STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable Deadra L. Jefferson, Circuit Court Judge

RANDALL PRICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-001037

BRIEF OF PETITIONER

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[1] In Bagwell, the Court found that trial counsel erred in failing to present DNA evidence establishing that Bagwell's blood was not present on the sliding glass door that the state alleged the perpetrator used to enter the victim's apartment.

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ISSUE PRESENTED

Trial counsel's error in failing to present significant forensic evidence in this case was similar to counsel's mishandling of the forensic evidence in Bagwell v. State, 410 S.C. 259, 763 S.E2d. 630 (Ct. App. 2014),[2] because the state's theory that petitioner attacked two females, who had proven credibility issues, was refutable via petitioner's position that **he** was the one who was attacked and robbed by these same two females **and** their boyfriends, and that the presence of a third-party's blood found on the crime scene knife as coming from someone other than petitioner and the two females would have supported his not guilty and self-defense claims.

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[2] In Bagwell, the Court found that trial counsel erred in failing to present DNA evidence establishing that Bagwell's blood was not present on the sliding glass door that the state alleged the perpetrator used to enter the victim's apartment.

STATEMENT

On June 7, 2007, the Spartanburg County Grand Jury indicted Petitioner Randall Price for two counts of assault and battery with intent to kill. App. 408—App. 409. On June 8, 2011, Petitioner proceeded to trial before the Honorable J. Derham Cole and a jury. Richard H. Whelchel represented Petitioner and Ryan F. McCarty represented the State.

"My only intention was to leave that house alive, that was my only intention. I would not have hurt them on purpose," Petitioner proclaimed at trial. App. 179, lines 3-4. On January 13, 2007, Jennifer Dawn Henson and her husband, Dewayne Henson, had invited him into their house. Petitioner had just met the couple after moving into his dad's home nearby after a debilitating car accident. App. 161, lines 14-25. As a result of the accident, Petitioner could not work, and the day before he had just received a settlement check for about $8,800. App. 163, lines 1-23. He had quickly deposited most of the funds but kept $3,000 in 100 dollar bills, App. 164, lines 1-8, and Dewayne and Dawn Henson knew it, App. 164, lines 9-24.

At the Henson's house, the three partied by using crack. When their supply ran low, Dewayne wanted to leave to find more, and Petitioner offered to pay. Dewayne drove himself and Petitioner to a trailer to meet up with a man named Rodney that Dewayne knew. At the trailer, Petitioner pulled out his $3,000 and gave Dewayne $200. Dewayne bought more crack, and the three men and a woman named Pamela Massey rode back to the Henson's house together to party some more. App. 166, line 18—App. 168, line 11; App. 169, lines 8-15; App. 172, lines 1-3.

The group used crack until nine o'clock that night, when Petitioner told Dewayne, Jennifer Dawn, Rodney, and Pamela that it was time for him to go and began to leave.

> [Rodney] grabbed my arm and Dewayne said, You're not leaving with that GD money and I said, Wait a minute, wait a minute, you know, I was real scared and startled so I fought off those two and

> they got the money but I grabbed ahold to it and was still strugglin' this (demonstrating) this away and I was holdin' the money and it tore, it ripped most of the money in half so I'm thinkin' okay, here's four people, how can I get rid of 'em so I just throw the money across the room as hard as I can and pieces go everywhere, well three of 'em went toward the money.

App. 170, lines 16-25. During the affray, Pamela Massey attacked Petitioner with a black-handled knife and Petitioner had pulled out his own pocket knife. He wrested Pamela's away. While trying to escape the house, he was "cutting every which way," stumbling out the back door and falling with Jennifer Dawn and Rodney on top of him. App. 171, line 11—App. 173, line 15. He quickly rose to his feet and ran to the only nearby house that was lit and banged on the door. Pam and Dewayne, after the eruption of violence inside the house, had already scrambled to the house, which was occupied by their neighbor, Mr. Brewington. App. 173, line 18—App. 174, line 10. Seeing them inside, Petitioner fled again but tripped, dropped both knives, and did not remember anything else until police woke him up laying on the ground. App. 174, lines 16-24.

Petitioner testified that he told the officers who woke him the entire story at the scene. App. 174, lines 16-24. The responding officers never recorded his statement. App. 175, lines 4-8. Instead, they booked him into jail having been stripped of everything but a single twenty-dollar bill. App. 176, lines 16-24.

