RECEIVED
Jul 22 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

RONNIE C. SWOFFORD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001436

BRIEF OF PETITIONER

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

STATEMENT 2

STANDARD OF REVIEW 4

ARGUMENT

Petitioner was denied effective assistance of counsel where counsel failed to challenge the prosecution's claim that Petitioner's fresh blood was splattered on the wall, where SLED found there was no blood on the wall, and where the freshness of the (nonexistent) blood was used to discredit Petitioner's alibi 5

Introduction 5

Relevant facts 5

Discussion 14

CONCLUSION 20

TABLE OF AUTHORITIES

United States Cases

Giglio v. United States, 405 U.S. 150 (1972) 16

Napue v. Illinois, 360 U.S. 264 (1959) 16

Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006).......... 16

Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016) 5

Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).......... 5, 15, 18

State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996).......... 17

State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997) 16

State v. Makins, 433 S.C. 494, 860 S.E.2d 666 (2021).......... 17

State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020).......... 19

State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979) 16

Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016).......... 17

Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996) 16

South Carolina Cases

Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) 3, 10

Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 14, 19

Fortune v. State, 428 S.C. 545 , 837 S.E.2d 37 (2019).......... 17

Strickland v. Washington, 466 U.S. 668 (1984) 14, 18, 19

Rules

Rule 403, SCRE.......... 16

Constitutional Provisions

U.S. Const. amend. V.......... 16

U.S. Const. amend. XIV 16

ISSUE PRESENTED

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

STATEMENT

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

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

Petitioner's direct appeal was dismissed by this Court at his request on June 28, 2013. App. 733 – 736. Petitioner then filed a motion for a new trial based on after-discovered evidence based on the discovery of potential trial witness Terry Stevens.[1] *See* App. 737 – 740. On December 9, 2013, the circuit court issued an order denying Petitioner's motion. App. 741 – 745. Petitioner's appeal of the order denying his motion for a new trial based on newly-discovered evidence was dismissed by this Court at his request on June 23, 2014. App. 752 – 753.

---

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

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

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

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

Petitioner filed a petition for writ of certiorari and a petition for certiorari pursuant to *Austin v. State*. The State conceded Petitioner was entitled to a belated appeal, and made an amended return to the petition for certiorari pursuant to *Austin v. State*. Petitioner filed a reply to

the return. On January 5, 2023, the Supreme Court transferred the case to this Court pursuant to Rule 243(l), SCACR. On March 21, 2024, this Court granted certiorari.

This brief of petitioner follows.

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, 180-181, 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

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

Introduction

Complainant was shot, and he shot back at his attacker. Complainant told law enforcement that he did not know who shot him. Petitioner admitted he had been shot by Complainant a week earlier, but presented an alibi defense for the night of this incident. The prosecution argued the forensic evidence could not have been left by an earlier shooting, because Petitioner's fresh, wet, red blood was on the wall. However, SLED had found the red substance on the wall of the dirty house was not blood. Defense counsel failed to catch this, and he agreed Petitioner's blood was on the wall when no one's blood was on the wall. The PCR court made the same mistake as trial counsel, and concluded counsel's performance was not deficient because there was no problem with the "blood" evidence. This finding was unsupported by the record. There was no blood on the wall. The PCR court's conclusions of no deficiency and no prejudice, which rested upon this finding, were error.

Relevant facts

Curtis Wooten, Complainant, alleged that at approximately 2:30 a.m. on July 27, 2009, a gunman wearing a ski mask entered his home in Greer just after Complainant walked into the house with groceries. Complainant alleged the gunman called Complainant's name and when Complainant turned, the gunman fired two shots, striking Complainant in the abdomen. Complainant returned fire with one shot from his own gun, striking the gunman. Rikki Edwards,

Complainant's girlfriend, was home during the shooting but she was not hit by gunfire. Complainant and Edwards called 911 and drove to the hospital. App. 63, ll. 12-22; App. 69, l. 15 -77, l. 8. The 911 operator asked if Complainant knew who had shot him and Complainant did not answer. App. 108, ll. 11-20. Police initially suspected Edwards shot Complainant herself. App. 304, ll. 14-24; App. 340, l. 4 – 341, l. 19.

