

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

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ANTHONY DOMINIQUE WILDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001697

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

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR court err in finding that trial counsel provided effective assistance of counsel where trial counsel failed to conduct a reasonable investigation by not consulting with an independent expert to support the defense's theory that DNA evidence showing the deceased's blood on Petitioner's clothes was hopelessly contaminated law enforcement's improper evidence handling?

## STATEMENT

### **Background**

On the afternoon of August 31, 2006, Patricia Green woke from her afternoon nap to the sound of her pit bulls barking in the front yard. App. 118, l. 20 – 119, l. 25. Looking outside her front room window she saw a man “pacing back and forth with a black hat on . . .” *Id.* She believed it was a neighbor or relative until the dogs started to bark more aggressively. *Id.*

Given the dogs nervous behavior, she decided to go to her front door to investigate. Before she reached the door, the man she saw standing outside kicked the door in and entered her house with anywhere from two to three accomplices. At trial, Green would identify Petitioner as the man standing outside her house that afternoon. App. 122, l. 9 – 123, l. 20.

Once the men entered, they began beating Green and searching the house. Green would testify that she believed the men were looking for money her sons’ won in a civil settlement. However, Green also admitted to having a drug habit and the State argued in closing arguments that the men could have been looking for drugs and money. App. 117, l. 2 – 118, l. 19.

Green further admitted at trial that she only identified Petitioner after seeing his photograph on the local news and reading newspaper articles announcing his arrest. Green also acknowledged that she ultimately decided that only three people, as oppose to the original five she claimed, were involved in the robbery because the police only arrested three men. App. 155 l. 3 – 163, l. 12.

During the home invasion, local drug dealer Jamie Williams and his associate Sterling Spann drove up to Green’s house to collect on a drug debt so that Spann could buy a new keyboard to advance his rap career. App. 149, l. 9 – 150, l. 7; App. 187, l. 16 – 188, l. 20. Williams saw that Green’s front door was “cracked,” which was unusual. However before

Williams could get to the door Williams claimed someone opened it quickly and “put a gun in my face.” *Id.*

Williams saw another man behind the man who put a gun in his face. Williams identified co-defendant Gadsden as the man who pointed the gun in his face. App. 191, l. 17 – 193, l. 7. Williams did not identify Petitioner. Williams remembered that Gadsden hit him in the head with the gun and shot him four times. Nevertheless, Williams managed to escape through Green’s backyard and ran to a nearby fire station for help. App. 194, l. 11 – 204, l. 19. Spann was still in the car when Williams ran.

Green’s across the street neighbor Leroy Daniel testified he heard the shots fired that afternoon while he was watching TV with his wife. Daniel said he saw two men pulling Spann out of the car. Spann was shot and killed on the spot. Daniel said he saw the men jump into a white Jeep and drive away. App. 235, ll. 2 – 25.

Charleston Police Officer Scott Jackson was at Green’s house within minutes of the shooting and issued an alert for the white jeep after talking with Daniel and other neighbors. App. 294, l. 1 – 298, l. 24. Charleston Police Office Elijah Simpson testified that he was routine patrol when the alert for the white jeep went out and that he spotted the jeep passing him only seconds later. App. 304, l. 13 – 305, l. 25.

Simpson turned around and attempted to pull the jeep over. The jeep refused to stop and accelerated onto I-26. Simpson claimed that the people inside the jeep threw several objects out of it during the chase. Ultimately, the driver lost control of the jeep and the chase ended with the jeep flipping several times. Petitioner and his two co-defendants were taken out of the jeep by police. App. 305, l. 2 – 317, l. 3.

## **Indictment and Trial**

Petitioner was indicted by the Charleston County Grand Jury -- along with Keive Milik Smith and Leo Corderrel Gadsden -- for the offenses of murder, two counts of kidnapping, burglary in the first degree and assault and battery with intent to kill (ABIK). All counts arose from a single incident. App. 1103 - 1112.

Their joint cases were called to trial on May 2008 before the Honorable J. Derham Cole and a jury. Nathan Stuart Williams and Julie Cardillo were the solicitors. Lionel S. Lofton and V. Lynn Lofton represented Petitioner. W. Tracy Brown and Mark Andrew Redmond represented co-defendant Smith. Rodney Duane Davis and Cody Groebar represented co-defendant Gadsden. App. 1.

DNA was central to the State's case against Petitioner and his co-defendants. Scientific evidence was particularly important in light of Green's suspect memory and her obviously contaminated identification of Petitioner. Specifically, the State argued that Spann's DNA, recovered from the clothes Petitioner was wearing when he was arrested, proved that Petitioner was guilty. App. 953, l. 11 – 955, l. 5.

Crime scene investigator Brent Roy testified that he took both Petitioner's and Spann's clothing from the hospital where they both were taken after the incident. Roy said the "usual approach" was "if an item has blood or it is wet in any way, the item is put into a bag, plastic bag, and sealed, initially placed into a paper bag and then sealed again. . . ." App. 426, l. 6 – 427, l. 16.

