychotic features'").

Recently, the Fourth Circuit Court of Appeals granted habeas relief to Charles Williams because trial counsel failed to present readily available evidence that he suffered from fetal alcohol syndrome. Williams v. Stirling, 914 F.3d 302 (4th Cir. 2019). In preparation for sentencing, Williams' trial counsel assembled a team that included a social worker, a clinical neuropsychologist, a clinical psychiatrist, neurologist, and forensic psychiatrist. Id. at 307. Trial counsel's investigation revealed Williams' mother abused alcohol while she was pregnant. Id.

"During the penalty phase, defense counsel presented mitigating evidence of Williams' troubled childhood – including his mother's alcoholism – as well as his mental illness and difficulties in school." Id. The jury learned Williams suffered neurological impairments as a result of frontal lobe damage causing learning difficulties. Id. The jury also learned Williams was diagnosed with bipolar, obsessive-compulsive disorder, and major depressive disorder. Id. at 307-308.

Williams' post-conviction relief counsel alleged trial counsel failed to investigate signs that Williams suffered from fetal alcohol syndrome – "namely, evidence of [mother]'s drinking during her pregnancy and Williams' corresponding brain damage." Id. at 308. During the state PCR hearing, one expert testified Williams suffered from Partial Fetal Alcohol Syndrome, another expert testified Williams had several functional impairments and damage to the corpus callosum, which were consistent with fetal alcohol syndrome, and a final expert concluded Williams' executive functions, including self-regulation and behavior control, were impaired by fetal alcohol syndrome, resulting in behavioral difficulties, impulse control problems, and coping skills equivalent to those of a nine-year-old. Id. "All three experts acknowledged that at the time of the trial in 2005, a widely recognized protocol to forensically assess FAS in the criminal justice context had not yet been fully developed, but that individual practitioners had been addressing FAS and had developed a framework for diagnosing the condition and treating its symptoms." Id.

The state PCR court denied Williams relief on his claim that trial counsel provided ineffective assistance by failing to investigate and present evidence that he suffered from fetal alcohol syndrome despite trial counsel's awareness of his mother's drinking during the pregnancy. Id. at 309-310. The state PCR court also determined that even if the evidence had been presented it was unlikely that the jury would have returned a different sentence. Id. at 310.

The Fourth Circuit Court of Appeals explained that "an inadequate investigation into potentially mitigating evidence can be, by itself, sufficient to establish deficient performance." Id. at 314. Thus, the court concluded "counsel's investigation into potentially mitigating evidence of FAS failed to meet an objective standard of reasonableness." Id. Williams' trial lawyers admitted "they were aware of the mitigating value of neurological defects at the time of Williams' sentencing ... yet they failed to investigate this issue." Id. The court explained that "because there was no recognition of potential FAS diagnosis by trial counsel, there was no further exploration of FAS as a potential mitigating factor[a]nd because there was no exploration, there was necessarily no opportunity for counsel to make a strategic decision about whether or not to further develop the FAS evidence or present it in mitigation." Id. The investigation was deficient because "the lack of an informed decision regarding mitigating evidence." Id. "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id.

The court explained trial counsel missed the "red flags" that required additional investigation, including evidence of his mother's drinking during pregnancy and of Williams' brain damage. Id. at 315. "[E]vidence of FAS *was* reasonably available, but counsel failed to connect the indicators suggesting further investigation." Id. "[G]iven that FAS evidence was widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored – as outlined in the ABA Guidelines and caselaw at the time, and by counsel during their PCR testimony – counsel's actions were deficient." Id.

Similarly, the South Carolina Supreme Court addressed trial counsel's deficient performance in capital cases involving failures to investigate mitigating evidence. The Court vacated John Edward Weik's death sentence based upon his counsel's failure to present Weik's

social history "even though there was abundant social history evidence available to them." Weik v. State, 409 S.C. 214, 235, 761 S.E.2d 757, 768 (2014). While trial counsel presented psychological testimony of Weik's mental illness, "counsel failed to present even a skeletal version" of his social history. Id. Defense counsel provided the mitigation investigator no support or guidance, but the investigator "uncover[ed] substantial mitigating information about [Weik]'s social history and provided counsel with written reports detailing that information." Id. Yet, counsel failed to use the information. Id. The mitigation case was "extremely limited," "general, vague, and offered no detail or insight into the degree of abuse Weik suffered as a child." Id. "[T]he jury remained unaware of the severity and pervasiveness of the physical and psychological abuse Weik faced and the full extent of his father's mental illness." Id. The Court attributed this to "counsel's failure to review the investigators' reports they possessed in their own case files to become aware of the wealth of information that had been uncovered." Id. Thus, there was no strategic decision not to present the evidence as counsel "simply did not read the investigators' reports." Id. "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." Id. See also Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (holding trial counsel's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable).

