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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2024-000848

Jacoby Jamar Gregory,.....Petitioner,

v.

State of South Carolina, ...Respondent.

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Jacoby Gregoy replies to the State's Return to his Petition for a Writ of Certiorari ("Return").[1]

Question I

Was trial counsel ineffective for failing to conduct a complete investigation and utilize investigative services, prior to and during trial, of an expert in cell phone extraction and mapping and forensic crime scene investigation? As a result of counsel's ineffectiveness, lay witnesses, expert witnesses, and evidence were not properly utilized to corroborate Jacoby Gregory's testimony or attack the State's case.

Although identifying the deficient performance and prejudice prongs of *Strickland*[2] (Return, p. 7), the State does not address the former. The State merely argues "the evidence that existed was so overwhelming that any testimony by these experts would not have changed the outcome of the trial. *Id.* The State does not discuss trial counsel's duty to conduct and independent investigation, including consulting expert witnesses. *See, e.g., McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008); *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007).

In addition, the State's prejudice prong analysis does not apply the correct legal standard. As this Court explained:

> To satisfy the prejudice prong, an applicant must demonstrate there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. As the Supreme Court of the United States explained in *Strickland*, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a

[1] Except for the Table of Contents (Return, p. i), the State's Return to the Petition for a Writ of Certiorari does not contain page numbers. This reply considers the page captioned "PETITIONERS [sic] QUESTIONS PRESENTED" to be page 1.

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

> reasonable doubt respecting guilt. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.

Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (internal quotations and citations omitted). "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" and "the strength of the State's case in light of all the evidence presented to the jury." *Id.*[3] [T]he existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id*., 422 S.C. at 189, 810 S.E.2d at 844. "In rare cases, using 'overwhelming evidence' as a categorical bar to preclude a finding of prejudice is not error." *Id.* 422 S.C. at 190, 810 S.E.2d at 844. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice, . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." *Id*., 422 S.C. at 191, 810 S.E.2d at 845.

The order of dismissal (A. 900) and the State's Return (p. 8) acknowledge "law enforcement did not do a perfect job in their investigation," but neither the order nor the Return consider the specific impact of counsel's errors. The trial strategy was "to raise as much reasonable doubt" as possible. A. 830, 919-20. As discussed below, the opinions of Skidemore and Tressel are consistent with this strategy as these witnesses correct misleading evidence presented by the State and offer expert insight into law enforcement's less than "perfect" investigation.

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[3] *See also Thompson v. State*, 423 S.C. 235, 245, 814 S.E.2d 487, 492 (2018) (adhering to *Smalls*).

A. Expert in Cell Phone Extraction and Mapping.

At the PCR hearing, Gregory presented the testimony of Peter Skidemore, an expert in cell phone extraction and mapping. A. 739.[4] Skidmore was able to obtain a "very minimal extraction" of data on the Samsung phone, which yield significant information. Skidmore compared the data he extracted from the Samsung phone with the trial testimony of Sergeant Dan Kelly and State's Trial Exhibit 50. When Skidmore added data from an access time of 22:49:06, which was omitted from the exhibit at trial, it made him question the accuracy and reliability of the coordinates of State's Exhibit 50. Gregory's location at 22:49:06 was 1.6 miles away from the location of the shooting. Skidmore opined it would be difficult to travel the difference in 41 seconds. Skidmore further opined that Gregory's cell phone data showed him traveling away from the location of the shooting. Both Skidemore and Robert Tressel believe the 22:49:06 data was purposefully left out to State's Exhibit 50. A. 740-68, 792; Applicant's Exhibits 2 (A. 874-77) and 3.[5] At the PCR hearing, Tressel specifically testified about how Skidmore's analysis would have contributed to Tressel's expert opinion and been relevant to the defense. A. 791-95, 918-19.

Neither the order of dismissal nor the Return "address the reliability of the information and arguments by the state at trial." A. 917. Neither considered the significance of Gregory traveling away from the crime scene at the time of the shooting. Skidemore's

[4] The Return initially misidentifies this expert as "Mr. Tressel" but later corrects this mistake. Return, pp. 7, 9. Mr. Tressel is the expert in forensic crime scene investigation that Mr. Gregory called the PCR evidentiary hearing. The failure of the order of dismissal and the Return to engage with Skidemore's testimony has been a constant theme. At the Rule 59(e), SCRCP hearing, Gregory complained "the order fails to properly address his testimony and make complete findings." A. 917.

[5] Applicant's Exhibit 3 is a USB drive that will be transported to the Court.

opinion undermines the reliability of the testimony of Investigator Dan Kelly and creates a reasonable probability the jurors would have had a reasonable doubt about Gregory's participation in the crime.