The disregard for Petitioner's side of the story continued at trial, when the State called Jennifer Dawn Henson to give a much more questionable account. She said that for at least four hours, she was drinking and smoking crack with Dewayne before Petitioner came over, bringing with him Pam Massey and another man, both of which she did not know. App. 64, line 9—App. 65, line 24; App. 83, lines 2-15. Though asked directly, she would not say under oath whether or not Dewayne knew either of the two. App. 87, lines 17-18. However, she later testified that at

some point Dewayne drove off with the man who he did not know to buy more crack. App. 67, lines 6-8; App. 89, lines 9-12.

She said after the two men left, she, Pamela Massey, and Petitioner were seated at a table playing cards when Petitioner suddenly stood up behind Pam and cut her in the throat. App. 72, lines 6-13. "When I seen what he did with her, and she had already ran out the door, I looked up 'cuz I looked to see where she ran and then I looked back and I looked up at him and he was smilin' holdin' a knife," she stammered. App. 74, lines 1-4. She then tried to explain that Pam ran out of a front door while she tried the kitchen door, but Petitioner cut her in the process "'cuz my dead bolt was locked on my door and when I went to unlock it he locked it back and as soon as he did that he—that's when he cut my, the backa my neck—." App. 75, lines 13-23. She claimed he also stabbed her in the ribs and punctured her left lung, but no photos or other testimony showed such a wound or treatment. App. 75, line 25—App. 76, line 4. She twice testified she never took any of Petitioner's money, but a discharge nurse and custodian of records at the hospital she visited later testified that she left the hospital with seven one-hundred dollar bills. App. 93, lines 5-17; App. 204, lines 9-17; App. 212, lines 1-17.

Pam Massey also testified and said she arrived at the house in a car with Rodney and Petitioner, whom Rodney had just introduced her to. App. 97, lines 3-21. She claimed she had seen Rodney "off and on" for about a year in partying environments, yet she said she never learned his last name. App. 110, lines 20-25. Contrary to Jennifer Dawn's account, she specifically said when Petitioner cut her neck, he was across the table from her. App. 102, lines 18-21.

The State called last an officer from the Spartanburg County Sheriff's Office, who laid a foundation for the admission of a lock-blade knife with a black, plastic handle and a Puma-brand pocket knife with blood on it, both of which he picked up from the front yard of the Henson's home

after the incident. App. 132, lines 16-18; App. 140, lines 6-19. He also testified Petitioner had a cut on his right wrist at the time. App. 152, lines 17-20.

After closing arguments, the jury deliberated for two hours and began again the next day, when they deliberated from nine in the morning until four in the afternoon. The jury asked the court to play back the testimonies of Jennifer Dawn Henson, Pamela Massey, Petitioner, and Mr. Brewington. App. 264, line 15—App. 269, line 5. Ultimately, it found Petitioner guilty on both counts. App. 270, lines 1-7. Judge Cole sentenced Petitioner to concurrent sentences of twenty years' incarceration suspended to twelve years with three years of probation. App. 275, lines 14—App. 276, line 8.

On May 9, 2013, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 278—App. 287. The State filed a return on May 8, 2014. App. 288—App. 293. On January 13, 2015, Petitioner appeared at an evidentiary hearing before The Honorable Deadra L. Jefferson. Christopher D. Brough represented Petitioner and Suzanne H. White represented the State. App. 294.

Petitioner offered into evidence an official SLED report of testing done on the knives used in the altercation that strongly corroborated his story and impeached that of the two women. The report showed blood from his Puma-brand pocket knife came from at least three individuals, possibly including Jennifer Henson and Petitioner; **however, Pam Massey was excluded.** Petitioner stated trial counsel had never discussed the report with him, and he was unaware any forensic testing was done on the knives until PCR counsel told him. App. 308, line 4—App. 309, line 3; App. 309, lines 4-23; App. 361—App. 365.

Trial counsel testified he was not aware if any forensic testing was done to show whether Dewayne Henson or Rodney was present in the house because "[w]e could not find them." App.

343, lines 10-14. Trial counsel was then asked whether he thought the fact that testing revealed a third party's blood on the knife would have supported Petitioner's defense. "Well, in order to get that testimony in I'm gonna have to bring in the SLED, the SLED chemist that . . . does the blood analysis." App. 343, lies 16-23. He said he was also concerned because a SLED analyst could testify that the test could not determine whether the blood was on the knife prior to the incident. However, he agreed that the evidence would still support the argument that the State could not disprove Petitioner's version of the incident beyond a reasonable doubt. App. 344, lines 1-14.

At the conclusion of the hearing, the PCR judge ruled from the bench that Petitioner had not shown ineffective assistance of counsel. Specifically, she said trial counsel made a valid strategic decision not to call a SLED chemist because the testimony "would have been probably, under these circumstances, more beneficial to the state . . . . the inability to determine the origin of when it was there, coupled with the fact that you could not find these other individuals . . . ." App. 350, lines 3-15. She added, "I would have to assume that these individuals that he was getting high with . . . I suspect they had a little brush with the system at some point in their life, and so it would seem to me that they would have popped up because when they run DNA they run it through CODIS." App. 351, lines 2-9. She also said the evidence would have been of little help to Petitioner's case because an analyst could not testify when the blood first appeared on the knife. App. 351, lines 15-19.