Additionally, counsel has a duty to call necessary experts to challenge the state's evidence. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007); Reeves v. State, 415 S.C. 366, 376, 782 S.E.2d 747, 752 (Ct. App. 2015).

This Court held trial counsel provided prejudicial deficient performance by failing to consult with his client about hiring a medical expert to challenge the state's medical evidence at trial in a criminal sexual conduct case. Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App.

2015). The alleged minor victim claimed Reeves sexually assaulted her over a period of time. Id. at 368, 782 S.E.2d at 748. An expert in emergency room pediatric care testified on behalf of the state that minor appeared to have a healing scar on her hymen, which was at least one week old. Id. at 370, 782 S.E.2d at 748. The expert opined that any kind of penetration, penile or digital, would have caused the injuries. Id. Another expert of the state testified that minor's hymen appeared normal. Id. at 371, 782 S.E.2d at 749. This expert testified that it was "common to see normal exams in these types of cases." Id. In closing argument, the state relied upon its expert witnesses to argue minor's testimony was "'100 percent corroborated by the medical evidence.'" Id. at 372, 782 S.E.2d at 750. According to the state, the expert provided "'undisputed testimony'" that the healing scar on the hymen had to be caused by penetration. Id.

At the PCR hearing, Reeves presented an expert in gynecology. Id. at 373, 782 S.E.2d at 750. This expert testified that injuries to the vaginal area may be caused in a variety of ways, including sexual play, accidental injury, self-mutilation, or a fall. Id. Consequently, the expert stated it would be "very difficult" to testify that the injury was consistent with physical abuse. Id. at 374, 782 S.E.2d at 751. Also at the PCR hearing, trial counsel testified he did not retain an expert because Reeves did not have funds to do so. Id. at 375, 782 S.E.2d at 751.

This Court held counsel was deficient "because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the state's medical evidence presented at trial." Id. at 377, 782 S.E.2d at 752. This Court further held Reeves was prejudiced by the deficiency because the expert at the PCR hearing "provided additional ways the injury could have occurred," which were "not presented during trial." Id. at 378, 782 S.E.2d at 753. This evidence was necessary to combat the state's closing argument that there was no other explanation for the injury other than minor was penetrated. Id. See also McKnight v. State, 378

S.C. 33, 661 S.E.2d 354 (2008) (holding counsel provided ineffective assistance by failing to call an expert forensic pathologist to counter the state's experts regarding cause of death in a homicide by child abuse case).

Here, despite the PCR judge's determination that trial counsel's cross-examination of McMillan on the phone records "was thorough and created a substantial question as to whether [Petitioner] was in the area where Mr. Koenig claims to have seen him driving the Volvo on Sunday morning," the evidence in the record shows otherwise. McMillan was no expert, and his testimony showed only a passing familiarity with the records themselves and no understanding of the importance of the records. Additionally, counsel was unable to make key points about the records because McMillan was unqualified and unprepared.

It is undisputed that the records supported Petitioner's alibi defense as they placed Petitioner's phone in the areas in which Petitioner's witnesses said Petitioner was present in those areas during specific timeframes. The phone records could not be biased, as the state suggested some of Petitioner's witnesses were; the phone records could not be mistaken as to time, as the state suggested some of Petitioner's witnesses were; and the phone records could not have faulty memories, as the state suggested some of Petitioner's witnesses had. In other words, the phone records, when explained thoroughly and by a competent expert – not McMillan – supported Petitioner's alibi and were not susceptible to the cheap and easy attacks employed by the state on Petitioner's alibi witnesses. A true expert like Levitan explaining the phone records would have cut the state's closing argument off at the knees.

