

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

FEB 17 2016

**SC SUPREME COURT**

\_\_\_\_\_  
Certiorari to Dillon County

Eugene C. Griffith, Jr., Circuit Court Judge  
\_\_\_\_\_

JEREMY WRIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001513  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

DAVID ALEXANDER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1  
ISSUE PRESENTED .....2  
STATEMENT .....3  
ARGUMENT .....4  
CONCLUSION .....9  
PETITION TO BE RELIEVED AS COUNSEL.....10

ISSUE PRESENTED

Whether trial counsel's failure to advance any argument that the State acted in bad faith when it lost crucial evidence violated petitioner's Sixth Amendment right to the effective assistance of counsel?

## STATEMENT

On August 27, 2007, a Dillon County grand jury indicted petitioner for murder and a related weapons charge. App. 537-44. On May 18, 2009, petitioner was tried before the Honorable Thomas A. Russo and a jury. App. 1. Kernard Redmond represented the State. App. 1. Rosalind L. Sellers and Tonya Copeland-Little represented petitioner. App. 1. App. 474, ll. 19 – 21. The jury convicted petitioner on both counts. App. 441, ll. 16 – 25. Judge Russo sentenced petitioner to life imprisonment without the possibility of parole for murder and five years' imprisonment on the weapons charge. App. 456, l. 20 – 457, l. 2. Judge Russo ordered these sentences to be served consecutively to each other and to a federal sentence petitioner previously received. App. 457, ll. 3 – 4. On May 30, 2012, the Court of Appeals affirmed petitioner's convictions. State v. Wright, Op. No. 2012-UP-334 (S.C. Ct. App. May 30, 2012).

On September 10, 2012, petitioner filed a PCR application. App. 459. On January 21, 2015, a hearing was held before the Honorable Eugene C. Griffith, Jr. App. 471. Tristan M. Shaffer represented petitioner. App. 471. Joshua L. Thomas represented the State. App. 471. On June 11, 2015, Judge Griffith denied petitioner's PCR application. App. 522. This petition follows.

## ARGUMENT

Trial counsel's failure to advance any argument that the State acted in bad faith when it lost crucial evidence violated petitioner's Sixth Amendment right to the effective assistance of counsel.

### **Factual and Procedural Background**

It is undisputed that the State lost key evidence before petitioner's trial. The solicitor testified at the PCR hearing and admitted that shell casings collected at the scene were lost. App. 512, l. 2 – 513, l. 8. The solicitor testified that he did not know if they “ever really got a definitive answer to what happened to” the missing evidence. App. 513, ll. 17 – 23.

Trial counsel explained at PCR that they “did not realize that that evidence was lost until the second day of the trial.” App. 483, ll. 14 – 16. She explained that she never had an opportunity to inspect the lost shell casings because they were used in a federal trial before petitioner's state trial. App. 483, l. 14 – 484, l. 10. She testified, “In a nutshell, when the items were brought back to Dillon County, the shell casings were not there.” App. 484, ll. 5 – 7.

Trial counsel moved *in limine* to suppress evidence of the shell casings and the bullet that was removed from the victim's head. App. 52, l. 20 – 53, l. 6. Trial counsel only cited the Due Process Clause of the federal constitution as authority for suppressing the evidence. App. 52, l. 20 – 53, l. 6. Trial counsel did not make any argument based on the South Carolina Constitution.

Agent West Jackson from ATF testified at the suppression hearing that the shell casings were used in petitioner's federal trial. App. 45, ll. 2 – 17. Agent Jackson explained that the normal procedure after the conclusion of a federal trial is that any physical evidence is returned to the agency that collected the evidence. App. 46, l. 1 – 47, l. 23. While Agent Jackson testified on direct-examination that this procedure happened in petitioner's case, on cross-

examination he admitted he had no memory of who he gave the evidence to and had no notes, reports, or memoranda documenting the return of the shell casings. App. 48, l. 12 – 50, l. 25.

