STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lancaster County

Honorable Daniel D. Hall, Circuit Court Judge

DEMARIO M. THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000224

PETITION FOR WRIT OF CERTIORARI

GARY H JOHNSON
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ISSUE PRESENTED

1. Did the PCR court err in ruling trial counsel was effective when he failed to conduct any investigation concerning prior damage to the apartment door when informed by both the petitioner and victim the door was already damaged and broken prior to petitioner's alleged forcible entry to commit burglary?

2. Did the PCR court err in finding trial counsel did not have a duty to object to the testimony of the responding officer that petitioner's girlfriend had been strangled based solely upon his lay opinion as to the cause of marks on her neck?

STATEMENT OF FACTS

On July 2, 2014, Demario M. Thompson (petitioner) was loudly knocking on the door to enter the apartment of his girlfriend, Keasia Drafton. It was not contested that he stayed at the apartment on at least some occasions with Drafton. App. 110, ll. 2-3. This woke several neighbors. App. 64, ll. 7 – 13; 72, ll. 11 - 17. Drafton herself called 911.[1] Witnesses testified about hearing petitioner hitting the door. App. 64, l. 11 –8; 72 ll. 9 – 17. In her 911 call, Drafton mentioned petitioner had a gun, but no other witness at trial testified regarding the presence of a gun prompting directed verdicts by the trial court on the two pointing and presenting a firearm charges. App. 103, ll. 8 – 23. When police arrived, they noted the door had been "kicked in" and Drafton had marks from "strangulation." App. 54, ll. 11 – 16; 59, l. 22 –60, l. 1. Drafton did not desire to press charges and she did not attend petitioner's trial. App. 35, l. 14 –36, l. 20; 234.

Central to the state's case was the condition of the entry door to the apartment on July 2, 2014. The Court of Appeals noted its importance, mentioning the kicked door in relation to the burglary charge. Id. Trial counsel was aware of damage to the door caused by forcible entry of the police from several weeks before July 2, 2014, but elected not to present any evidence of the prior damage at trial. As trial counsel admitted:

> "I did not focus on the door. Maybe I should have pulled the incident report. I'm not going to sit here and say that it wouldn't have been -- it would have been worthless. It could have been. That's why I did not pull an incident report. I checked my notes and checked my emails to see if I emailed the solicitor for it and I did not do that."

App. 210, l. 24 –211, l. 5. Counsel admitted he did not investigate the prior damage to the door *at all* even though the prior damage was confirmed by Drafton. App. 210, ll. 15 - 18.

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[1] The 911 call was introduced at trial over objection and its admissibility upheld on direct appeal.

Trial counsel also did not object when the state elicited opinion evidence from the responding officer as to the cause of marks on Drafton's neck. The officer described them at trial as resulting from "some sort of strangulation." App. 59, l. 24 –60, l. 1. The state then used the strangulation evidence numerous times during closing to argue for conviction, particularly for the burglary charge as discussed *supra*. App. 108, ll. 6-13; 111, ll. 11-18; 112, ll. 18-20.

On October 2, 2014, a Lancaster County Grand Jury indicted petitioner DeMario Thompson for one count of first-degree burglary, one count of attempted murder, one count of possession or display of a firearm during a violent crime, and two counts of pointing and presenting a firearm arising out of the incident. App. 156 - 161. On January 5, 2015, petitioner was tried before the Honorable Brian Gibbons and a jury. Brandon Steen represented Petitioner and Assistant Solicitor Andrew Cook represented the State. Judge Gibbons granted a directed verdict of acquittal for the two pointing and presenting a firearm charges due to lack of evidence. App. 103, ll. 8-23. The jury found Petitioner not guilty of attempted murder and not guilty of possession or display of a firearm during a violent crime. App. 147, l. 20 –148, l. 12.