McMillan was a poor substitute for an actual telecommunications expert as a juxtaposition of McMillan's testimony and Levitan's testimony shows. When asked if he had conducted an analysis of the records, McMillan responded that he had "looked over it." App.

769, ll. 2-4. He had not conducted in the in-depth analysis and prepared the companion charts and maps as Levitan had. Even the state was aware that McMillan was out of his depth as shown by the state's objection to "technical questions about cell phones." App. 772, ll. 8-10.

Trial counsel's failure to present an expert witness, such as Levitan, to testify at Petitioner's trial was deficient performance that was prejudicial to Petitioner. The records supported Petitioner's alibi and corroborated his alibi witnesses, who suffered from attacks by the state on allegations of bias, faulty memories, and simple mistakes. McMillan was unprepared and not qualified to testify as to the contents of the cell phone records. Had trial counsel presented an expert to explain the records to the jury and corroborate Petitioner's alibi defense in this weak circumstantial evidence case where the state was unsure of where or when the deceased died, there is a reasonable probability that the outcome of the trial would have been different.

III. Violating Petitioner's Sixth and Fourteenth right to the effective assistance of counsel, trial counsel failed to present an arson expert to establish a timeline for when the car was set afire to enable Petitioner to defeat the testimony of Koenig, the state's only eyewitness.

Relevant facts

In this weak circumstantial evidence case, Darrell Koenig was the state's star witness – his credibility was crucial. Koenig and his wife owned a six-acre lot at Boyle's Pond. App. 625, ll. 1-5. On May 22, 2005, Koenig was working on the entryway to his lot. App. 625, ll. 20-25. He recalled that it was "very early in the morning" when he "noticed a blue Volvo sedan" on the nearby road. App. 627, ll. 1-6. He estimated that he saw the car "about 9:30." App. 629, ll. 6-8; App. 659, ll. 8-9. He saw two black men sitting in the car. App. 627, ll. 11-12. Koenig claimed that he and the driver were looking directly at each other. App. 627, ll. 22-24. Koenig later identified Petitioner as the driver of the Volvo. App. 638, ll. 5-9.

An officer who examined the burnt Volvo claimed he could "tell that some type of accelerant probably was used in burning it and ... it was burnt beyond recognition really." App. 693, ll. 8-12. The agent who processed the Volvo was unable "to obtain any physical evidence that would link it to any particular person or persons" because the car was "burnt so severe." App. 698, ll. 2-8. The lead investigator indicated he did not know when the car was set afire or how long it took to burn, but he was "sure the burn would have been intense for a short period of time." App. 737, ll. 11-23. Under the state's theory, the car was burned between 11:00 a.m. and 2:30 p.m. on Sunday. App. 739, ll. 12-15; App. 747, ll. 19-24.

At the PCR hearing, Petitioner presented Daniel Olson, an undisputed expert in mechanical engineering and origin and cause of machinery and automobile fires. App. 1318, l. 22 – App. 1319, l. 12. Olson explained that Koenig claimed he saw Petitioner as early as 9:30

a.m. on the day the burnt Volvo was found. App. 1323, ll. 6-17. After finding the location of the cemetery, Olson plotted the shortest route from Koenig's property to the cemetery where the car was found. App. 1328, ll. 14-20. The two locations were approximately 26.66 miles apart. App. 1329, ll. 17-18. Olson used posted speed limits to estimate that it would take almost forty-six minutes to travel that distance. App. 1330, ll. 3-4. Thus, if Petitioner were seen by Koenig at 9:30 a.m., then the earliest he could have made it to the cemetery was 10:17 a.m. App. 1330, ll. 8-16. Furthermore, Olson explained that a car set afire would have flames emanating from it within five to seven minutes. App. 1332, ll. 1-9. The car would produce "dense black smoke" and "high visible flames with plume as high as 20 feet." App. 1332, ll. 18-20. Thereafter, the car would burn with intensity for forty-five minutes to an hour. App. 1339, ll. 12-17. The car fire would finally burn out a little bit past 11:30 a.m. App. 1339, ll. 21-23. The car would then cool. App. 1340, ll. 1-4. The car would not have cooled completely by the time it was found at 2:30 p.m. App. 1347, ll. 19-21. Many parts would have still been hot. App. 1348, ll. 1-6. Some parts would even have been still smoky. App. 1348, ll. 4-8. However, none of the witnesses who saw the car between 2:30 and 3 said that it was smoldering or smoking. App. 1348, ll. 9-24. Olson opined that the car that was seen at 9:30 am was not the car that burned in the cemetery. App. 1357, ll. 19-22. In short, Koenig did not see the blue Volvo in this case. App. 1357, l. 23 – App. 1358, l. 2. Olson noted that Matt Bramlett, a witness at Petitioner's trial, remarked that his dog was barking around 1:30 a.m. App. 1361, ll. 3-7. Olson explained that the condition in which the Volvo was found in the cemetery would be more consistent with the car having been set on fire around 1:30 a.m., when Bramlett's dog was barking. App. 1362, ll. 14-23.