Defense counsel questioned the manner in which Petitioner's and Spann's clothing was gathered since it raised a great chance the evidence was contaminated. Spann's clothes were covered in blood. Detective Heide Drake testified she collected Spann's clothes, but admitted she could not remember whether the clothes were in a container. However, she maintained that the

clothes were in a “folded over” paper bag when she gave them to Detective Roy. App. 519, l. 14 – 520, l. 13.

Further increasing the risk of contamination, Detective Donald Stanley, the lead investigator, admitted that he was not aware of how Petitioner’s or the co-defendant’s clothes were collected. Stanley acknowledged on cross-examination that a law enforcement form indicated their clothes were taken when they were booked into the jail. App. 628, ll. 8 – 19. This notation is totally inconsistent with Detective Drakes contention that she collected them at the hospital and handed the clothes to Detective Roy.

Counsel, without presenting any scientific evidence supporting his claim, averred that there was a very strong chance the DNA evidence in this case was contaminated because of the way it was handled. *Id.* In moving to suppress the DNA evidence pursuant to Rule 702, SCRE, defense counsel further argued that Petitioner’s own DNA was not even found on pants that allegedly were his own. The court countered that there was no evidence Spann and Petitioner’s clothes were intermingled and ruled that the DNA evidence was not contaminated. App. 685, l. 9 – 692, l. 20.

SLED DNA analyst Lily Gallman later admitted that Petitioner’s DNA was not found on his jeans but that co-defendant’s Smith’s DNA was found on the pants that allegedly were taken from Petitioner on the night of the shooting. App. 734, l. 8 – 735, l. 3. Gallman said that decedent Spann’s DNA was also found on those pants. App. 718, l. 25 – 719, l. 11.

Defense counsel did not present any evidence, Petitioner was convicted of all counts. App. 967, l. 3 – 976, l. 14. The trial court sentenced Petitioner and each co-defendant to life imprisonment for murder, life imprisonment for burglary in the first degree, twenty years imprisonment for ABIK and thirty years imprisonment for kidnapping. App. 988, l. 1 – 991, l. 22.

However, the trial court correctly did not sentence Petitioner for kidnapping since he had sentenced him for murder. App. 991, ll. 18 – 22.

### **Direct Appeal**

Petitioner was represented on appeal by Chief Appellate Defender Robert Dudek. Petitioner alleged that the trial court erred in admitting “DNA evidence regarding Petitioner’s pants as the chain of custody and improper handling of the evidence showed an extremely strong chance the DNA was contaminated, and therefore that it was unreliable pursuant to Rule 702, SCRE.” App. 994 – 1009. The Court of Appeals denied Petitioner’s appeal in an unpublished opinion. App. 1010.

### **Post-Conviction Relief Application and Evidentiary Hearing**

On September 25, 2013, Petitioner filed an application for post-conviction relief. App. 1011 – 1022. On February 19, 2014, the State filed a Return. App. 1023 – 1028.

On December 15, 2015, an evidentiary hearing was held before the Honorable Deadra Jefferson. Naki Richardson-Bax represented Petitioner. Assistant Solicitor J. Rutledge Johnson represented the State. Petitioner and trial counsel both testified.

Petitioner testified that counsel only met with him two or three times in the months before trial and repeatedly told Petitioner that he had no defense. App. 1034, l. 2 – 1035, l. 20. Counsel did not review the State’s discovery with Petitioner. *Id.* Petitioner stated that this appeal challenged the admissibility of the pants collected from him that had Spann’s blood on them. App. 1046, l. 17 – 1047, l. 16.

Defense counsel averred that he or his daughter, who was also representing Petitioner, would have gone over discovery with Petitioner multiple times. App. 1056, ll. 9-20. Counsel claimed that his defense theory was based on challenging the reliability of the DNA evidence and the eye-witness accounts. App. 1057, l. 2 – 1059, l. 22.

Counsel admitted that he did not attempt to or even consider retaining a DNA defense expert. "I did not consider consulting an expert." App. 1064, ll. 2-3. With respect to the strength of the State's case against Petitioner, counsel recalled:

You got to remember the big problem with this case was that he and the other two Defendants were arrested in a car fleeing the scene and that was during the course of their fleeing the scene of course they were throwing evidence out the window, mask and things of that nature. Those were pretty substantial obstacles to try to overcome.

App. 1057, ll. 17-24.

### **Order of Dismissal**

On May 5, 2016, the PCR court denied Petitioner's application by a written order of dismissal. App. 1083 – 1092. In denying Petitioner relief, the Court ruled that counsel was not ineffective for failing to investigate the contamination of Petitioner's pants with Spann's blood by hiring an expert. App. 1088.

The Court determined that "[c]ounsel fully investigated this case and assisted Applicant in his defense. Counsel vigorously objected to the introduction of the DNA evidence based on defects in the chain of custody of this evidence and cross-examined the State's witnesses, specifically concerning the possible contamination of DNA on the defendant's clothes." *Id.* On July 26, 2016, the filed an amended order of dismissal denying Petitioner's allegations of ineffectiveness with respect to appellate counsel. App. 1093 – 1102.