B. Expert in Forensic Crime Scene Investigation.

At the PCR hearing, Gregory presented the testimony of Robert Tressel, an expert in forensic crime scene investigation. A. 776. Although Tressel identified multiple problems with law enforcement's processing the crime scene, both the order of dismissal (A. 900) and the State's Return (pp. 8-9) focus on the trial counsel's decision not to have the weapon and hoodie tested for DNA evidence. Tressel's testimony, however, was more about the procedures law enforcement should have followed in processing the evidence. Proper processing of the hoodie for DNA might have identified other people who wore the hoodie. Proper processing of the .45 caliber Springfield pistol could have identified other people who handled the weapon.

The order of dismissal is silent on Tressel's testimony about law enforcement's failure to document the crime scene with an adequate number of photographs, diagram the location of the evidence, and make notes of the crime scene including measurements for the location of evidence so the crime scene could have been reconstructed. Gregory specifically argued his trial counsel "could have consulted with [Tressel] to help craft cross examination of the state's witnesses." A. 918. As argued at the Rule 59(e), SCRCP hearing, the order of dismissal "fails to properly address [Tressel's] report and his testimony offered regarding it to include his specific expert opinions." *Id*.

Tressel's opinion undermines the reliability of the State's case and creates a reasonable probability the jurors would have had a reasonable doubt about Gregory's participation in the crime.

C. The State has not identified a valid trial strategy.

The State argues, "Within *Strickland*, second-guessing valid trial strategy is not allowed by the PCR court," and "[t]o question the decision by trial counsel not to have the weapon tested for DNA is not proper for the PCR judge according to *Strickland*." Return, p. 9. This argument is a misapplication of *Strickland*. "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); *cf. Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002).

The order of dismissal appears to justify trial counsel's failure to engage these experts as a strategic decision. A. 900-01 (Trial counsel "did not think hiring an expert was necessary."). This paragraph of the order never addresses trial counsel's reasons for not consulting an expert in cell phone extraction and mapping.[6] Nor does this this section of the order address the importance of Skidemore's opinion that Gregory was moving away from the crime scene at the time of the shooting. The order concludes, "The reason [trial counsel] never hired a DNA expert to examine the weapon that was recovered" was because if Gregory's "DNA was found on this weapon it would have seriously damaged the defense." Gregory, however, admitted owning the pistol. In fact, he reported it missing. Proper processing of the pistol might have revealed who else handled the weapon and fired

[6] At the PCR hearing, trial counsel "testified he was concerned about the cell phone evidence," and he "could not recall why he did not utilize an expert and did not want to speculate about it." A. 919.

the fatal shots. Furthermore, the order of dismissal misses the point. Tressel's role was not to process the weapon or hoodie for DNA evidence. Rather, his role would have been to assist the jurors understanding how the inadequate crime scene investigation failed to collect evidence that could have identified another suspect as the shooter. As discussed above, utilizing Skidemore and Tressel was consistent with trial counsel's strategy "to raise as much reasonable doubt" as possible. A. 830, 919-20.

Gregory's Rule 59(e), SCRCP motion complained "the expert testimony [he] presented is not properly reflected" in the order of dismissal. The motion also complained that the findings of fact about trial counsel's testimony are contrary to and, therefore, not supported by the record. A. 916-20.

This Court should grant the petition and consider the question. Alternatively, this Court should reverse the PCR court and remand with instructions to prepare and order with "specific findings of fact" and express "conclusions of law" as required by S.C. Code Ann. § 17-27-80. *See v. State*, 439 S.C. 97, 886 S.E.2d 204 (2023); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019).

Question II

Was trial counsel ineffective for failing to make a complete record, make a motion and/or move for mistrial when mistrial when counsel addressed the Court making faces that made it "abundantly clear" that he did not believe Jacoby Gregory during his trial testimony?

The State argues, "There is no proof that any jury member saw the 'faces' supposedly being made by the trial judge." Return, pp. 10-11. The State is wrong. During the trial, trial counsel stated:

> Your honor, as I hope you know, I have the upmost respect for the Court, I truly do. But during most of my client's testimony, I could not help but notice that you were making faces as though you were in complete disbelief.

> ***And it was abundantly clear to everyone in the courtroom and most obviously to the jury.*** It couldn't have been any worst [sic] as if you held up a sign that said you didn't believe what my client was saying."

A. 629 (emphasis added).[7] The trial judge responds, "That's your opinion," but he did not expressly deny making faces. A. 630. In fact, the trial judge implicitly acknowledged the conduct by stating, "Thank you, very much. I was surprised at the narrative an experienced trial lawyer would allow their client to go through." *Id*. This statement is consistent with trial counsel's PCR testimony about the trial judge motive for making faces." A. 808-10.