According to the PCR judge, trial counsel's failure to call an origin and cause expert amounted to deficient performance was "a closer question." App. 1772. The PCR judge agreed

that "Koenig's testimony may have been discredited in the jury's eyes by Olson's testimony." App. 1772. Nevertheless, the judge found Petitioner did not suffer any prejudice due to trial counsel's failure to call an expert witness at his trial. App. 1772-1773. According to the PCR judge, if the car were set on fire earlier in the morning, then Petitioner's phone records would have placed him in Lee County at 7:16 a.m. App. 1773. The judge concluded this was "within the time frame Olson opine[d] the fire was set." App. 1773. According to the judge, "[c]alling expert witnesses such as Olson and Levitan 'sounds good on paper,' but their testimony casts [Petitioner] in an incriminating light as well." App. 1773. Therefore, the judge concluded trial counsel was not deficient and Petitioner suffered no prejudice. App. 1773.

Discussion

Again, the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 686. The applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

It is axiomatic that trial counsel has a duty to investigate. See Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147; Wiggins v. Smith, 539 U.S. 510, 533 (2003); Hinton v. Alabama, 571 U.S. 263, 274 (2014); Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004). Also, trial counsel has a duty to call necessary experts to challenge the state's evidence. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007); Reeves v. State, 415 S.C. 366, 376, 782 S.E.2d 747, 752 (Ct. App. 2015).

The United States Supreme Court examined the failings of trial counsel in a capital case involving trial counsel's failure to secure an expert witness. Hinton v. Alabama, 571 U.S. 263 (2014). In early 1985, two restaurant managers were killed during similar robberies. In mid-1985, a third restaurant manager was robbed and shot, but survived. Two .38 caliber bullets were recovered from each scene. The third restaurant manager identified Hinton as the shooter after viewing a photographic line-up. Id. at 264. When the police arrested Hinton, they recovered a .38 caliber revolver belonging to his mother, who shared the house with him. Id. The state's expert analyzed the six bullets and opinioned that all had been fired by the gun found in Hinton's home. Id. at 265. The state charged Hinton with capital murder for the first two killings and tried to link Hinton to those killings through the use of the forensic evidence and the third restaurant manager's eyewitness testimony. Id. There was no other evidence connecting Hinton to the crimes. Hinton maintained his innocence of all three crimes. Id. As stated by the Supreme Court, "[t]he state's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver." Id.

Hinton's trial counsel filed a motion for funding to hire an expert witness. The judge granted $1000 to hire an expert. In the funding order, the judge indicated he believed he was limited to $1000 by statute, but told trial counsel to seek additional funding if necessary. Id. at 266. Unfortunately, trial counsel did not seek additional funding and the statute did not limit the funding as the judge believed. Id. at 267. Although trial counsel did not believe the person qualified, he hired the only person willing to take the case for the paltry sum – Andrew Payne. Id. at 268.

At trial, Payne testified that the toolmarks in the barrel of the Hinton revolver had been corroded away such that it was impossible to say with certainty whether a particular bullet had

been fired from that gun. Payne also testified that the bullets from the three crime scenes did not match each other. On cross-examination, the prosecutor "badly discredited" Payne by forcing him to admit he had testified as an expert on firearms and toolmark identifications only twice in the preceding eight years and that one of the two cases involved a shotgun, not a handgun, by forcing him to admit he had difficulty operating the microscope at the state forensic laboratory, and finally by forcing him to admit he had only one eye. Id. at 269. As expected, in his closing argument, the prosecutor seized on Payne's lack of qualifications. Id.

