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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Honorable Kristi F. Curtis, Circuit Court Judge

JOSHUA LENARD POACHER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001899

PETITION FOR WRIT OF CERTIORARI

GARY H JOHNSON
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

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ISSUE PRESENTED

1. Whether the PCR court erred in finding trial counsel was effective when he failed to challenge the testimony of the state's firearm toolmark expert that the bullets found during autopsy and at the crime scene had all been definitively fired by a gun found at petitioner's residence to the exclusion of all other firearms?

2. Whether the PCR court erred in finding trial counsel was effective when he failed to object to the improper bolstering of the state's fingerprint expert who claimed her opinions had been "peer" reviewed?

STATEMENT

Petitioner was indicted by a Jasper County grand jury and charged with two counts of murder, one count of armed robbery, and one count of possession of a weapon during a violent crime. App. 581 – 588. The indictments alleged petitioner entered a motel room occupied by Kantibha Patel and Hansaben Patel, shooting and killing both in connection with an armed robbery. App. 581 – 588.

A key piece of evidence against petitioner was the presence of a fingerprint on an envelope and a jewelry box found at the crime scene, which the state's latent fingerprint expert, Kimberly Mears of SLED, opined was a match with petitioner's fingerprints. App. 265, l. 24 – 266, l. 11. Petitioner's trial counsel, Stephen Plexico, cross-examined Mears on the subjective nature of her opinion and the different points of agreement required for a "match" in the United States versus other nations. App. 267, l. 1. – 268, l. 20. In response and without objection, Mears referenced that her opinion on the match had been "peer" reviewed as part of the quality control protocols in place at SLED to verify accuracy. App. 280, l. 23 – 281, l. 3.

The state also presented the expert testimony of Suzanne Cromer who was qualified as an expert in "toolmarks and firearm identifications." App. 288, l. 12 – 289, l. 8. Cromer opined that the various bullets recovered from the Patels' autopsies and the crime scene had been fired by the handgun found in petitioner's apartment. App. 304, l. 8 – 305, l. 1. Petitioner's counsel made no objections during Cromer's testimony and conducted no cross-examination of her opinions. App. 306, ll. 8 – 12.

A suppression hearing was held regarding multiple statements Petitioner provided police that included several different versions of events surrounding his connection to the crime. Petitioner originally told police he obtained items from the crime scene, including the gun

identified as the murder weapon by Cromer, from another individual in exchange for drugs. App. 12, l. 16 – 13, l. 10. After a second interview in which he relayed substantially the same story, petitioner invoked his right to counsel. App. 14, ll. 6 – 22. After petitioner was arrested and jailed, the lead investigator was told petitioner wanted to speak to the investigator by someone from the jail, and petitioner was questioned a third time, without the presence of a lawyer, and again relayed that he obtained the gun and other items from a third-party and was not involved in the shooting. App. 16, l. 18 – 19, l. 2. During a fourth and final interview, all conducted without petitioner being provided legal counsel, petitioner admitted direct involvement in the shooting. [1] App. 20, l. 6 – 22, l. 11. After police interrogation about what really happened since the investigator knew petitioner was both lying but also no murderer, petitioner relayed a story about Mr. Patel reacting aggressively to petitioner's presence at the door to the motel room and grabbing for the gun, causing petitioner to panic and shoot both victims in response to their aggressive behavior. App. 320, l. 2 – 324, l. 10.

Trial counsel argued before the jury that the final statement should be disregarded since it was obtained in violation of petitioner's right to counsel and that the fingerprint evidence was unreliable. App. 432, ll. 4 – 9. Trial counsel's argument to the jury centered on projecting a rushed and sloppy investigation, including concerns related to the fingerprint analysis and noted how petitioner came into possession of the firearm was a matter of dispute. App. 431, l. 18 - 433, l. 2.

Petitioner was tried before the Honorable R. Lawton McIntosh and a Jasper County jury from April 10 – 13, 2017. App. 1. At trial, petitioner was represented by Plexico with McDuffie

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1 Trial counsel moved to suppress the statement, but the motion was denied since the lead investigator testified that he was told by other officers that petitioner wanted to talk about the charges and had reinitiated contact voluntarily. App. 22, l. 25 – 30, l. 24.

