

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

S.C. Supreme Court

Roger M. Young, Circuit Court Judge  
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BROOKE JEWELL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000898  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
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## ISSUE PRESENTED

The PCR judge erred in denying petitioner's claim of newly discovered evidence because the mitigating evidence presented at the plea proceeding was limited to pharmacological<sup>1</sup> studies proving that compulsive violence, aggression, and sexual libido were side effects of the drug Paxil, which petitioner ingested before committing the rape, but that scientific pharmacogenetical<sup>2</sup> testing previously unavailable established that petitioner's blood contained a DNA-based genetic mutation/abnormality that greatly slowed the elimination of Paxil from his system and increased the side effects of Paxil "tenfold,"<sup>3</sup> and that this new scientific information would have created a side effects case in mitigation **unique** to petitioner only and yielded different sentencing results.

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<sup>1</sup> Pharmacology is the study of the origin, nature, chemistry and effects of drugs.

<sup>2</sup> Pharmacogenetics is the branch of pharmacology concerned with the effect of genetic factors on reactions to drugs.

<sup>3</sup> App. 187, line 18 – 24.

## STATEMENT

Petitioner Brooke Alexander Jewell pled guilty to first degree burglary and first degree criminal sexual conduct during the November 2001 term of the Charleston County General Sessions Court before Judge Edward B. Cottingham. Petitioner was sentenced to fifteen years on the burglary conviction and twenty-one years on the criminal sexual conduct conviction. App. 1 - 129. Andrew J. Savage represented petitioner at the plea proceeding. Assistant Solicitor Scarlett Wilson appeared on behalf of the state in the case.

Petitioner appealed, but his case was dismissed by the Court of Appeals on April 25, 2005. See State v. Jewell, Op. No. 2005-UP-296 (S.C. Ct. App. 2005). Petitioner was represented on appeal by William J. LaLina.

On June 15, 2011, petitioner filed a PCR application with the Charleston County Office of the Clerk of Court alleging newly discovered evidence in his case. App. 131 – 136. The respondent filed a return dated October 24, 2011, requesting that a hearing be held in response to petitioner's newly discovered evidence PCR claim. App. 137 – 142.

A PCR hearing into the matter was convened at the Charleston County Courthouse on July 23, 2012, before Judge Robert M. Young, Senior. App. 144 – 241. Petitioner was present at the PCR hearing and represented by Jeremy Thompson at that time. On March 21, 2013, Judge Young issued an Order of Dismissal in the case. App. 247 – 256.

Petitioner appealed Judge Young's Order of Dismissal. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in denying petitioner's claim of newly discovered evidence because the mitigating evidence presented at the plea proceeding was limited to pharmacological<sup>4</sup> studies proving that compulsive violence, aggression, and sexual libido were side effects of the drug Paxil, which petitioner ingested before committing the rape, but that recent scientific pharmacogenetical<sup>5</sup> testing previously unavailable established that petitioner's blood contained a DNA-based genetic mutation/abnormality that greatly slowed the elimination of Paxil from his system and increased the side effects of Paxil "tenfold,"<sup>6</sup> and that this new scientific information would have created a side effects case in mitigation **unique** to petitioner only and yielded different sentencing results.

In the case at bar, petitioner admitted that he committed the crimes charged against him, i.e., that he went inside the apartment of the prosecutrix, armed himself with a knife, and committed the act of sexual battery upon her. Tr. 47, l. 8 – p. 54, l. 24.

At the plea proceeding, petitioner did not allege insanity or GBMI, but rather trial counsel presented a case in mitigation establishing petitioner's ingestion of the drug Paxil prior to the commission of the crimes actually had adverse side effects upon him, which in turn resulted in his compulsive and uncontrollable aggression, sexual libido, and violence; and that these side effects alone led to his criminal actions. App. 70, l. 17 – p. 72, l. 7; App 122, lines 12 -17. Note that petitioner was a college graduate who was employed, had a girlfriend, participated in positive community activities, and had no prior criminal record. App. 68, lines 15 – p. 70, l. 16; App. 168, l. 22 – p. 169, l. 7.

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<sup>4</sup> Pharmacology is the study of the origin, nature, chemistry and effects of drugs.

<sup>5</sup> Pharmacogenetics is the branch of pharmacology concerned with the effect of genetic factors on reactions to drugs.

<sup>6</sup> App. 187, line 18 – 24.

At the sentencing phase of the plea, defense counsel presented petitioner's case in mitigation. This included medical experts who testified in reference to pharmacological studies available at that time that confirming the adverse side effects of Paxil that were documented to have occurred in some patients.