During state post-conviction relief proceedings, Hinton presented three new experts on toolmark evidence. One of the three had worked on toolmark identification at the FBI in a senior position; the other two had worked for many years for the Dallas County Crime Laboratory and had testified as experts in several hundred cases. Id. at 270. All three examined the evidence and testified "they could not conclude that any of the six bullets had been fired from the Hinton revolver." One of Hinton's experts testified that he had asked the state's expert to show him how he determined the recovered bullets had been fired from the Hinton revolver, and the state's expert refused to do so. Id.

The Supreme Court explained the case "call[ed] for a straightforward application of our ineffective-assistance-of-counsel precedents." Id. at 272. After recognizing that Hinton's case required consultation with experts and the introduction of expert evidence, the Court noted that trial counsel had recognized the need for an expert as well, but counsel hired an unqualified expert based upon his mistaken belief that the statute limited his funding. Further, the Court noted that trial counsel failed to request additional funding despite the court's express invitation to do so. Id. at 273. The Court held this was deficient performance. Id. at 274. The Court

explained that trial counsel "failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants." Id.[2]

During Ard's capital trial, the state called an expert in gunshot residue analysis to testify. Ard v. Catoe, 372 S.C. 318, 322, 642 S.E.2d 590, 592 (2007). The expert testified that swabs taken from the deceased's hands showed particles that were "very interesting," but there was not enough material for him to say the deceased had gunshot residue on her hands. Id. at 323, 642 S.E.2d at 592. The expert testified less equivocally when he claimed there was no gunshot residue on her hands indicating she had not pulled the trigger. Id. The defense did not cross-examine the expert. Id. A second witness who claimed to be the expert's supervisor and to having reviewed and confirmed the expert's conclusions. Id.

Ard presented an accident defense to the capital murder charge. Id. at 324, 642 S.E.2d at 593. Ard explained the deceased was suicidal as she held a gun. Id. Fearing she would kill herself, Ard leaned forward to grab the gun. Id. As he grabbed the gun's cylinder, it went off. Id. To defeat this defense, the state capitalized on its expert witness's testimony in its closing argument. Id. at 325, 642 S.E.2d at 593. The state argued the defense could not "attack" its expert and therefore, the expert's findings that the deceased did not have gunshot residue on her hands showed Ard's defense was not true. Id. at 325-326, 642 S.E.2d at 593.

At his PCR hearing, Ard called the state's expert witness from his trial as a witness. Id. at 327, 642 S.E.2d at 594. The expert explained that his trial testimony was based upon SLED's

[2] The Supreme Court remanded the case for a determination of whether Hinton suffered prejudice because no court had yet evaluated the prejudice question. Hinton v. Alabama, 571 U.S. 263, 276 (2014). On remand, a state judge dismissed the charges after prosecutors said that scientists at the state lab tested the evidence and confirmed the crime bullets could not be matched to Hinton's weapon. After thirty years in custody, Hinton was exonerated. Darren Sands, Wrongly Convicted, he was on death row for decades. On Tuesday, he cast a vote for president, The Wash. Post, Nov. 3, 2020, electronic version available at https://www.washingtonpost.com/politics/2020/11/03/anthony-ray-hinton-vote-election/.

protocol at the time that a positive finding of gunshot residue only occurred when perfectly round particles were detected. Id. The protocol in place at the time of the PCR hearing required the expert to testify that the particles found on the deceased's hands meant the tests were inconclusive for gunshot residue. Id. This finding meant it was not consistent with a person firing a gun, but could be consistent with a person handling a gun. Id. at 327-328, 642 S.E.2d at 594-595. Furthermore, the expert testified that if he had been cross-examined at trial regarding his statement that several particles were interesting, he would have testified that although the evidence found on the deceased's hands did not satisfy the protocol for a positive result, the evidence "could have been associated with gunshot residue." Id. at 328, 642 S.E.2d at 595. Finally, the expert related that if he had been contacted prior to trial by defense counsel, he would have explained the evidence, including the particles on the deceased's hands meant she may have been handling a weapon. Id.