However, the jury did find Appellant guilty of burglary in the first degree and guilty of a lesser-included offense of assault and battery third degree.[2] App. 147, l. 20 –148, l. 12. The trial court sentenced Petitioner to time served for assault and battery and to fifteen years imprisonment for first degree burglary. App. 154, l. 9 – 155, l. 3. On direct appeal, Petitioner asserted errors regarding the admission of the 911 call made by the alleged victim, Keasia Drafton, and a trespass notice letter provided to Drafton by the apartment complex several months before the incident, and the sufficiency of the evidence to support the burglary charge.

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2 "A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so." S.C. Code Ann. §16-3-600(E)(1) (2011).

The Court of Appeals affirmed, finding both the 911 call and the letter properly admitted, and the evidence supporting burglary sufficient to submit to a jury. State v. Thompson, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017).

Petitioner filed an application for PCR on April 8, 2020. App. 162. The application was amended before the evidentiary hearing to include allegations surrounding counsel's failure to investigate prior damage to the door to the apartment. App. 181. Petitioner was represented at his PCR hearing by Tommy Thomas and Danielle Dixon appeared on behalf of the state. App. 183. An evidentiary hearing was held before the Honorable Daniel D. Hall on September 2, 2022. Before the hearing, petitioner clarified the basis for his relief as including allegations trial counsel failed to investigate prior damage to the apartment door along with the original allegations. App. 185, ll. 13 – 22. Petitioner and trial counsel, Brandon Steen, presented testimony. By order dated October 14, 2022, Judge Hall denied the application for relief. App. 235 – 246. This petition for *certiorari* followed.

ARGUMENT

1. The PCR court erred in finding counsel effective when he admitted he failed to investigate prior damage to the door of the apartment petitioner shared with Drafton caused by police kicking open the door when they responded to an incident a couple of weeks before the petitioner's alleged forcible entry.

   A. The PCR court erred in finding petitioner did not request trial counsel investigate the prior damage to the door caused by the police.

During the evidentiary hearing, trial counsel admitted he was informed prior to trial that Drafton's apartment door had been kicked open by police during an incident that happened a few weeks prior to the incident on July 2, 2014. This information was provided to him by both petitioner and Drafton. App. 197, l. 7 –198, l. 23; 210, l. 13 –211, l. 17.

The PCR court erroneously found it credible that petitioner did not ask trial counsel to investigate the door since no evidence supported that finding. App. p. 244. While trial counsel testified he did not *remember* petitioner asking about the door, he acknowledged being aware of it through Drafton: "I was aware of it from talking to Ms. Drafton. So I'm not sitting here saying that I did not have any knowledge of the situation." App. 211, ll. 9 – 11. By contrast, petitioner recalled telling trial counsel about the importance of the prior damage:

> Q. Did you talk to your attorney about that door?
>
> A. I told him to try to see, could he get the paperwork from Lancaster County saying the incident report, when it happened. I told him, like, it was a couple weeks before this incident happened, to try to get it for me. I don't know if -- I guess he couldn't get it or he didn't try to get it, I don't know.
>
> Q. How was that communicated to your attorney, did you talk to him, did you write him?
>
> A. Yeah, I talked to him. I think I talked to him in person. I can't remember if I wrote him, but I know I talked to him. I might have wrote him too though. I don't remember.

Q. And you felt that was important?

A. Yes, sir. I really did.

App. 198, ll. 6 – 20. Despite trial counsel admitting he knew about the prior damage to the door and not remembering being specifically told about it by petitioner, the PCR court found trial counsel was not asked to investigate the prior damage to the door. This finding is not supported by the record as there would be no credible reason he was being told, by two sources, about the prior damage incident if it was not potentially important to the case and worthy of at least some investigation. In addition, while trial counsel could not remember being asked by petitioner, he never denied or contradicted petitioner's direct testimony that he informed trial counsel of the prior damage since he felt it was important to his case. App. 198, ll. 6 – 20. Further, trial counsel indicated it was possible petitioner wrote him regarding the door.

> Q. Do you know whether or not he sent you any letters from the detention center asking about it?
>
> A. He -- I do not recall seeing that. I looked at my letters. It's possible. He sent me 16. Most of what we know was, wanting to plead to the time served and probation.