Trial counsel explained that petitioner was prejudiced by the loss of the evidence. App. 53, l. 24 – 55, l. 4. The State intended to introduce photographs of shell casings matching only the gun petitioner allegedly used in the shooting, but a “total of thirty-three shell casings” of “four to five different” types were recovered. App. 52, l. 20 – 55, l. 4. The solicitor agreed that “there was more than one gun being shot that night.” App. 55, ll. 6 – 8. The State argued that there was no prejudice because SLED analyzed the bullet taken from the victim’s brain and could testify about the kind of weapon that would have fired it. App. 55, l. 6 – 56, l. 24. The trial court made a preliminary ruling that the defense failed to show bad faith on the part of the State. App. 58, ll. 2 – 15.

The next morning, trial counsel objected again to the introduction of State’s Exhibits 21 and 22, photographs of a shell casing and an unfired bullet. App. 70, l. 21 – 71, l. 22. Trial counsel argued for the exclusion of these photographs as more prejudicial than probative, citing Rule 403, because of the inability to introduce the lost evidence of the other shell casings collected. App. 70, l. 21 – 73, l. 2. Judge Russo denied the motion to suppress. App. 74, l. 16 – 75, l. 14. At no point did trial counsel argue that the State acted in bad faith or make any argument based on state law. Trial counsel only asked the court to note her previous objection when photographs of shell casings were admitted. App. 102, ll. 7 – 15. When photographs of the bullet fragments were introduced, trial counsel admitted she had no authority to support her motion to suppress based on the Due Process Clause. App. 262, l. 3 – 263, l. 10. Trial counsel did not renew these objections when the SLED expert testified. The trial court denied petitioner’s request for a jury charge regarding lost evidence. App. 377, ll. 19 – 24.

At the PCR hearing, petitioner argued that trial counsel was ineffective for failing to argue that the State acted in bad faith in losing the shell casings. App. 501, ll. 5 – 12. The PCR court denied petitioner’s claim. App. 527-28. Citing Arizona v. Youngblood, 488 U.S. 51 (1988), the PCR court held that the “record contains no evidence the State acted in bad faith in destroying the evidence.” App. 527-28. Judge Griffith concluded that with no evidence the State acted in bad faith, trial counsel could not have been ineffective in failing to make this argument. App. 528.

### **Discussion**

The PCR court erred in its application of Youngblood to this ineffective assistance of counsel claim. Trial counsel made no argument concerning bad faith under federal law or any argument under state law. Because the evidence was always in the exclusive possession of the State, any evidence that the State acted in bad faith would also be in the exclusive possession of the State. In such a circumstance, trial counsel should have argued under state law for a modified test when the State loses potentially material evidence.

This Court recently criticized the Youngblood standard in State v. Reaves, 414 S.C. 118, 777 S.E.2d 213 (2015). In Reaves, a case in which the State lost evidence, the Court found there were “deeply troubling aspects of the investigation.” Reaves at 129, 777 S.E.2d at 218. The Court noted that a “number of state courts have declined to follow the bad faith standard established in Youngblood based on state law grounds.” Id. at 127, 777 S.E.2d at 217. Because Reaves only based his argument on the federal constitution, the Court decided the case against him under the strict Youngblood standard. Id.

In a concurrence, then Justice Pleicones wrote that South Carolina’s analysis “is more expansive than Youngblood.” Id. at 133-34, 777 S.E.2d at 221. Citing State v. Cheeseboro, 346

S.C. 526, 552 S.E.2d 300 (2001), the concurrence found that under state law, a defendant can establish deprivation of a fair trial if “the evidence possessed an exculpatory value apparent before the evidence was destroyed, and the defendant cannot obtain other evidence of comparable value by other means.” Id.