Additionally, Ard called his own gunshot residue expert at the PCR hearing. Id. at 330, 642 S.E.2d at 596. This expert positively identified the particles found on the deceased's hand as gunshot residue, which could have been placed there by picking up a gun, firing a gun, or being close to a gun going off. Id.

The Supreme Court held trial counsel provided ineffective assistance by failing to "further investigate[] and more thoroughly challenge[] the gunshot residue evidence." Id. at 332, 642 S.E.2d at 597. Testimony from trial counsel at the PCR hearing showed "how crucial the gunshot residue evidence was to [Ard]'s defense." Id. The negative gunshot residue test results produced by the state's expert significantly undermined Ard's defense. Id. at 332, 642 S.E.2d at 597. The Court noted that trial counsel's failure to discuss the gunshot residue analysis with the state's expert prior to trial resulted in trial counsel missing the opportunity of learning details that

would have allowed for a more thorough and productive cross-examination of the state's expert. Id. at 333-334, 642 S.E.2d at 598. Most importantly, the state's expert would have revealed that his testimony was not inconsistent with the deceased handling a gun. Id. at 334, 642 S.E.2d at 598. According to the Supreme Court, counsel performed deficiently by failing to explore the gunshot residue evidence with the state's expert prior to trial. Id.

Furthermore, the Court explained how "[e]ven at trial, [the state's expert]'s testimony clearly alluded to some uncertainty in the evidence." Id. "Counsel should have cross-examined [the state's expert] as to what he meant by 'very interesting' and not 'enough material.'" Id. According to the Court, "[h]ad counsel asked these questions, [the state's expert] would have filled the 'hole' in the defense which they thought was created (but actually was not) by [the state's expert]'s ultimately conclusion of 'no gunshot residue.'" Id. The Court "counsel's decision to not cross-examine [the state's expert] on the gunshot evidence was not an objectively reasonable strategy." Id. Eliciting the favorable testimony from the state's expert would have prevented the state from attacking the defense theory as convincingly as it did in closing. Id. at 335, 642 S.E.2d at 598.

The Supreme Court held Ard's "counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense at the guilt phase." Id. at 336, 642 S.E.2d at 599. Additionally, the Court held there was a reasonable probability the jury would have had a reasonable doubt as to whether Ard was guilty of murder had the jury learned the meaning of the "interesting" gunshot residue test results as that would have supported Ard's defense.

In the instant case, had trial counsel presented an arson expert, such as Olson, trial counsel would have obliterated the testimony from the state's key witness, Koenig, that he saw Petitioner in the Volvo at 9:30 a.m. It was impossible for the Volvo to get from Koenig at 9:30 to the cemetery where it was found and burn until it was completely cool by 2:30. Olson's testimony made this clear. Thus, the jury would have been left with only one conclusion – Koenig was mistaken. Discrediting Koenig was necessary to the defense because he was the only witness that tied Petitioner to the deceased after the evening on which the deceased left his family home. Koenig was the key to the state's case. Calling an arson expert to discredit Koenig was a necessary tool in trial counsel's arsenal that should have been used; it was more than a strategy that simply "sound[ed] good on paper." The PCR hearing showed the testimony of such an expert was essential to tie together the testimony from the witnesses who found the car that it was not smoking or smoldering when it was found. Without Olson's expert testimony to explain the duration of a fire and the length of time required to cool, the testimony trial counsel elicited from those witnesses was meaningless.

Furthermore, in the PCR judge's analysis of how the phone records may have hurt Petitioner with the inclusion of an arson expert, the PCR judge failed to consider Olson's testimony that was corroborated by the state's witness, Bramlett, that the fire likely started around 1:30 a.m. While the phone records placed Petitioner in Lee County during the morning, the phone records did *not* place Petitioner in Lee County around 1:30 a.m. No calls were made or received around 1:30 a.m.; therefore, the records contained no cell site location information for that specific timeframe. The PCR judge's conclusion that the records were incriminating when used in conjunction with the arson expert's testimony shows a misapprehension of the evidence presented.

CONCLUSION

Petitioner respectfully requests this Court grant him a new trial based upon his trial counsel's prejudicial deficient performance.

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This 13th day of July, 2022.