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

Law enforcement searched Complainant's home for evidence and they found 3 shell casings and a bullet jacket on the floor. They saw a hole in the kitchen wall. A red substance was splattered on the wall around the hole, and they thought it might be blood. App. 156, l. 17 – 165, l. 23. It was not blood. Petitioner would later explain Complainant's home was "dirty and nasty." App. 793, l. 24. Officers collected the casings and the bullet jacket, and they cut out the section of the wall that had the bullet hole and splattered red substance. App. 165, l. 24 – 166, l. 5; App.

177, l. 24 – 179, l. 18; App. 189, l. 9 – 196, l. 13. Officers sent evidence to SLED and asked for a rush on the DNA analysis. Petitioner's DNA was already in the system and was quickly matched to an unspecified piece of evidence from the scene (possibly the bullet jacket). App. 311, l. 1 – 312, l. 9; App. 316, ll. 15-23. A warrant was sought for Petitioner's arrest, and he was apprehended a few weeks later with round, scabbed wounds on his arm. App. 319, l. 15 – 321, l. 10; App. 334, ll. 19-22.

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

Petitioner also presented an alibi defense. Petitioner presented the testimony of a friend who had seen him driving home the night of the incident, a neighbor who saw him arrive home that night, and the testimony of Petitioner's fiancée and her daughter who were home with him at the time Complainant was shot. App. 415, l. 9 – 417, l. 12; App. 450, l. 13 – 453, l. 9; App. 463, l. 25 – 469, l. 1; App. 473, l. 10 – 479, l. 14. Petitioner admitted he had prior criminal convictions and he was cross-examined on his failure to explain his defense to law enforcement prior to trial. App. 501, l. 21 – 502, l. 1; App. 615, l. 8 – 617, l. 12. Several of the defense

witnesses had prior criminal convictions. App. 388, l. 22 – 389, l. 2; App. 394, l. 20 – 395, l. 9; App. 419, ll. 4-6. Petitioner's fiancée, Shannon Lawter, was also impeached.[2]

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

Importantly, SLED found the splattered substance on the wall was **not** blood. State's Exhibit # 53 was the cut-away section from the wall, which had been sent to SLED. App. 178, l. 3 – 179, l. 13. Verona Gibson, who was an evidence processing technician at SLED and who was qualified as an expert in forensics processing, testified that she swabbed State's Exhibit # 53 and tested it for blood, but the test was negative. App. 246, l. 14 – 247, l. 16; App. 252, l. 6 – 253, l. 9. The following exchange took place between the prosecutor and Gibson.

> Q. All right. I think what has now been marked State's No. 53; see if you can identify this.
>
> A. Yes, ma'am. This is a section of the wall that I processed.

---

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

. . .

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

A. **Was negative.**

Q. **Was negative for blood**. Okay.

App. 252, l. 5 – 253, l. 9 (emphasis added). To be clear, the splatter on the wall was not blood and it was therefore not Petitioner's blood.[3] Prior to trial, it appears both the prosecution and the defense received the SLED report which showed SLED's analysis found no blood on the wall. App. 984 – 986.

Nevertheless, in her opening statement, the prosecutor claimed Petitioner's DNA was found splattered on the wall at the crime scene. "[T]he person that was the shooter, the person that was shot by Mr. Wooten left behind his DNA. A splatter on the kitchen wall and body tissue and hair, is the DNA of the Defendant, Ronnie Swofford." App. 48, ll. 5-9. However, splatter implies blood, which was not found. In fact, only Petitioner's hair was found on the wall and his DNA was found on a bullet jacket on the floor. In his opening statement, defense counsel did not correct this critical misstatement of fact. Instead, defense counsel stated, "The blood and tissue that was found in the home of Curtis Wooten belongs to my client, Ronnie Swofford." App. 49, ll. 18-19.

