ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JAN 17 2014

S.C. Supreme Court

January 13, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211-1330

RE: **Robert Earl Ricketts v. State of South Carolina**
Appellate Case No.: 2012-213611
Lower Court Case No: 2002-CP-04-1544

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: Lara M. Caudy, Esq. (2 copies with all the attachments)

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STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton Mcintosh, Circuit Court Judge

Appellate Case No. 2012-213611

Robert Earle Ricketts, ... Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is certiorari warranted review counsel's performance for not consulting an expert in metallurgical evaluation where? And if this Petition warrants further review, is there evidence of probative value to support the PCR Judge's finding that Petitioner failed to meet his burden to prove prejudice where PCR expert's findings were rendered inconclusive?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted Petitioner at the August 1999 term of General Sessions for murder (99-GS-04-1945), assault and battery with intent to kill (99-GS-04-1943), assault with intent to kill (99-GS-04-1944) and possession of a weapon during the commission of a violent crime (99-GS-04-1942). James L. Goldsmith, Esq., represented Petitioner.

The State called its case to trial on October 11, 1999. Dana R. and Corey R. both testified to witnessing Petitioner, their father, first shoot their aunt, Dee Garrett, with a riffle then shoot and kill their mother, Renee Billadeau. (App.pp.78-81; pp.137-8). Dana R. contemporaneous detailed the attempted murder and subsequent murder to emergency dispatch. (App.p.78). The taped recording of the 911 call was published to the jury. (App.p.120). Renee wore a tape a recorder that captured her murder. The tape recorder was located near Renee's body; the tape was submitted into evidence. (App.p.174). Dee Garrett testified that Petitioner first shot her causing her fall. Renee's cries for help were silenced by a subsequent gun shot. (App.pp.321-26). Dawn Billadeau testified she remained in her vehicle and although armed, was unable to intervene until Petitioner had already shot one sister and killed the other. (App.p.337). The eyewitness all testified Petitioner executed Renee and severely injured Dee prior to Dawn exiting her vehicle or holstering her pistol. (App.pp.75-81; pp.135-37; pp.318-22).The second sequence of events resulted in Petitioner first shooting at Dawn before she returned fire and shot him. (App.p.181; p.337).

Lieutenant Creamer, of the Anderson County Sheriff's Office collected the

Browning .300 Winchester magnum bolt-action rifle used by Petitioner during the offense along with three unfired live bullets from the murder scene. (App.p.163). Lieutenant Creamer described the rifle as "very powerful weapon" designed for big game hunting. (App.p.164).

Agent David Collins, AN expert firearms examiner from the South Carolina Law Enforcement Division "S.L.E.D," identified Petitioner's rifle and the .300 Winchester magnum caliber cartridge bullet that it fired. (App.p.376). Agent Collins testified that the rifle was much more powerful than a handgun. (App.p.376). Dawn's pistol was identified as a Ruger that fired .357 caliber bullets. (App.p.381). The projectile fragments found in Renee's body were too badly damaged to determine their origins. Agent Collins testified,

> as a result of impact with an object, a bullet can often be damaged to the point where the microscopic markings that I'm looking for on the surface of the bullet are obliterated or wiped away, or sometimes you'll find a piece of a fragment or a fragment of a bullet that comes from the interior of a projectile that doesn't ever come in contact with the barrel

(App.p.382, lines 19-25). He found the fragments were unsuitable for identification. (App.p.383).

Agent Kimberly Black, an expert in trace analysis from S.L.E.D., testified to the absence of gunshot residue "GSR" on Renee's body. (App.p.371). A shot from the Petitioner's rifle would have occurred forty-two inches away from Renee; conversely, a shot from Dawn's pistol would have occurred at least sixty-six inches away from Renee.

Doctor Woodard, an expert in forensic pathologist, testified to his medical findings from Renee's autopsy. Renee suffered a single gunshot wound that entered in her

abdomen that produced two exit wounds "where particles of the bullet left the body." (App.p.256, lines 20-21). Dr. Woodard testified that handgun fired in tight apposition to the skin would not create the requisite energy required to produce the severity of injuries found on Renee's ribs, spleen, kidneys, and liver. (App.pp.258-59). Dr. Woodard also noted "lead storming" where a "handgun round won't produce that lead storming phenomenon." (App.p.259, lines 10-11).

Doctor Cook treated Dee and Petitioner immediately after the murder and noted Petitioner's gunshot wounds to his shoulder and mandible to be minor and unremarkable compared to Dee's gunshot wound. (App.pp.126-27). He elaborated that Dee's injuries were grave and testified that, "she had a very large defect, large amount of muscle mass that was, to me as a vascular surgeon and a trauma surgeon, I was very surprised she did not at least initially have neurovascular damage from the large kinetic energy of the blast." (App.p.127 line 24—p.128, line 3).