Dr. Jenkins, a psychiatrist, testified during the mitigation/sentencing phase of the plea proceeding and explained that medicating petitioner with Paxil lead to his heightened state of aggression, rage, and impulsive hyper-sexuality on the day these crimes were committed. App. 74, l. 8 – p. 81, l. 9.

Dr. Waid, who testified during the mitigation/sentencing phase of the plea proceeding, explained also that petitioner's personally was not one of violence, but that being medicated with Paxil placed him in a manic state that induced him to participate in atypical behavior, including hostile aggression and the need for an object to act on his heightened state of sexuality. App. 86, l. 5 – p. 91, l.6.

Dr. Breggin, who specialized in FDA studies on the side effects of Paxil and other SSRI drugs, testified during the mitigation/sentencing phase of the plea proceeding and explained that behavior such as impulsive aggression, anxiety, paranoia, psychosis, mania, aggression, hostility, and increased libido were well known side effects of Paxil. App. 91, l. 16 – p. 101, l. 15; App. 104, l. 15 – p. 109, l. 17.

Before petitioner was sentenced, the trial judge agreed that Paxil “may have been” a contributing factor in connection with petitioner's commission of the crimes to which he pled guilty. App. 123, lines 4-6.

During the PCR hearing, PCR counsel argued that petitioner's mitigating evidence submitted at the plea proceeding was supported by pharmacological evidence listing the side effects

of the drug Paxil, but that recent scientific pharmacogenetical evidence supported and amplified exponentially the Paxil side effects that were **unique** to petitioner's genetic DNA. More specifically, petitioner's blood work revealed that he possessed a DNA mutation (lack of 2D6 existing in only 10% of Caucasians), which proved that he was a poor metabolizer of prescription drugs and that his capacity to eliminate drugs in his system (liver) was greatly diminished as compared to the majority of other individuals. In support of this claim, petitioner presented the testimony of pharmacogenetics expert Dr. David Kurtz, who explained at the PCR hearing that petitioner's specific and **unique** DNA sensitivity test results and how his blood mutation impacted exponentially the side effects he experienced while taking Paxil. Dr. Kurtz testified that petitioner's bloodwork test results revealed that the 2D6 mutation (polymorphism) he possessed (existing in only 10% of Caucasians) lowered the rate at which he metabolized Paxil or any prescription drug, and that due to this slow elimination by his liver, the side effects of Paxil were highly concentrated in his body and stayed at high peaks for longer (even chronic) time periods in his body. Thus, due to petitioner's **unique** blood mutation, the side effects of Paxil on petitioner were increased "tenfold." App. 182, l. 19 – p. 192, l. 4; App. 198, l. 1 – p. 199, l. 16.

Additionally, petitioner testified at the PCR hearing and explained that he felt "crazy" like never before when he was on Paxil, and that his feelings of agitation and violence emanated from taking Paxil, and that Paxil made him hyper-aggressive and hyper-violent and hyper-sexual also. Now it is clear that petitioner's feelings and state of being can be authenticated scientifically via his genetic DAN lab testing results that highlighted his 2D6 blood deficiency. App. 212, l. 1 – p. 225, l. 18.

Finally, trial counsel testified at the PCR hearing and explained that there was no rational explanation for the commission of the crimes by petitioner other than the pharmacological

component emanating from the side effects of the drug Paxil which petitioner consumed before the crimes were committed; and that as a result of these truths, he focused on the drug's side effects via the pharmacological information provided the psychologists and the psychiatrists as strong mitigating evidence at the sentencing phase of the plea. Counsel added that had he known of the pharmacogenetical aspect of petitioner's blood mutation as a scientific component of the case and how the same increased his susceptibility to Paxil's side effects to a much greater degree, then he would have presented this new information in petitioner's case in mitigation at the plea proceeding. App. 200, l. 1 – p. 209, l. 10.

The PCR judge ruled that petitioner's newly discovered scientific evidence (pharmacogenetical blood test results) of his inability to metabolize prescription drugs normally, which resulted in the increased side effects from the use of Paxil that led to his criminal behavior, did not meet the requirements of newly discovered evidence because this information was merely cumulative to the prior case in mitigation and lacked any basis to support the assertion that had the same been presented during petitioner's plea case in mitigation that a different (more lenient) prison sentence would have been handed down in the case. App. 247 – 255.