This petition follows.

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to conduct a reasonable investigation by not consulting with an independent expert to support the defense's theory that DNA evidence showing the deceased's blood on Petitioner's clothes was hopelessly contaminated law enforcement's improper evidence handling.**

### **Introduction**

Because trial counsel failed to even interview an independent expert witness to support Petitioner's argument that the DNA evidence, indicating that the deceased's blood was on Petitioner's clothes, was hopelessly contaminated and to challenge the State's expert witness, trial counsel's performance was constitutionally deficient for not adequately preparing for trial. App. 1064, ll. 2-3; *see Lounds v. State*, 380 S.C. 454, 462, 670 S.C. 646, 650 (2008) (finding that it "was not objectively reasonable given the defense theory of the case" for counsel not to interview or call a witness that was critical to his client's defense.).

Thus, the PCR court erred in holding that trial counsel provided effective assistance of counsel. App. 1088; *See Strickland v. Washington*, 466 U.S. 668 (1984) (provides that a petitioner must show that counsel was deficient and that the deficiency prejudiced the outcome of petitioner's proceedings); *see also Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 692; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation

within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Bulter*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Id.* at 117, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-118, 386 S.E.2d at 625.

Specifically, "[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*, 466 U.S. at 694); *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

### **Deficient Performance**

In this case, trial counsel failed "to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State" when he failed to interview an independent expert to evaluate the possibility of contamination in the State's DNA evidence. App. 1064, ll. 2-3; App. 1088; *see McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (finding that counsel was ineffective in a homicide by child abuse case for: (1) calling an expert witness that undermined the defense; (2) failing to call an expert witness that supported the defense theory; and (3) in failing to challenge the State's evidence.).

At the PCR evidentiary hearing, trial counsel admitted that although he was aware of the State's expert witness and the nature of the expert's findings, he did not attempt to find an expert to evaluate the State's expert witness's findings. App. 1064, ll. 2-3. *See Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").

Speculation is not an adequate substitute for scientific testimony. App. 669, l. 1 – 679, l. 17. Regardless of his chosen trial strategy, at a minimum, trial counsel had a duty to conduct a reasonable and independent investigation and to seek out potentially supportive expert witnesses in his preparation for trial. *See Ard v. Catoe*, 372 S.C. 318, 331-32; 642 S.E.2d 590, 597 (2007) (finding that counsel has a duty to conduct a reasonable and independent investigation and to interview potential witnesses); *see also Lounds*, 380 S.C. at 460, 670 S.C. at 64.

Trial counsel should have sought an expert witness who could testify with authority on the likely contamination of the State's DNA evidence. Therefore, the PCR court erred in holding that trial counsel provided effective assistance of counsel because trial counsel's performance was constitutionally deficient, as it fell well below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 694; *see also Bulter*, 286 S.C. 441, 334 S.E.2d 813.

### **Prejudice**

As to prejudice, trial counsel failed to subject the State's case "to meaningful adversarial testing," which is tantamount to deficient legal representation where prejudice is presumed. App. 592, ll. 17-22; *See Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (finding that trial counsel's failure to investigate, plan, and present a defense constituted "a classic example of a complete breakdown in the adversarial process."); *see also Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) (finding that counsel's ineffectiveness was so pervasive as to exempt a particularized

prejudice analysis).

Accordingly, trial counsel's performance prejudiced Petitioner's right to a fair trial since it "undermine[d] confidence in the outcome of [his] trial" because the defense presented no evidence to support its contamination claim or to contradict the State's expert witness's testimony, Petitioner's right to a fair trial was adversely affected by trial counsel's deficient performance. *See Strickland*, 466 U.S. at 694; *see also Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Prejudice is further illustrated by the prosecution's emphasis on the importance of the DNA evidence in his closing argument: "D. N. A. is solid, reliable physical evidence. You heard the testimony. You don't get Sterling Spann's blood on your pants unless you were out there with him." App. 870, l. 24 – 871, l. 1.

Therefore, the PCR judge erred in holding that trial counsel provided effective assistance of counsel because there is a reasonable probability that but for trial counsel's deficient performance, Petitioner would have received a fair trial. App. 1088.

**CONCLUSION**

Based on the foregoing reasons, Anthony Wilder's petition for writ of certiorari should be granted to allow full briefing on the issue.



John H. Strom  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of March, 2017.

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ANTHONY DOMINIQUE WILDER,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Anthony D. Wilder states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
  2. He has reviewed the record of petitioner's trial before Judge Deadra L. Jefferson, which was held on December 15, 2015 (evidentiary hearing), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
  3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve him as counsel for Anthony D. Wilder.

Respectfully Submitted,



John H. Strom  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 8th day of March, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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CERTIFICATE OF SERVICE

\_\_\_\_\_

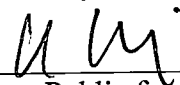
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Anthony D. Wilder, #328282, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 8th day of March, 2017.

  
John H. Strom

Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of March, 2017.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025