During the defense's case in chief, Petitioner testified he did not kill Renee or shoot Dee. Petitioner claimed he attempted to prevent an altercation and exited the scene but was drawn into a gun fight with Dawn. (App.pp.419-21). He surmised the victims were shot in the cross-fire from Dawn where he was merely acting in self-defense. Petitioner provided five separate and inconsistent accounts of the facts that led to his arrest and conviction. (App.pp.412-19; p.424; p.446; p.450; p.453).

The jury found Petitioner guilty as indicted. On October 14, 1999, the Honorable H. Dean Hall sentenced Petitioner to a term of life imprisonment for murder, twenty (20) years imprisonment for assault and battery with the intent to kill, ten (10) years

imprisonment for assault with intent to kill, and five (5) years imprisonment for the weapons conviction. (App.pp.558-59).

A notice of appeal was filed at the South Carolina Court of Appeals and perfected by Joseph L. Savitz, III, Esq., of the Office of Appellate Defense. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Ricketts, Op. No. 2002-UP-235 (S.C. Ct. App. filed March 28, 2002. (App.p.567).

Petitioner filed an Application for Post-Conviction Relief on May 23, 2002. (App.pp.562-66). Respondent subsequently filed its Return. (App.pp.589-93). A hearing was convened at the Anderson County Courthouse on June 15, 2010. (App.pp.611-83). Petitioner was represented by Raymond McKay Esq., and Respondent was represented by A. West Lee Esq., of the Office of the Attorney General. At the PCR hearing, Petitioner alleged counsel was ineffective for not consulting an expert to conduct an independent ballistics examination that allegedly would have proved his innocence. (App.p.636). He testified to his version of the facts that led to his conviction. (App.pp.620-25). He now claimed he went over to Renee's home to discuss her alleged suspicions regarding an accusation of infidelity. (App.p.621). Petitioner asserted he fired three rounds in the opposite direction of Renee. (App.p.630). Petitioner testified he asked counsel to consult an expert but was told by counsel it was not a viable option. (App.p.633).

Petitioner consulted Ara Nalbandian, an expert in metallurgical evaluation in the presentation of his PCR action. Nalbandian was deposed by by agreement on November 12, 2009, whereupon the transcript from the deposition was submitted into the record. He was consulted to evaluate the chemical composition of the various munitions where he

utilized a scanning electron microscope "S.C.M." The instrument was utilized in combination with x-ray spectroscopy to identify the elemental composition of the two projectile fragments retrieved from Renee's body, and one live intact .300 Winchester bullet located at the murder and a spent bullet from the .375 Ruger pistol that were located at the murder scene. (App.p.656). In his expert opinion, he testified the projectile fragments found in Renee's body were not the remnants of .300 Winchester bullet fired from Petitioner's rifle. (App.p.681). The conclusion was based upon the absence of copper in the projectile fragments. He identified the presence of copper in the .300 Winchester bullet's external tip and jacket. (App.pp.660-65). In comparison, he found the projectile fragments consisted of lead and tin alloy composition similar to the spent Ruger bullet. (App.p.665).

The PCR judge held the case open, retained jurisdiction, and reconvened a second PCR hearing at the Anderson County Courthouse on March 15, 2011. (App.pp.684-748). Respondent was represented David Spencer, Esq., of the Office of the Attorney General. At the PCR hearing, counsel testified he reviewed Nalbandian's report and the deposition transcript. Counsel noted that during the course of his practice, he was unaware of the use metallurgical testing in in the field of ballistics identification. He stated, "the typical testing there was firing a bullet and identifying it through the spirals or whatever in the bullet itself and tracing that bullet to a particular gun." (App.p.701, lines 4-8). Counsel noted Nalbandian failed to examine the internal components of the Winchester .300 live round. (App.p.702). He testified would have utilized Nalbandian in retrospect just for the sake of presenting an expert. (App.p.700). Counsel testified he did not consider retaining

an expert because of limited resources. Counsel stated he would have been surprised if the prosecuting solicitor, Druanne White, Esq., the Tenth Circuit Solicitor at the time, would not have cross-examine Nalbandian on his failure to test the inside of the .300 live bullet. (App.pp.705-6).