Stone and Mary Jones appearing for the state. App. 2. The jury returned guilty verdicts on all charges, and the court sentenced petitioner to life imprisonment for each of the murders, thirty years for the armed robbery, and five years for the weapon charge. App. 510, ll. 17 – 24.

On direct appeal, an *Anders* brief was filed by Kathrine Hudgins raising the problem of a suggestive identification.[2] The Court of Appeals dismissed the appeal with an unpublished opinion. *See* State v. Poacher, No. 2017-000918 (S.C. Ct. App. Apr. 17, 2019).

Petitioner timely filed for PCR, alleging ineffective assistance of counsel. App. 513. James Falk was appointed as counsel for petitioner and filed an amended PCR application asserting two grounds of ineffective assistance of counsel concerning the testimony of both Mears and Cromer. App. 531. An evidentiary hearing was held on July 18, 2022, before the Honorable Kristi Curtis, with Falk representing petitioner and Lauren Mims appearing on behalf of the state. App. 533. The PCR court denied relief by order of dismissal dated November 27, 2023.

This petition for certiorari follows.

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2 Anders v. California, 386 U.S. 738 (1967).

ARGUMENT

1. The PCR court erred in finding trial counsel was effective when he failed to challenge the testimony of the state's firearm toolmark expert that the bullets found during autopsy and at the crime scene had all been definitively fired by a gun found at petitioner's residence to the exclusion of all other firearms.

A. How the issue was raised at PCR.

During his original trial, Suzanne Cromer was qualified as an expert in "toolmarks and firearm identifications" without objection. App. 288, ll. 12 – 16. Cromer then opined that there was "sufficient agreement in the individual identifying characteristics on the cartridge cases and bullets to determine that they were fired, in my opinion, from *this firearm*." App. 300, ll. 11 – 14 (emphasis added). Cromer repeatedly testified that the bullets she examined were fired from "this" firearm, referring to the handgun obtained from a search of Petitioner's room. App. 239, ll. 2 – 18; 304, l. 19; 305, l. 1. Trial counsel did not cross-examine Cromer or challenge her opinion that the bullets could be connected to a specific firearm to the exclusion of all other firearms. App. 306, ll. 8 – 11.

In an amended PCR application, counsel for petitioner asserted trial counsel was ineffective in failing to challenge the reliability of Cromer's opinion. App. 531. At the PCR hearing, PCR counsel presented the problem as "counsel should have requested a [*Council*] hearing before the ballistics expert, Cromer, could testify, and he should have conducted a more rigorous cross-examination of her testimony." App. 539, ll. 13 – 17 (referencing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (holding the trial judge must find the "expert witness

is qualified, and the underlying science is reliable. The trial judge should apply the Jones[3] factors to determine reliability.")).

Trial counsel admitted he did not question Cromer about nor obtain information on Cromer's false positives regarding her testing. App. 545, ll. 15 – 23. Trial counsel was unaware of scholarly articles and case law questioning the reliability of a ballistic expert's ability to opine that a specific handgun fired a specific bullet, all dated well before petitioner's trial. App. 548, l. 11 – 552, l. 9.

B. How the PCR court ruled.

In ruling on the matter, the PCR court noted the type of testimony regarding an expert's opinion that a fired bullet could be matched to a specific firearm was common in South Carolina. App. 578. The PCR court also noted the cases cited by Petitioner's counsel in support of the argument were using the *Daubert*[4] standard and did not provide guidance to either the PCR court or trial counsel at the time of the original hearing. App. 578-579. The PCR court also found trial counsel's cross-examination was "reasonable" considering the "prevailing professional norms" despite there being no cross-examination at all of Cromer during the original trial. App. 579.

C. How the PCR court erred.

There is a growing body of science and law questioning the ability of "tool marks" to connect a bullet as being fired by a specific gun to the exclusion of all other firearms. *See* Geter v. United States, 306 A.3d 126, 134 (D.C. 2023) (holding the admission of expert testimony that a specific gun fired a specific bullet based upon tool markings was plain error); Brandon L. Garrett *et. al.*, *Judging Firearms Evidence*, 97 S. Cal. L. Rev. 101, 160 (2024) ("After many

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[3] State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

[4] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

decades of rote acceptance of the assumptions underlying the methodology, judicial interest in firearms expert evidence has exploded. *Over half of the judicial rulings that we identified have occurred since 2009*, the year that the NAS issued its pathbreaking report. Dozens of opinions limit testimony of firearms experts in increasingly stringent ways.")(emphasis added).