As a rule, newly discovered evidence would warrant the grant of a new trial if the newly discovered evidence would change the result if a new trial were granted, and was discovered since the trial and could not have been discovered prior to trial, and would constitute material evidence that was not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

Here, the newly discovered evidence at issue would warrant the grant of a new sentencing hearing<sup>7</sup> because the DNA genetic information was not cumulative side effects evidence, but a

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<sup>7</sup> Petitioner stated that at the outset that he was requesting a new sentencing to present this newly discovered evidence in his case in mitigation.

clearly a different type of evidence because it was genetically-and-scientifically-based evidence that addressed petitioner's **unique** blood and DNA and how that **uniqueness** played a previously unknown role in the analysis of how the side effects of Paxil affected petitioner to a worsened level than what was before believed. Undoubtedly, this was a totally different aspect of petitioner's prior case in mitigation to the extent that this was scientific evidence uniquely attributable to the effect of Paxil based on petitioner's **unique** blood and DNA such that had the same been previously available as mitigating evidence, then this would have meant that petitioner's sentences received most likely would have been different.

This pharmacogenetical information would have provided the trial judge with scientific proof of the side effects of Paxil on petitioner that was **unique** to petitioner only in order to establish concretely that but for the Paxil ingested by petitioner during the time in question, he would not have committed these crimes. This previously unavailable pharmacogenetical evidence showed clearly that Paxil remained and peaked longer in petitioner's body after he ingested it, and thereby increased, exaggerated, and magnified the proven troubling side effects to such a heightened extent that his level of hyper sexuality, aggression, and violence would have surpassed the normal intensity "ten-fold" beyond what other individuals sans this genetic abnormality would have experienced after ingesting Paxil. Clearly, this newly discovered pharmacogenetical evidence was material to petitioner's case, which also would support his position in mitigation that the presentation of this newly discovered evidence at a new sentencing hearing would change petitioner's sentencing outcome. This type of pharmacokinetic testing was not available until after petitioner pled guilty as charged. App. 191, lines 8-13. Had this pharmacogenetical scientific testing been available previously to petitioner to present in addition to the pharmacological studies submitted in mitigation at the plea proceeding, then a reasonable probability exists that petitioner's sentencing prison terms

would have been significantly lower than the actual period of imprisonment handed down in his case.

Also, this newly discovered evidence was not available in 2001 when petitioner was sentenced, but rather came about by way of new genetic sensitivity testing five years later via a Genalex lab report issued on June 17, 2010 summarizing petitioner's DNA/blood drug sensitivity. App. 191, lines 8-13. See also Supp. Appendix. This lab testing by Genalex was not available in 2001 when petitioner was sentenced. Thus, per S.C. Code Ann. § 17-27-45 (c) this newly discovered evidence was made known per the filing of the PCR application within one year of the date on which the DNA sensitivity lab report was issued on petitioner's behalf. The lab report was dated June 17, 2010, and petitioner filed his PCR application timely within a year (on June 15, 2011) of the Genalex lab report issuance date. App. 151, l. 8 – p. 156, l. 1. See also Supp. Appendix.

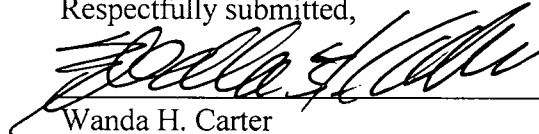
Lastly, petitioner's prayer is for a remedy that is not in the form of a new trial, but rather in the form of a new sentencing. This remedy is authorized under S.C. Code Ann. § 17-27-45 (c), where relief is allowed if there is evidence of material facts not previously presented and heard that requires the vacation of the conviction or sentence and under S.C. Code Ann. § 17-27-20 (4), which permits collateral actions where "there exists evidence of material facts, not previously presented or heard, that requires the vacation of the conviction or sentence in the interest of justice. Thus, the remedy petitioner would now seek is a new sentencing proceeding, which although not specifically listed as a remedy provided via newly discovered evidence, is nonetheless provided for by the above mentioned statutes. App 160, lines 2 -17; App. 168, lines 16 – 25. Flexibility exists in the assessment of newly discovered evidence. For instance, in McCoy v. State, 401S.C. 363, 737 S.E.2d 623 (2013), the Court held that the standard test for governing newly discovered evidence

would not apply in juror misconduct cases, but rather a separate standard, which is the same standard used in for juror misconduct in State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) would apply.

CONCLUSION

Based on the foregoing argument, petitioner would request that this Court grant a new sentencing proceeding in order to present newly discovered scientific pharmacogenetical evidence in mitigation in the case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wanda H. Carter", is written over a horizontal line.

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of January, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Roger M. Young, Circuit Court Judge

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BROOKE JEWELL,

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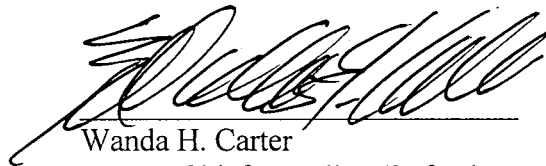
RESPONDENT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on Ashleigh R Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Brooke Jewell #279898, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 2nd day of January, 2014.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day  
of January, 2014.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022.