During the State's case-in-chief, Sergeant David Weiner testified the kitchen wall appeared to have blood on it. App. 235, ll. 11-15.

After the defense had rested its case, which included Petitioner's alibi witnesses and his innocent explanation about being shot a week prior to the incident, the prosecution recalled Investigator Chris Miller in rebuttal to testify about the (nonexistent) blood on the wall. Miller

---

3 The State has conceded in its return that the substance on the wall was not blood. *See* State's Amended Return to Petition for Writ of Certiorari Pursuant to *Austin v. State* at 9.

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

> Q. In State's No. 39, the matter that you see as suspected or possible blood, tissue, hair, **does that appear to be fresh blood**, tissue, hair in your experience?
>
> A. **That would be fresh blood, the red.**
>
> Q. I need you to say that in the microphone?
>
> A. **The blood is red.**
>
> Q. And what does that tell you?
>
> A. **That it is still fresh.**

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

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

> Q. Your testimony is that this is fresh because it's still in a liquid state? I'm holding No. 39 in my hand. That's your testimony?
>
> A. Yes, sir.

App. 645, ll. 10-16.

Defense counsel did not address the fact that there was no blood on the wall with Detective Miller, Verona Gibson, or any witness at all. Defense counsel did not argue to the jury that SLED had found there was no blood on the wall. Defense counsel never acknowledged there was no blood on the wall. Instead, in his closing argument, defense counsel said Miller was wrong about the "blood evidence" because fresh blood would be dripping off the wall. App. 654, l. 19 – 655, l. 6. The freshness of the nonexistent blood on the wall was used by the prosecution, to devastating effect, to discredit Petitioner's alibi defense and innocent explanation that he was shot the week before by Complainant. The importance of this "evidence" cannot be overstated—the prosecution put up a rebuttal case just to get Investigator Miller's testimony that the "blood" was "red" and "fresh."

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

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

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

> Ms. Hodge knew that the actual results of this same blood test, and they knew that my blood didn't exist. And I felt like that since [counsel] **pretty much conceded me being there with this blood** in the beginning, **never questioning the experts to refute that**

> **'hey, this is not his blood.' And continuing to get in debates with Detective Miller about how fresh the blood is** and . . . how red the blood is. **The solicitor expounded on the same thing . . . she knew it wasn't blood** . . She expounded about how fresh the blood was, How red it was and . . . both attorneys for the State and the Defense knew what did and did not exist and the jury should not have [been told] those things.

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

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

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

Discussion

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

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

The PCR court's finding of effective representation was error. The PCR court found that, "Applicant has failed to meet his burden of proving trial counsel should have challenged the blood and hair evidence. While the Applicant argued the blood evidence was not actually blood . . . this Court does not find these arguments persuasive." App. 864. There was no evidence to

support this finding, and this Court should reverse the denial of PCR. *See Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018) (We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them.). The red substance on the wall was not blood, according to the State's own expert. It appears the solicitor knew that, since she at one point called it "suspected blood" in her closing argument. Nevertheless, she elicited testimony from two police officers that there was blood on the wall, when SLED had already concluded it was not blood.[4]

The State argued Petitioner's fresh blood was splattered on the wall, an argument that, if believed, negated Petitioner's alibi defense. The prosecutor had already elicited from her own expert witness that the witness tested the wall for blood and the test was negative. App. 252, l. 5 – 253, l. 9. The claim that Petitioner's fresh blood was on the wall was factually incorrect. At best, there was an inference that Petitioner's blood was on the bullet jacket (which was on the floor and was not tested for blood) since his DNA was on the bullet jacket. However, any DNA on the bullet jacket was not wetly splattered on the wall effectively negating Petitioner's defense. Defense counsel's failure to catch the prosecution's factually incorrect claims fell below the level of competence required in this case. Counsel should have known there was no blood on the wall since SLED had issued a report stating there was no blood on the wall.