This pushback on the ability to examine the markings on a bullet and definitively testify that it was fired by a specific firearm to the exclusion of all other firearms originated well before petitioner's trial in 2017. *See* United States v. Monteiro, 407 F. Supp. 2d 351, 372 (D. Mass. 2006) ("One important caveat: during the testimony at the hearing, the examiners testified to the effect that they could be 100 percent sure of a match. Because an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty."); United States v. Glynn, 578 F. Supp. 2d 567, 574 (S.D.N.Y. 2008) ("It follows that ballistics examination not only lacks the rigor of science but suffers from greater uncertainty than many other kinds of forensic evidence. Yet its methodology has garnered sufficient empirical support as to warrant its admissibility. *See*, *e.g.*, NRC Report at 70–75, 81–85; tr. 6/30/08 at 882–83. The problem is how to admit it into evidence without giving the jury the impression—always a risk where forensic evidence is concerned—that it has greater reliability than its imperfect methodology permits. The problem is compounded by the tendency of ballistics experts—such as those in *Brown* and *Glynn*—to make assertions that their matches are certain beyond all doubt, that the error rate of their methodology is "zero," and other such pretensions."); United States v. Ashburn, 88 F. Supp. 3d 239, 249 (E.D.N.Y. 2015) ("However, given the extensive record presented in other cases, the court joins in precluding this expert witness from testifying that he is "certain" or '100%' sure of his

conclusions that certain items match. Nor can LaCova testify that a match he identified is to 'the exclusion of all other firearms in the world,' or that there is a "practical impossibility' that any other gun could have fired the recovered materials.").

State courts have also held this type of definitive matching opinion are based upon an unreliable premise. *See* Abruquah v. State, 296 A.3d 961, 997 (Md. 2023) ("[W]e conclude that the methodology of firearms identification presented to the circuit court did not provide a reliable basis for Mr. McVeigh's unqualified opinion that four bullets and one bullet fragment found at the crime scene in this case were fired from Mr. Abruquah's Taurus revolver."); State v. Raynor, 254 A.3d 874, 895 (Conn. 2020) ("As both the defendant and the state acknowledge, a substantial number of courts addressing this issue, including the United States Court of Appeals for the Second Circuit, have prohibited experts from testifying that a bullet or casing matched a specific firearm with absolute certainty or to the exclusion of all other firearms."). State courts have allowed opinion evidence concerning ballistics' toolmark matching; but placed limitations on the exactitude of the language used by such experts well before petitioner's trial. *See* Com. v. Pytou Heang, 942 N.E.2d 927, 945 (Mass. 2011) ("Where a qualified expert has identified sufficient individual characteristic toolmarks reasonably to offer an opinion that a particular firearm fired a projectile or cartridge casing recovered as evidence, the expert may offer that opinion to a 'reasonable degree of ballistic certainty.'").

Despite the growing pushback on the blind acceptance of this type of "scientific" testimony, Petitioner's trial counsel did not object to testimony from the state's expert that the recovered bullets had been fired by the same firearm, found in petitioner's apartment. The PCR court's finding of a "reasonable" cross-examination of the expert considering the "prevailing

professional norms" was error considering there was no cross-examination by trial counsel at all. App. 579.

While trial counsel is not expected to be clairvoyant, counsel is expected to act reasonably and conform to professional norms. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial"). "When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Strickland v. Washington, 466 U.S. at 690).

Trial counsel did not need to be clairvoyant to challenge the ability of the state's expert to connect a fired bullet to a specific firearm to the exclusion of all other firearms. At the time of Petitioner's trial, counsel should have been aware of the growing skepticism surrounding "toolmark" and ballistic matching. The prevailing professional norm was to challenge the admission of the testimony and effectively cross-examine the expert on the nature and limits of the "science" behind such testimony. Trial counsel admitted he was unaware of the growing trend to question and limit the scope of a ballistics' expert opinion that a gun definitively fired a bullet through examination of toolmarks: "And I'm glad I'm aware of it now. In all my years of doing this, I haven't heard anything. I haven't heard anything about that." App. 552, ll. 5 – 7.