App. 211, ll. 12 – 17. The PCR court erred in ruling trial counsel was not asked to investigate the prior damage to the door.

B. The PCR court erred in finding trial counsel exercised a reasoned judgment in not seeking additional information regarding the damage to the door.

Rather than investigate the door's prior damage, counsel made the decision not to investigate because it would "open the door" to the fact of the prior altercation. App. 210, ll. 20-23. The PCR court found trial counsel was reasonable in not investigating this incident since it

involved a prior incident between petitioner and Drafton. App. 244. However, since no charges for the prior altercation were ever filed and since the damage was caused by the police entering the residence rather than any action of the petitioner, trial counsel was ineffective for not investigating the nature of the prior incident so that he was at least aware of what "other things" he was avoiding by not pursuing evidence of this incident. App. 210, l. 13 –212, l. 2.

Petitioner described the prior incident during the PCR hearing:

> I know it was -- basically, they said -- it was off the hinges. But the door was already messed up from previous weeks *when the Lancaster County Police Department kicked the door down.* We had a little altercation over there and when they came and knocked on the door, we didn't say nothing because we had been arguing. We didn't say nothing and they kicked the door down and never got it fix.

App. 197, ll. 9 – 16 (emphasis added). No charges were filed. App. 197, ll. 22 – 24.

Counsel's stated fear of opening the door to the prior incident may have been a strategic decision if the earlier incident actually been investigated and included violence *on the part of petitioner*. However, there were no charges from the earlier incident. Petitioner indicated the argument was verbal and the police themselves kicked open the door since he and Drafton kept quiet when they arrived and would not open the door themselves. App. 204, l. 16 –205, l. 9. Trial counsel admitted he "did not focus on the door" and "should have pulled the incident report." App. 210, ll. 24 – 25.

To establish ineffective assistance of counsel, the petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted).

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which *at a minimum* includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (emphasis added); *see also* Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) ("Moreover, while the scope of a reasonable investigation depends upon 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.'").

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Gilchrist v. State, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002). However, "strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting* Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Trial counsel's failure to investigate this prior incident over a fear of an unknown impact of "opening the door" to an earlier argument between petitioner and Drafton was ineffective assistance of counsel. *See* McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008)(finding ineffective assistance in not attempting to rebut the medical studies counsel knew the State's experts would cite); Bagwell v. State, 410 S.C. 259, 266, 763 S.E.2d 630, 634 (Ct. App. 2014) (finding decision not to test broken glass for DNA prior to trial was unreasonable because the state used the glass as circumstantial evidence of guilt).

In the present case, trial counsel's decision not to investigate the prior damage to the door was unreasonable when forcible entry was an essential element of the case against petitioner. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that

makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (*quoting* Strickland v. Washington, 466 U.S. 668 (1984)). Trial counsel's fear of "opening the door" was not a valid strategy when he was unaware, due to a failure to investigate, to what he potentially was in danger of allowing into evidence versus the clear benefits of showing prior damage to the door which explained its "broken" condition on the night of the incident.

C. Petitioner was prejudiced by trial counsel's failure to investigate.

The PCR court erred in finding counsel's failure to investigate and utilize the prior damage was not prejudicial. "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief." Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989) (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (*quoting* Strickland, 466 U.S. at 692).

The "violence" towards the door was central to the state's case. The solicitor made numerous references to the door being "kicked" and "broken off the hinges" during closing

argument. App. 106, ll. 1-2; 107, ll. 1-3; 109, ll. 11-22. This included specific argument surrounding the burglary offense:

> "There's no question he did not have permission to be in there that night. I'm sure in the past he's gone there plenty of times, that was his girlfriend. At 4:00 in the morning this night he did not have consent to be there, if he did he wouldn't have *to kick the door down to get inside*. Ms. Drafton even said on the 911 call, they asked her, said, "What was he wearing? I don't know, I was asleep." How is she going to consent to him coming in if she's asleep? Just like in anything else, silence itself is not consent for anything, let alone for somebody to come in your house. If somebody knocks on the door and you don't answer, that does not give them consent to come in. Because you didn't say no, because you didn't answer, they did not have the right to come in, *let alone kick the door off the hinges to get in there*."