Counsel should have objected to the factually incorrect testimony from the two law enforcement witnesses. Counsel had valid objections he could have made to the prosecutor's elicitation from Investigator Miller that there was "fresh," "red," "blood" on the wall; and from

---

4 Petitioner is not claiming misconduct by the officers, who likely did not remember SLED's findings as to each item of forensic evidence in a given case, and who were probably relying on the prosecutor not to steer them wrong during their testimony. However, if two experienced police officers who worked on the case did not catch the problem with the "blood" evidence, it is unreasonable to expect that the jury could have done so.

her elicitation from Sergeant Weiner that there appeared to be blood on the wall. Counsel could have objected to the testimony on due process grounds, since "the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (cleaned up); U.S. Const. amend. V; U.S. Const. amend. XIV. "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction [is] implicit in any concept of ordered liberty." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "The failure to correct false evidence is as reprehensible as its presentation." *Riddle v. Ozmint*, 369 S.C. 39, 47–48, 631 S.E.2d 70, 75 (2006) (citing *Washington v. State*, 324 S.C. 232, 235, 478 S.E.2d 833, 835 (1996)).

Counsel could have objected under Rule 403, SCRE, since the testimony was likely to mislead the jury. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Counsel could have objected to facts not in evidence. *E.g.*, *State v. Tyner*, 273 S.C. 646, 654–55, 258 S.E.2d 559, 564 (1979) (trial court properly sustained objection to question that assumed facts not in evidence). Counsel could have moved to strike the testimony and asked for a curative instruction. Counsel could have moved for a mistrial. *E.g.*, *State v. Crim*, 327 S.C. 254, 257, 489 S.E.2d 478, 480 (1997) (instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced); *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021) (trial court has discretion to grant a mistrial when prejudice can be removed in no other way). Counsel could have cross-examined SLED's forensic processing expert and State's witness Verona

Gibson to clarify there was no blood on the wall. However, instead of clarifying that Petitioner's blood was not on the wall, counsel conceded Petitioner's blood was at the scene during argument and counsel quibbled with Investigator Miller over the freshness of the "blood."

In addition to objecting to the testimony, counsel should have objected to the prosecutor's factually incorrect argument about the "blood." Perhaps the solicitor did not listen to her expert witness from SLED when the expert said the substance was not blood. App. 252, l. 6 – 253, l. 9. Perhaps she did not read the SLED report received by her office prior to trial which stated the evidence was not blood. App. 984 – 986. Regardless, the prosecutor's argument that: "I don't think it takes an expert to testify to you that that stuff is fresh, that is fresh body tissue and blood. When blood dries it turns brown, doesn't it? It turns a brownish color," was objectionable. App. 691, ll. 11-17. Counsel should have objected on the grounds that the argument was not confined to the evidence and reasonable inferences from the evidence. *See, e.g.*, *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (solicitor's closing argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it); *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (solicitor's statements which misrepresented the evidence adduced at trial were clearly improper and objectionable); *Fortune v. State*, 428 S.C. 545, 561, 837 S.E.2d 37, 46 (2019) (solicitor's misconduct in closing argument amounted to due process violation requiring new trial).

Counsel's failure to challenge the incorrect assertions that there was blood on the wall and that it was fresh was not strategic. Counsel presented a defense that Petitioner had an alibi and that any of his DNA left at the scene was left a week earlier when Petitioner was shot by Complainant. Petitioner's fresh blood being on the wall was inconsistent with this defense. Counsel could have effectively represented Petitioner if he had pointed out to the jury that there

was no blood on the wall and therefore it could not be fresh and wet. Because no objections were made to this presentation of factually incorrect evidence and improper argument, the testimony was not stricken. No curative instructions were given. The jury was not instructed to disregard the improper argument. Additionally, the judge did not instruct the jury that the attorneys' arguments were not evidence. Nevertheless, the jury deliberated for three hours.