The PCR court's criticism that the majority of cases cited were federal and thus relied upon Daubert is likewise misplaced. "While this Court does not adopt *Daubert*, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE. When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence

will assist the trier of fact, the expert witness is qualified, *and the underlying science is reliable.*" State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (emphasis added). In determining reliability, South Carolina courts examine the Jones factors:

> (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Council, 335 S.C. at 19, 515 S.E.2d at 517.

Here, the cited cases applying the Daubert factors question the "publications and peer review" along with the "consistency of the method" outlined in Council. The same argument and result apply under both of these standards: the underlying science of toolmark analysis does not support a conclusive statement that a particular firearm fired a particular bullet to the exclusion of every other firearm. Moreover, trial counsel's complete failure to challenge the expert testimony, particularly in light of his trial strategy discussed below, was not "reasonable within prevailing professional norms" since trial counsel made no effort to challenge the expert's definitive opinion with the growing judicial checks on this type of definitive toolmark opinion.

D. Prejudicial impact.

Trial counsel's strategy depended on the jury rejecting elements of the case due, in part, to doubts about the quality of the state's investigation. Mears, the state's fingerprint expert, was cross-examined on the different points of agreement required for a "match" in the United States versus other nations. App. 267, l. 1. – 268, l. 20. Mears was also challenged regarding the reliance on subjective areas of opinion on the various levels used in classifying the nature of the examiner's opinion and which involve a more subjective interpretation. App. 269, l. 1. – 270, l. 21. The lack of formal notes in connection with Mears' opinion gave the impression of an

agency cutting corners and reducing costs. App. 272, l. 12 – 279, l. 12. Trial counsel argued the jury should disregard petitioner's final statement to police that confessed involvement in the shooting since it was obtained in violation of petitioner's right to counsel and that the fingerprint evidence was unreliable. App. 432, ll. 4 – 9.

Any evidence that reinforced or strengthened the jury's opinion of the quality of the state's investigation effectively undermined this trial strategy. As the ballistics' expert was allowed to testify, unchallenged by cross-examination, that the firearm obtained from petitioner was the actual gun that fired the shots was prejudicial to this trial strategy.

As this Court noted in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017), trial counsel's decision must be supported by the actions taken during trial. This Court in Briggs noted that the defense strategy to show "nobody believed the victim, and thus the abuse did not happen, could not have been advanced by allowing [forensic interviewer] to testify she believed [victim]." Id. at 329, 806 S.E.2d at 720. As in Briggs, since trial counsel's trial strategy asked the jury to doubt the quality of the expert opinions, a failure to either limit or cross-examine the ballistics' expert was both ineffective and prejudicial. *See* Strickland v. Washington, 466 U.S. 668 (1984).

2. The PCR court erred in finding trial counsel was effective when he failed to object to the improper bolstering of the state's fingerprint expert who claimed her opinions had been "peer" reviewed.

A. How the issue was raised at PCR.

Trial counsel explained the purpose of his cross-examination of the state's fingerprint expert at the PCR hearing:

> A. Americans seem to do it, kind of, slackly. They use the minimum number which would lead to error and cause doubt in the jurors's mind, is what I was trying to get across. If I remember correctly, I think, like, 16 is the European standard or at least in some countries.
>
> Q It almost seems like the American standard almost, sort of, gets down to a subjective test.
>
> A Yeah. I mean, you find one thing. Let's move on to the next set of prints. We got a bunch to get done today, get home early for dinner. I mean, that kind of thing. I mean, I don't think it was done right, but that's not my area.

App. 542, l. 15 – 543, l. 2.

Despite the stated goal of reducing the jury's confidence in this testimony, trial counsel failed to object to the introduction of testimony that the expert's opinion had been "peer reviewed" as part of SLED's quality control.

> Q. And this print, once you actually do it, then it is peer reviewed. In other words, you have other experts in your department to check after your work; is that correct?
>
> A Yes. Another examiner reviews that -- this entire case file.
>
> Q And they did that in this case as well?
>
> A Yes, they did.

App. 280, l. 23 – 281, l. 5.

Trial counsel admitted this was a form of bolstering and raised a Confrontation Clause problem and acknowledged missing the opportunity to object.

> Q. Would you agree though that if it sounds like it's peer reviewed that that is somewhat -- that's another individual that both are bolstering her testimony?
>
> A. *Yes, vouching for her, the quality of her work.*
>
> Q. And you didn't have any opportunity to cross-examination of any of the peer reviewers, did you?
>
> A. *No, I should have objected to that.*
>
> Q. So you would agree that that's possibly a confrontation clause issue?
>
> A. Yes, sir.