App. 110, ll. 1-15 (emphasis added). The importance of the violence towards the door was equally apparent to the South Carolina Court of Appeals on direct appeal which noted the "'door appeared to have been kicked in' because '[t]he deadbolt was still engaged[,] and the door was hanging slightly off its hinges.'" Thompson, 420 S.C. at 393, 803 S.E.2d at 47. Trial counsel acknowledged the importance of the alleged violent entry.

> Q. Do you think it would have been important to have been able to show that this door was damaged prior to this incident?
>
> A. Yes, sir.
>
> Q. 'Cause I mean, there's a lot of references to violently kicking this door in.
>
> A. Yes. The State focused on it a lot.
>
> Q. Right. And did you -- you did not make any efforts to determine or be able to provide any evidence in regards to the damage to the door?
>
> A. No. There was evidence that the door -- there was prior -- he said -- it's possible the door was kicked in before or damage was done to the door, but there was evidence that suggested that it was

> opened again that night also. But nobody -- I did not make any -- look to appear to make any objections or motions to keep that out.

App. 213, l. 24 –214, l. 15.

The fact that the door was damaged and not repaired from a prior incident would have been very relevant to the alleged "violent" nature of petitioner's entry into the apartment he shared with Drafton.[3] The jury, which acquitted petitioner of attempted murder and of possessing a firearm during the commission of a violent act, would likely have evaluated his *intent* to commit a burglary first degree in a different fashion had evidence of prior damage to the door been introduced at trial. "First-degree burglary requires the entry of a dwelling *without consent with the intent to commit a crime therein*, as well as the existence of an aggravating circumstance." Thompson, at 403, 803 S.E.2d at 52 (emphasis added). As the condition of the door was central the state's argument that petitioner both lacked consent and intended to commit a crime upon entry, trial counsel was deficient in not investigating the prior damage to the door. Petitioner is entitled to a new trial due to counsel's failure to investigate evidence he was aware of from multiple sources that went to a key element of the charges. *See* Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011); Bagwell v. State, 410 S.C. 259763 S.E.2d 630 (Ct. App. 2014)

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[3] At trial, the state conceded petitioner and Drafton were in a relationship, and that petitioner had been in the apartment "plenty of times." App. 110, ll. 2-3.

2. The PCR court erred in finding trial counsel was effective in failing to object to the investigating officer classifying marks on Drafton's neck as resulting from "some sort of strangulation."

A. The PCR court committed an error of law in determining the officer's testimony on the cause of marks on Drafton's neck was proper lay opinion under Rule 701, SCRE.

At trial, Deputy Reuben Silberman, was allowed to describe marks on Drafton's neck as resulting from strangulation.

> Q: Why did you take a picture from this angle? Why did you take this picture?
>
> A: I took a picture to show that there was a wound on her neck, *it appeared to be the result of some sort of strangulation.*

App. 59, l. 22 –60, l. 1 (emphasis added).

Trial counsel did not object to the officer's opinion about the nature and cause of the marks on Drafton's neck nor did he object to the state's argument at closing that petitioner strangled and choked Drafton. Trial counsel acknowledged the officer was not competent to provide expert opinion on the cause of the marks but reasoned the officer did not need to be an expert to describe what he saw. App. 215, l. 20 –216, l. 12; 224, ll. 9-19. The PCR court found the officer's description of the marks on Drafton's neck as resulting from strangulation was proper lay testimony and trial counsel had no basis to object. App. p. 245. This is an error of law as allowing a police officer to give an opinion that marks on a person's neck are caused by strangulation was not proper lay opinion under Rule 701, SCRE.