Additionally, the State did not contradict the observations of trial counsel—neither at trial nor during the evidentiary hearing. The Solicitor did not contradict trial counsel's observations "it was abundantly clear to everyone in the courtroom and most obviously to the jury." Nor did the State offer any evidence to contradict trial counsel's PCR testimony.

Significantly, the order of dismissal accepted the allegations as true of "trial judge making faces during the Applicant's testimony" and "has reactions during the applicant's testimony." A. 901-02.

Finally, Gergory's petition cites three cases supporting his position: *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994); *Crenshaw v. S. Ry. Co.*, 214 S.C. 553, 559, 53 S.E.2d 789, 791 (1949)*; State v. Pruitt*, 187 S.C. 58, 196 S.E. 371, 372 (1938). All three opinions ordered new trials. The State's return does not address any of these cases. Rather the State merely argues the trial court's general instruction that "the jury is the sole and exclusive judge of the facts" cures "[a]ny possible prejudice." Return, p. 10. *Pruitt*, holding

[7] During the Rule 59(e), SCRCP hearing, Gregory pointed to this testimony not only to establish prejudice but also to demonstrate why the trial judge's standard jury instruction regarding the roles of the judge and jury did not cure the prejudice. A. 921-22 (trial counsel testifying that the trial judge's facial expressions was "something that was very hard for us to overcome."

"it quite probable that the remarks of the trial judge diminished very materially the defendant's chances of acquittal," 187 S.C. 58, 196 S.E. 371, 374 (1938), rejected this precise argument:

> But this view cannot be accepted, for if, as we have seen, the real object of this constitutional provision was to leave all questions to the jury, to be decided according to their own judgment, unbiased by any expression, or even intimations, of opinion from the judge, it is manifest that such object would be defeated if a circuit judge should be allowed to express his own opinion upon any material question of fact, and then undertake to wipe out the impression made upon the minds of the jury by telling them that all questions of fact were for them. The impression having once been made, it would be very difficult, if not impossible, thus to obliterate it, and the result would be that the jury would be more or less influenced by an opinion coming from so high a source as an intelligent judge, whose mind had been trained to weigh testimony, and determine its force and effect, and thus the very object of the constitutional provision-to preserve the minds of the jury from being in any way influenced by the opinion of the judge as to a question of fact-would be defeated.

Id.

This Court should grant the petition and consider the question. Alternatively, this Court should reverse the PCR court and remand with instructions to prepare and order with "specific findings of fact" and express "conclusions of law" as required by S.C. Code Ann. § 17-27-80. *See Inman* and *Fishburne, supra*.

Question III

Was trial counsel ineffective for failing to address the conflict issue involving Scott Robinson, Esquire, pre-trial for failing to effectively address it when the issue came up at trial and for failing to make a complete record?

The State argues "no conflict ever existed" and "[n]o evidence was presented that Mr. Robinson owed any duty to" Gregory. Return, pp. 11-12. Once again, the State is wrong. The record reflects that cooperating co-defendant Shawndell Clemons changed his story after retaining Robinson. A. 397-403; 818-22. Moreover, the order of dismissal found

that Robinson "spoke to" Gregory and later represented Clemmons. Robinson's meeting with Gregory established a duty of confidentiality. Rule 407, SCACR, Rule 1.6, RPC.

As set forth in the petition, at p. 16, the order of dismissal only considers Robinson's testimony at trial and never considers Gregory's testimony at trial. The order resolves this claim based on the trial recorded without any consideration of the PCR evidence, other than a passing reference to trial counsel's testimony. A. 902-03. Robinson's duty of loyalty to Clemmons conflicted with his duty of loyalty to Gregory.

This Court should grant the petition and consider the question. Alternatively, this Court should reverse the PCR court and remand with instructions to prepare and order with "specific findings of fact" and express "conclusions of law" as required by S.C. Code Ann. § 17-27-80. *See Inman* and *Fishburne, supra*.

Question IV

Was trial counsel ineffective for failing to make an objection under *State v. Sierra*, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) during the State's examination of Bobby Thomas and Jacoby Gregory?

The State argues, "*State v. Sierra* did not apply." Return, pp. 12-13. The State is wrong and tries to misdirect this Court. Gegory's petition pointed to the following exchange between the Solicitor and Bobby Thomas, at A. 309-11. The State only wants this Court to look at the testimony found at A. 614-15.[8] Return, p. 12. The following exchange at trial invokes *Sierra*:

Q. Who drives a dark green SUV?

A. I have no idea.

Q. Do you remember talking to me a couple of weeks ago?

A. Yes, ma'am.

[8] This portion of the transcript is when the Solicitor cross-examined Gregory about letters Gregory wrote from the detention center.