Agent Stoner testified as an expert in trace evidence. Stoner testified that this was the sixtieth time she has testified in court as an expert. She testified she examined Nalbandian's report and testimony, and had concerns about the efficacy of Nalbandian's conclusions. (App.pp.715-18). Principally, the x-ray dispersive testing would only tell the composition of materials on the outside of the bullets. Therefore, without mutilative testing, it was not possible to know what was on the inside of the rifle bullet and that the tests were inconclusive as to whether the bullet may have a lead core. Accordingly, the testing was not reliable in determining whether or not there was lead or lead alloy in the bullet. (App.pp.718-22). She also noted that although Nalbandian testified that the pistol ammunition and the fragments contained a lead/tin alloy, Nalbandian's reports indicated "Sb", which is the symbol on the periodic table of elements for antimony. Among other issues Agent Stoner noted was that testing for each item was run for only fifty seconds, shorter than the standard time for testing. (App.pp.726-32).

At the close of Petitioner's case, the PCR Judge opined, "regardless if we get into the interior of the bullet or not, I don't know if its going to tell us the answer." (App.p.742, lines 22-24). In an order dated March 28, 2012, the PCR judge denied relief. (App.pp.749-58).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

Certiorari is not warranted where the PCR Judge correctly found counsel's representation sufficient where the duty to investigate did not extend to consulting an expert in the obscure and maligned field of metallurgical evaluation. Furthermore, evidence of probative value supports the PCR judge's finding that Petitioner failed to meet his burden to prove that counsel's alleged deficiency resulted in prejudice where the PCR expert's examination was plagued by internal inconsistencies and inherent unreliability.

Unpersuaded by a perceived duty of clairvoyance, the PCR judge correctly ruled counsel was not deficient for failing to consult an expert in metallurgical evaluation. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "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. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances,

applying a heavy measure of deference to counsel's judgments." Id.

As a matter of initial impression, this Court should decline a substantive review of Petitioner's appeal because Petitioner's PCR expert's field of expertise has been discredited by the Federal Bureau of Investigation among other credible experts in forensic science. Petitioner suggests this Court place an undo burden on defense attorneys to compel the expenditure of resources and time on consulting an expert witness whose field of expertise is either unknown or is considered too unreliable to accepted a valid forensic science. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Certainly in the present case, it was objectively reasonable for counsel to rely on Agent Collin's expert opinion that projectile fragments retrieved from Renee's body were too badly damaged to allow for a ballistics examination. Agent Collins employed the predominant and accepted examination used to identify ballistics where a fired projectiles are compared to determine the source firearm. Poyner v. Murray, 964 F.2d 1404, 1418 (4th Cir.1992); and that the Constitution does not require attorneys to "shop around" for more favorable expert testimony.

Unpersuaded by a perceived duty of clairvoyance, the PCR judge correctly ruled counsel was not deficient for failing to consult an expert in metallurgical evaluation. Petitioner failed to meet his burden to prove the .300 Wincheser bullet standard was sufficiently unique in its chemical composition to warrant the metallurgical identification at issue in the present case. Even Petitioner's expert Nalbandian recognized the ballistics

identification testing he espoused required a comparison to the materials utilized "as the basis of manufacture or production of that bullet." (App.p.660, lines 17-18). However, Nalbandian's presumption that the one live .300 Winchester round he analyzed is compositional identical to the bullet standard, not to mention the particular parent box of munitions purchased by Petitioner, is troubling. Agent Stoner correctly cautioned that identification of a projectile by electron scanned microspore was *per se* insignificant absent a finding that a bullet standard for the munition in question is "very unique." Although Nalbandian harped on the density of copper in the single live .300 Winchester bullet's jacket and external tip that he examined, he did not provide any basis of why the elemental composition was unique only to the .300 Winchester bullet. Nalbandian's assumption rested on speculation and would have been exposed through the crucible of cross-examination at trial.

The Fourth Circuit Court of Appeals recently echoed Agent Stoner's concerns on utilizing metallurgical ballistics testing because of the inherent inability to ensure compositional consistency in the manufacture of a single box of munitions. United States v. Higgs, 663 F.3d 726 (4th Cir. 2011) cert. denied, 133 S. Ct. 787, 184 L. Ed. 2d 583 (U.S. 2012) The Higgs Appellant argued his attorney was ineffective for failing to adequately discredit prosecution's firearm expert that utilized metallurgical ballistics testing. Id. The court outlined the historical development of lead based munitions analysis and identification to its current state of disfavor.