App. 543, l. 23 – 544, l. 9 (emphasis added).

B. How the PCR court ruled.

In its ruling, the PCR court found that the improper testimony did not "improperly bolster her testimony, and no Confrontation Clause violation occurred based on Mears' mere passing statement that her work had been peer-reviewed—especially when Mears's never commented on what the peer review revealed." App. 577. The PCR court also emphasized that trial counsel's decision to "focus his cross-examination on the less rigorous American standard for fingerprint comparison was reasonable." App. 577.

C. How the PCR court erred.

In its order, the PCR court appears to have equated a lack of prejudice with a finding that counsel was not ineffective in handling the improper testimony. Making reference to "peer" review as merely passing ignores trial counsel's intended strategy to reduce the jury's confidence

in the testimony. Allowing improper and unconstitutional vouching of that very testimony was ineffective assistance of counsel.

Generally, "out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." State v. Brewer, 438 S.C. 37, 49, 882 S.E.2d 156, 162 (2022). To avoid a Confrontation Clause violation, an expert witness may not serve "as a conduit for introducing the results of [fingerprint] tests that were performed by an expert who did not testify." State v. McCray, 413 S.C. 76, 90, 773 S.E.2d 914, 922 (Ct. App. 2015).

While the state's expert testified extensively about her own testing, the testimony regarding her work being "peer" reviewed was merely a conduit to bootstrap an additional expert's hand on the scales to make this testimony more credible before the jury and was a violation of petitioner's rights under the Confrontation Clause of the Sixth Amendment of the Constitution of the United States and Article I, Section 14 of the South Carolina Constitution.

In addition to violating petitioner's rights under the Confrontation Clause, the testimony was improper bolstering and not admissible. "The assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Therefore, "even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others." State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). "This type of bolstering, especially when made by a witness imbued with imprimatur of an expert witness, improperly invades the province of the jury." State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015).

Allowing the state's expert witness to bolster her own testimony with reference to her work being "peer reviewed" as part of quality control provides only one conclusion for the jury:

an additional expert reviewed the opinion and agreed with her assessment. This testimony was both improper bolstering and a violation of petitioner's Confrontation Clause rights, and trial counsel was ineffective in failing to object.

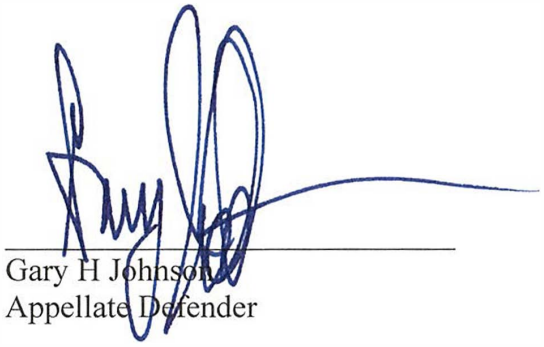
D. Prejudicial impact.

As noted, trial counsel's strategy depended on the jury rejecting elements of the case due to doubts about the state's investigation. As part of this strategy, Mears was cross-examined on the different points of agreement required for a "match" in the United States versus other nations. App. 267, l. 1. – 268, l. 20. Mears was also challenged regarding the reliance on subjective areas of opinion on the various levels used in classifying the nature of the examiner's opinion and which involve a more subjective interpretation. App. 269, l. 1. – 270, l. 21. The lack of formal notes in connection with Mears' opinion gave the impression of an agency cutting corners and reducing costs. App. 272, l. 12 – 279, l. 912. Allowing Mears to bootstrap her own testimony with another expert's "peer" review would have effectively muted the effort to undermine the credibility of her opinion.

This Court in Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017) noted that the defense strategy to show "nobody believed the victim, and thus the abuse did not happen, could not have been advanced by allowing [forensic interviewer] to testify she believed [victim]." Id. at 329, 806 S.E.2d at 720. As in Briggs, since trial counsel's trial strategy asked the jury to doubt the quality of Mears' analysis and opinion, his failure to object to the improper bolstering of her testimony by referring to her work being "peer" reviewed was in direct contradiction of this strategy and prejudicial. *See* Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

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



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of July, 2024.