Counsel's deficient performance was incredibly prejudicial to Petitioner. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* The prosecutor elicited incorrect testimony from Detective Miller and Sergeant Weiner that there was blood on the wall. Detective Miller was a highly experienced police officer and homicide investigator, and he said the "blood" looked "fresh," which surely would have been compelling to the jury.

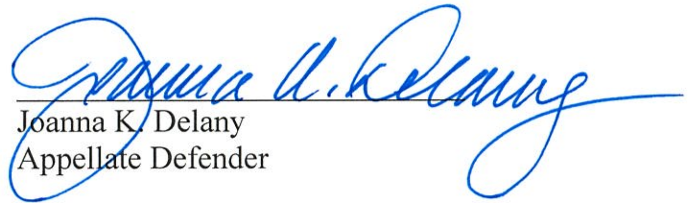
In contrast, the testimony that there was *no* blood on the wall came out during complicated testimony about multiple exhibits where the prosecution and its witnesses referred to single exhibits using multiple identification numbers. The testimony that the presumptive test was negative for State's Exhibit #53 (i.e., there was no blood on the wall) was obscure enough that trial counsel and the two testifying police officers did not catch it. "DNA evidence is well known as a powerful and accurate evidentiary tool for the State to solve crimes and obtain convictions. Nevertheless, DNA evidence has also come to be known for its potential to confuse and mislead jurors." *State v. Phillips*, 430 S.C. 319, 329, 844 S.E.2d 651, 656 (2020). In *Phillips*, the South Carolina Supreme Court concluded that misstatements and wrong statements by the

solicitor and SLED analyst about complicated DNA concepts required a new trial, especially where solicitor's incorrect statements in closing argument all but guaranteed the jury was confused and misled. *Phillips*, 430 S.C. at 342, 844 S.E.2d at 663. In this case, like in *Phillips*, the manner in which the correct testimony about the actual evidence came out was confusing and the prosecutor's misstatements during closing argument all but assured the jury was confused and misled.

The failure to object to the solicitor's improper argument and to the improper testimony by Sergeant Weiner and Detective Miller prejudiced Petitioner. The impact of counsel's errors was to allow the jury to believe that Petitioner's defense was invalid because if he was really at home when Complainant was shot as he claimed, his "fresh" "blood" would not have been on Complainant's wall when law enforcement arrived. The testimony and argument impugned Petitioner's alibi, which was testified to by two witnesses who were home with him, and corroborated by two others who saw him heading home and arriving home. Petitioner provided an innocent explanation for the actual forensic evidence found. The solicitor put up a rebuttal case just to emphasize this "blood" "evidence." There is a reasonable likelihood the result of the trial would have been different if Petitioner had the effective assistance of counsel. Petitioner has proven error and prejudice. *Strickland*, 466 U.S. at 686; *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

CONCLUSION

Based on the foregoing argument, this Court should reverse the denial of PCR and grant Petitioner a new trial.



Joanna K. Delany
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 22nd day of July, 2024.

RECEIVED
Jul 22 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

RONNIE C. SWOFFORD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001436

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Ronnie Cleveland Swofford, #218281, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 22nd day of July, 2024.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

From:	Warren, Kaylynn
To:	SC - BROWN MELODY
Cc:	Delany, Joanna; Angela Brown
Subject:	2021-001436 Ronnie C. Swofford v. The State
Date:	Monday, July 22, 2024 4:12:00 PM
Attachments:	2021-001436 Ronnie C. Swofford v. The State Brief of Petitioner.pdf

Good Afternoon,

Attached for service in the above-referenced case is the Brief of Petitioner which will be filed today, July 22, 2024, with the Court of Appeals via email filing.

Respectfully,
Kaylynn

Kaylynn Warren
Administrative Assistant
South Carolina Commission on Indigent Defense
Division of Appellate Defense
(803) 734-1330