> From the late 1960s until at least 2004, CBLA was performed by the FBI to compare bullets found at or associated with a crime scene to bullets associated with a defendant, usually in cases where a fired bullet could not be

> matched to a particular firearm because the firearm was not recovered or the fired bullets were too mutilated for comparison of physical markings. CBLA evidence, when introduced at trial, generally consisted of two components: (1) the scientific test used to measure the elemental composition of the lead in bullets; and (2) the conclusions drawn by the examiner based upon the similarities or differences in the elemental compositions of the compared bullets.
>
> The primary source of bullet lead is recycled car batteries. Secondary lead smelters melt and mix the lead with smaller lead sources and other chemicals in large vats, and these smelters then harden the lead into a solid form suitable for sale to bullet manufacturers. The manufacturers, in turn, process the lead into bullets. Due to impurities in the source material and the changes that are made to it, the elemental composition of lead melts varies. Bullets that share the same elemental composition were deemed by CBLA examiners to be analytically indistinguishable, creating the inference that the compared bullets originated from the same lead melt.
>
> The [Iowa State Study] specifically suggested that further research be done on bullet manufacturing, distribution, and usage, noting that "[b]ullets manufactured from different batches of raw material may end up in the same box of bullets; similarly bullets manufactured from the same batch can end up in different boxes" and that it had "been difficult from the limited data available to estimate the relative frequency of these events."

Id., at 736. In the present case, Stoner testified that regardless of a bullet standard's potential unique and identifiable compositional character, she further cautioned against Nalbandian's method of identification by alchemy because of the possibility of variances in a single box of munitions. (App.p.718). Presenting an expert in the defunct expertise of metallurgical evaluation would have provided no additional benefit to Petitioner's defense where counsel effectively cross-examined the State's expert firearm's examiner

to show that a recognized forensic ballistics examination failed to prove the origins of the fatal bullet that killed Renee. See Frasier v. State, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms.

Furthermore, evidence of probative supports the PCR judge's ruling that Petitioner failed to meet his burden to prove the second prong of the Strickland test – that he was prejudiced by counsel's performance. Agent Stoner's testimony exposed the numerous flaws in Nalbandian's findings that neutered any beneficial impact of presenting an expert in metallurgical evaluation. Presuming ballistics identification by metallurgical evaluation was accepted within the forensic community, Petitioner's expert neglected to examine the relevant part of the live .300 Winchester bullet. Agent Stoner testified "[w]hen you have a projectile found in a body at autopsy, you're getting what's in the core of that bullet because the rest of it usually breaks away in the process of being fired and going through what its hitting." (App.p.719, lines 18-21). Significantly, Agent Stoner noted the S.C.M.'s x-ray could not penetrate the outer copper jacket of the bullet to retrieve the elemental compositional data of its inner core. (App.p.719).

Nalbandian's examination was subpar. Agent Stoner noted Nalbandian failed to meet industry standards in his analysis. First, Nalbandian's brief fifty second scan was

negligibly short. (App.p.726). Second, he operated the S.C.M. at an insufficiently weak voltage. (App.pp.728-29). Third, he erred in his recording and interpreting the data he collected. (App.pp.720-24).

Last evidence of probative value supports value supports the PCR judge's finding that Petitioner's conviction was supported by overwhelming evidence of guilt. A "reasonable probability of a different result does not exist when there is overwhelming evidence of guilt." Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991). Three eyewitnesses included two of Petitioner's children witness him execute Renee and shoot Dee prior to engaging in a gun fight with Dawn. Dee testified that Petitioner shot her. Audio tape recording that captured the offense were presented to the jury.

The pathologist identified the phenomena of "lead storming" unique only to a bullet fired from Petitioner's rifle here. Notably, Petitioner incurred superficial gunshot wounds from Ruger handgun compared to the catastrophic single gunshot wounds suffered by Dee and Renee. The pathologist was skeptical that a contact shot from a handgun had the capability of producing enough kinetic energy to produce the carnage noted in Renee's autopsy. Furthermore, the absence of GSR on Renee's body showed that fatal shot was fired from a distance of at least four feet. Simply, Petitioner's version of the facts was implausible. The solicitor's impeachment of Petitioner through his correspondence showed Petitioner's malingering on his claim of amnesia. No eyewitness corroborated Petitioner's story.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See

Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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S.C. Bar # 100793

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By:____________________
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ROBERT EARL RICKETTS,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

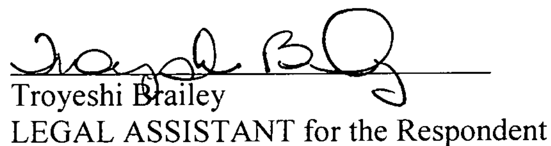
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Lara M. Caudy, Esq.
SC Commission of Indigent Defense
1330 Lady St. Suite 401
Columbia, SC 29201

This 13th day of January, 2014



Troyeshi Brailey
LEGAL ASSISTANT for the Respondent