On April 30, 2015, the PCR judge issued a written order of dismissal. App. 378—App. 406. Although she acknowledged that the case "was ultimately a credibility case," she wrote, "This Court finds it highly probable that the SLED witness's testimony would have been more beneficial to the State." App. 393—App. 394.

ARGUMENT

Trial counsel's error in failing to present significant forensic evidence in this case was similar to counsel's mishandling of the forensic evidence that existed in Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014),[3] because the state's theory that petitioner attacked two females, who had proven credibility issues, was refutable via petitioner's position that he was the one who was attacked and robbed by the same two females and their boyfriends, and that the presence of a third-party's blood found on the crime scene knife as coming from someone other than petitioner and the two females would have supported his not guilty and self-defense claims.

In this case, the record repeatedly shows that trial counsel's failure to present evidence of the third-party blood on the knife was unreasonable under the circumstances. At the PCR hearing, trial counsel explicitly agreed that the blood evidence tended to support Petitioner's account of the altercation and therefore the argument that the State could not disprove his account beyond a reasonable doubt. Trial counsel only attempted two justifications for failing to present it. First, he intimated he was unable to subpoena the SLED chemist to lay a foundation for the evidence. This justification was unreasonable because trial counsel subpoenaed the hospital's nurse and records custodian to testify in Petitioner's defense, and nothing in the record shows why he could not have done the same with a witness from SLED. Moreover, even without a SLED chemist, trial counsel could have introduced at trial the SLED report introduced at the PCR hearing by laying a foundation under Rules 801(d)(2) and 902(1), SCRE, which

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address non-hearsay admissions by party-opponents and self-authentication of domestic public documents under seal, respectively.

Trial counsel's second justification was that the SLED report could not rule out the possibility that the third-party's blood was on the knife prior to the incident. This justification was unreasonable because the jury was obligated to consider the evidence and any inferences to be fairly drawn therefrom, and the State therefore would have shouldered the burden of convincing the jury that the third-party's blood should not cause it to reasonably doubt Jennifer Dawn and Pamela's story.

The PCR judge ruled as an additional basis that trial counsel's decision not to adduce the blood evidence was reasonable because if the blood belonged to Dewayne or Rodney, the SLED anaylsis would have revealed it. Nothing in the record itself supports this analysis, and she could not have taken judicial notice under Rule 201, SCRE,[4] that both men had blood samples taken and recorded in a SLED database because such a fact would be subject to reasonable dispute and not generally known by the jury or readily determined through a source whose accuracy could not reasonably be questioned.

Considering adducing the evidence of the potential blood on the knife from someone other than Petitioner, Jennifer Dawn, and Pamela risked no conceivable harm to Petitioner's defense, the conclusions of both trial counsel and the PCR judge that the costs of adducing the evidence outweighed the benefits was entirely unreasonable, and the PCR judge's ruling that trial counsel was not deficient in failing to present the evidence was unsupported by the record.

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[4] Rule 201(b), SCRE, provides that a "judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Trial counsel's deficiency also caused prejudice to Petitioner's defense because, as the PCR judge noted, the State's case was a very close one built on weighing Jennifer Dawn and Pamela's credibilities against Petitioner's. Significant evidence impeached Jennifer Dawn and Pamela's credibilities. Jennifer Dawn and Dewayne were strung out from hours of crack use, and Pamela and Rodney were likely not far behind. If they knew Petitioner had the cash from the settlement on him, whether through word on the street, his telling them, or his showing them when buying crack, then they not only had the propensity for violence but also a clear motive to attack him. The women's testimonies were also inconsistent. For example, even when asked directly, Jennifer Dawn would not aver that Dewayne had never met Rodney, but a short time later she testified that Dewayne did not know him when they left to buy more crack. She also specifically described Petitioner as standing behind Pamela when he cut her, but Pamela specifically said Petitioner attacked her from across the table. Jennifer Dawn claimed Petitioner stabbed her in the ribs and punctured her left lung, but no photos or other testimony showed such a wound or treatment. Finally, Jennifer Dawn twice testified she never took any of Petitioner's money, but the discharge nurse confirmed that she left the hospital with seven one-hundred dollar bills—exactly one-quarter of the twenty-eight hundred dollars Petitioner said was taken.