Q. All right. And we went over this statement, didn't we?

A. Yes, ma'am.

Q. You didn't tell me at the time that you didn't know about the dark green SUV?

A. 310. The Solicitor also asked, "Did I ask you if there was anything about your statement that I needed to know?" A. 311.

The Court of Appeals summarized the situation in *Sierra*:

> Savceda and Sierra were arrested and indicted for trafficking in marijuana. They received a joint trial beginning January 5, 1998. At the close of the State's case, Savceda pleaded guilty. Sierra then called Savceda as his witness. Savceda testified on direct examination that the marijuana belonged to him, and Sierra knew nothing about it. On cross-examination, the assistant solicitor attempted to impeach Savceda with inconsistent statements he allegedly made to her in a pretrial meeting between counsel, which Savceda attended. This cross-examination culminated in the following exchange:
>
> > Q. [assistant solicitor] And when I said the drugs were found in the trunk you said—
> >
> > *Defense Counsel:* Objection, your honor. If she wants to submit herself as a witness, that's fine with me, but if she's going to testify as to what she was told, she needs to be sworn.
> >
> > *The Court:* No, sir. Overruled. Go ahead.
> >
> > Q. And you said, "It wasn't mine. It belonged to the other guy."
>
> In response, Savceda denied the statement, and remained steadfast in his testimony that the marijuana belonged to him. The assistant solicitor did not attempt to withdraw in order to testify under oath about the alleged prior inconsistent statement, and no independent evidence was presented to establish it.

337 S.C. 368, 371-72, 523 S.E.2d 187, 188-89 (Ct. App. 1999).

The Court of Appeals also recognized, "When the prior inconsistent statement was allegedly made to the prosecuting attorney, the availability of extrinsic evidence to establish the statement is directly linked to the ability of the prosecuting attorney to appear as a witness in the trial." *Id*., 337 S.C. at 376, 523 S.E.2d at 191. Regarding prejudice, the Court of Appeals observed this Court "recognized long ago that prejudice may result from the question, irrespective of the answer." 337 S.C. at 375, 523 S.E.2d at 190.

As pointed out in the petition, the order of dismissal states, "There was no impeachment made by the Assistant Solicitor regarding a conversation between her and Mr. Thomas." A. 904. This conclusion is contrary to the record cited above and the position taken by the State in the Return. This Court should grant the petition and consider the question. Alternatively, this Court should reverse the PCR court and remand with instructions to prepare and order with "specific findings of fact" and express "conclusions of law" as required by S.C. Code Ann. § 17-27-80. *See Inman* and *Fishburne, supra*.

Question V

Was trial counsel ineffective for failing to object to bolstering and vouching during the State's closing argument?

The Solicitor argued, "All right, let's talk about Shawndell Clemmons now and why you should believe him." The Solicitor acknowledged problems with Clemmons' statement and argued:

> But what his statement is and what he has done and he – he's pled guilty He's looking at up to 30 years in jail. And what – he confessed to his role in the murder. And in life and in the law, when somebody confesses to something, we give that a high degree of reliability because why would somebody lie and incriminate themselves? It does not make sense. You don't like and put themselves in a spot to go to jail for 30 years.

A. 683-84.[9] Trial counsel did not object.

The Solicitor implied she had life experiences she brings to the law that support Clemmons' credibility. The petition, at p. 19, argued this situation is very similar to the prosecution's opening statement in *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002). At the Rule 59(e), SCRCP, Gregory pointed to *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences."). As argued in the Petition, at, 20, the order of dismissal regarding this claim does not cite any South Carolina authority. Rather, the order cites only *United States v. Meacham*, 799 F.2d 751 (1986). A. 903-04. The order, accordingly, does not provide a conclusion of law expressly addressing this claim for relief. This Court should grant the petition and consider the question. Alternatively, this Court should reverse the PCR court and remand with instructions to prepare and order with "specific findings of fact" and express "conclusions of law" as required by S.C. Code Ann. § 17-27-80. *See Inman* and *Fishburne, supra*.

CONCLUSION

For the reasons set forth in the Petition and this reply, this Court should grant the petition and consider the questions presented. Alternatively, this Court should reverse the PCR court and remand with instructions to prepare and order with "specific findings of fact" and express "conclusions of law" as required by S.C. Code Ann. § 17-27-80. *See Inman* and *Fishburne, supra*.

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[9] Undersigned counsel acknowledges an error in the petition. In discussing the bolstering, counsel quoted trial counsel rather than the Solicitor. Petition, p. 19.

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