The test articulated by the concurrence aligns with public policy because the State has sole custody of the evidence and the burden of preserving the evidence must be placed on the State. The State will also retain all of the evidence relating to the evidence’s destruction, making it nearly impossible for a defendant to prove bad faith under the strict federal standard. Using Chief Justice Pleicones’ standard for evaluating lost evidence cases creates a strong incentive for the police to be scrupulous in their handling of evidence. Because a defendant cannot influence the storage and handling of evidence, then it makes no sense for the defendant to bear the extraordinarily high burden under the Youngblood test. Under Youngblood, the State can claim simple negligence in losing key evidence and suffer no sanction.

The cases cited by the majority in Reaves use a similar state law test. See Commonwealth v. Henderson, 582 N.E.2d 496 (Mass. 1991). Massachusetts holds that its due process clause provides more protection in lost evidence cases than Youngblood. Id. at 497. The Henderson test requires the trial judge to “consider and balance the degree of culpability of the government, the materiality of the evidence, and the potential prejudice to the defendant in order to protect the defendant’s constitutional right to a fair trial.” Id. See also State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995) (establishing a multi-factor test when the state loses evidence that expressly considers negligence and the state’s duty of preservation).

Had trial counsel made any argument elaborating on ways to prove bad faith under existing state law or referencing law from other jurisdictions, there is a reasonable probability the

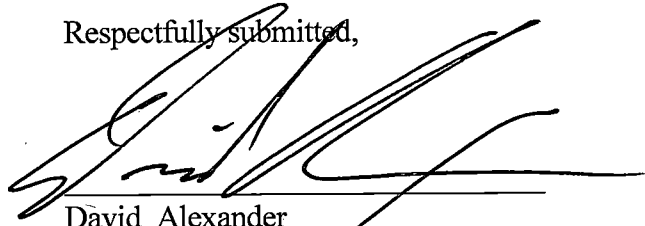
outcome of petitioner's trial would have been different because the State's ballistics information would have been suppressed. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). Trial counsel's failure to do so constitutes prejudicial ineffective assistance under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 686 (1984).

It was undisputed that the missing evidence was in the sole possession of the State. At best, the State acted negligently in losing the shell casings. Had petitioner been able to present the missing shell casings, it would have bolstered his defense that multiple guns were used and he was not the shooter. A witness who had military experience testified that multiple assault rifles were fired that night. App. 353, l. 14 – 354, l. 12. She said it “sounded like the Fourth of July.” App. 355, ll. 16 – 19. She did not hear any gunshots when petitioner left the club. App. 353, ll. 14 – 19. Sherika Robinson testified that she did not see petitioner with a gun that night and was observing him at the same time she heard gunshots. App. 360, ll. 14 – 24. Tina McKinnon also testified that there was more than one gun and the shooting was “coming from different directions.” App. 366, l. 13 – 367, l. 8. Under these circumstances, the lost evidence was crucial to bolster petitioner's defense witnesses. The PCR court erred and petitioner should receive a new trial.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and remanding the case for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO DILLON COUNTY  
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

---

JEREMY WRIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001513

---

PETITION TO BE RELIEVED AS COUNSEL

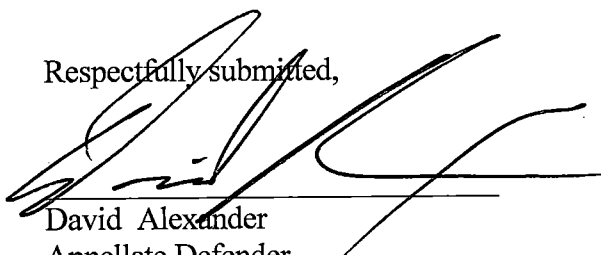
---

Counsel for Jeremy Wright states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on January 21, 2015. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Jeremy Wright.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 17th day of February, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Dillon County

Eugene C. Griffith, Jr., Circuit Court Judge  
\_\_\_\_\_

JEREMY WRIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001513  
\_\_\_\_\_

CERTIFICATE OF SERVICE  
\_\_\_\_\_

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Jeremy Wright, #302369, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29809, this 17th day of February, 2016.

  
\_\_\_\_\_  
David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day  
of February, 2016.

Maiz Kunder (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.