Jennifer Dawn's testimony also seemed overly calculated insofar as she gave unasked but specific detail in attempting to make her account realistic: "When I seen what he did with her, and she had already ran out the door, I looked up 'cuz I looked to see where she ran and then I looked back and I looked up at him and he was smilin' holdin' a knife." She then testified Petitioner was able to attack both of them separately "cuz my dead bolt was locked on my door and when I went to unlock it he locked it back and as soon as he did that he—that's when he cut my, the backa my neck—."

Petitioner's account carried multiple signs of credibility. Only he accounted for how the black-handled knife became involved in the altercation and therefore testified consistent with the police's recovery of the knife in the yard. Petitioner also testified that he kept to his story from the outset, and the State did not produce police officers to testify that he ever gave them a changing story.

Compare the case of Bagwell v. State, supra, where the issue was whether counsel erred in failing to request that DNA testing be conducted on blood found on glass pieces recovered from the shattered sliding glass door where the burglar entered since the state implied that the blood on the glass belonged to petitioner and touted this as the linchpin evidence in the case placing Bagwell at the crime scene because ultimately subsequent test results revealed that the blood found on the glass did not match petitioner's DNA. In Bagwell, the state's case consisted of two pieces of evidence: the homeowner claim that he saw Bagwell inside his residence and the inference that the cut on Bagwell's face emanated from the broken sliding glass door from which he allegedly entered/exited although said glass door contained bool that did not match his DNA. Note that Bagwell stated that he was asleep in his apartment when the burglary occurred. The Court of Appeals held in Bagwell that counsel erred in failing to seek DNA testing on the glass prior to trial because the state used the glass as circumstantial evidence to prove its case. A criminal attorney has a duty to conduct reasonable investigations to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut evidence introduced by the state. See McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008).

Considering the dueling credibilities in the case, the function of the blood test results as physical evidence refuting Jennifer Dawn and Pamela's story was clear. The fact that the jury deliberated for nine hours over two days and asked to rehear the testimonies of Jennifer Dawn

Henson, Pamela, Petitioner, and Mr. Brewington shows the overall strength of the prosecution's case was far from overwhelming. Thus, trial counsel's failure to adduce the blood evidence undermines confidence in the jury's ultimate decision that the totality of the evidence showed Jennifer Dawn and Pamela were more believable than Petitioner beyond a reasonable doubt.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687.

As to the first prong, "[t]he validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C 467, 470, 560 S.E.2d 401, 402 (2002)). "[A]n attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'" *Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)). In determining whether a criminal defense counsel sufficiently investigated and presented evidence favorable to the defendant, a court must identify an affirmative decision not to proceed with the evidence and assess the reasonableness of the decision under the facts and circumstances within counsel's knowledge:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate

> must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)).

"The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that 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. 115, 118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

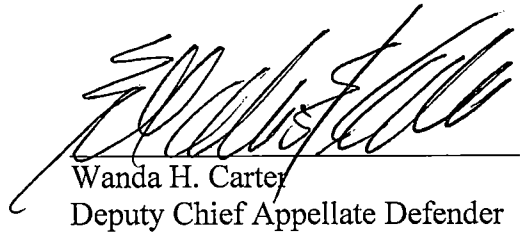
In determining whether trial counsel's deficient management of evidence harmed the defendant's case, the court should consider the following factors: the importance of the evidence in the prosecution's case; whether the evidence was cumulative; the presence or absence of other evidence corroborating or contradicting the evidence on material points; the overall strength of the prosecution's case. *C.f. State v. Curry*, 370 S.C. 674, 680, 636 S.E.2d 649, 652 (Ct. App. 2006) (in determining harmless error, court should consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case" (quoting State v. Clark, 315 S.C. 478, 482, 445 S.E.2d 633, 635 (1994))). The court should also consider that the importance of a piece of evidence to the jury's deliberations and the overall strength of the prosecution's case are reflected in a jury's written request to review the evidence during deliberations. *C.f., e.g., State v. Stanley*, 700 N.E.2d881, 899 (Ct. App. Ohio 1997) ("The question from the jurors indicates that they believed that they were missing an exhibit, but does not

demonstrate that the jurors placed any kind of special evidentiary value or weight on the document."). Importantly, the standard for prejudice "is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

The record does not support the PCR judge's bases for concluding that trial counsel made a reasonable decision not to present evidence of a third party's blood on the knife, and his failure to present the evidence undermines any confidence in the guilty verdict centered on witness testimony that the blood evidence tended to refute.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reverse his convictions and sentences and remand his case to the lower court for a new trial.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Deadra L. Jefferson, Circuit Court Judge

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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Valerie Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Randall Price, #346410, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 16th day of June, 2017.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 16th day of June, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.