Allowing the officer to testify not just to the presence of "marks on her neck" but to the cause of such marks – resulting from strangulation – was not proper lay opinion under Rule 701, SCRE. As noted by the Mississippi Supreme Court in a similar case, allowing the police to describe "red marks" as indicative of being "strangled constituted the sort of testimony properly reserved to an expert." Kirk v. State, 160 So. 3d 685, 693 (Miss. 2015). Kirk involved

conflicting claims of the nature of an encounter between Kirk and his wife. In reviewing the propriety of allowing the investigating officer to identify marks on wife's neck as resulting from strangulation, the Mississippi Supreme Court reviewed whether such testimony was permissible lay opinion or required an appropriate foundation or expertise. In finding such testimony was "the sort of testimony properly reserved to an expert" the Mississippi Supreme Court noted that the "potential harm to the objecting party requires reversal where a police officer gives expert testimony without first being qualified as such. Id. at 693.

South Carolina courts have similarly warned of the dangers of allowing police officers to provide improper opinion testimony. "An officer's improper opinion which goes to the heart of the case is not harmless." State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (holding officer's opinion outside scope of his expertise reconstructing the position of the victim's body when he was shot was harmful error); *see also* State v. Andrews, 424 S.C. 304, 318, 818 S.E.2d 227, 235 (Ct. App. 2018), *aff'd as modified*, 427 S.C. 178, 830 S.E.2d 12 (2019) (holding that allowing an emergency medical technician to testify to the location victim was standing when shot exceeded the scope of her expertise and was inadmissible).

In the present case, the officer should not have been allowed to provide an opinion on the causation to any marks on Drafton's neck. Trial counsel was ineffective in failing to object to this testimony and the PCR court erred in finding no legal basis for objecting by erroneously concluding it was proper lay opinion under Rule 701, SCRE.

B. Petitioner suffered prejudice in trial counsel's failure to object to the improper opinion testimony.

The state then used this inadmissible opinion evidence in closing, compounding trial counsel's error in not objecting to the improper opinion testimony. The nature of the injury

shown in the photograph and its reported cause was hammered by the state during closing argument:

> You can see -- and I'll show you the pictures and you can take them back there with you, she's got knots on her head, she's got knots on her neck. How did he do that? *He choked her.* You can easily kill somebody by choking her. And that's what this means, that the means likely to produce death or great bodily injury. Even if she didn't die *you can have serious injury when somebody comes and chokes yo*u.

App. 108, ll. 6-13 (emphasis added).

Specifically, in arguing for a conviction on burglary and the intent to commit a crime element, the solicitor argued as follows:

> "She's got bumps on her head, her eyes are red, she's got marks on her neck. *He knew before he went in that door that he was going to go after her, whether he was going in there to kill her or hit her or strangle her or whatever* he was doing, he knew before he crossed that -- when he got from this side of the door to that side of the door that he was going after her if he got in there."

App. 111, ll. 11-18 (emphasis added).

> Who did it? Demario Thompson injured her. He hit her in the head, he choked her, he slammed her on the floor.

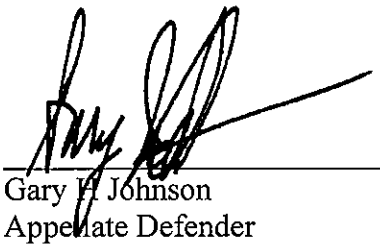
App. 112, ll. 18-20.

Trial counsel's error in failing to object was compounded by the state's continued use of and reference to this opinion. As the solicitor compounded the impact of this error by continuously referring to it in closing dictates a finding of prejudice. See Ellis, 345 S.C. at 178–79, 547 S.E.2d at 491 ("The effect of this error, compounded by the solicitor's repeated references to this 'scientific evidence,' was to impermissibly undermine appellant's self-defense claim."). The importance of the strangulation testimony concerning the burglary charge was noted by the Court of Appeals on direct appeal. Thompson, 420 S.C. at 403, 803 S.E.2d at 53

("Deputy Silberman testified Drafton had injuries to her head and neck, and it appeared she had been strangled."). Allowing this improper opinion testimony without objection was ineffective assistance of counsel and prejudicial warranting a new trial. *See* Strickland v. Washington, 466 U.S. 668 (1984); Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014); Ellis, 345 S.C. 175, 547 S.E.2d 490.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



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This 25th day of August, 2023.