LAW OFFICE OF
TRICIA A. BLANCHETTE

December 18, 2017
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Willie Bell, Jr. v. State; App. Case No. 2017-001595

Dear Sir:

Attached for filing, please find an original and six copies of the Petition for Writ of Certiorari, an unbound and bound copy of the Appendices and Certificate of Service.

Thank you for your assistance with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Ruston W. Neely, Office of the Attorney General
Willie Bell, Jr.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

Appellate Case No: 2017-001595

Willie Bell, Jr., #254817, Petitioner,

vs.

State of South Carolina Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court erred in failing to grant a new trial on matters related to an undisclosed pathology report contained in the Coroner's file.

Whether The Lower Court Erred by Failing to Find that Petitioner was Entitled to a New Trial on the Basis of Prosecutorial Misconduct.

The Lower Court Erred for Failing to Find that Trial Counsel Rendered Ineffective Assistance of Counsel Requiring a New Trial Since Counsel Failed to Utilize a Forensic Pathologist and Obtain the Pathology Report in Question.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). However, questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. The Petitioner was indicted during the April 2006 term of the Orangeburg County Grand Jury for Murder (2006-GS-38-0751). He was represented by Peggy Hinds, Esquire, and Doug Mellard, Esquire (jointly referred to as trial counsel or counsel). Petitioner proceeded to a jury trial before the Honorable James C. Williams, Jr., and the jury returned a guilty verdict. On March 15, 2007, Petitioner was sentenced to fifty (50) years.

A notice of appeal was filed and an appeal perfected by the Office of Appellate Defense. On June 15, 2009, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Bell, Op. No. 2009-UP-325 (S.C. Ct. App. filed June 15, 2009). App. p. 729. The remittitur was sent on July 1, 2009. App. p. 731.

On July 29, 2009, Petitioner filed an Application for Post Conviction Relief in Orangeburg County. App. p. 732. The State filed a Return on or about February 1, 2010. App. p. 738. On October 14, 2014, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief, which amended the Application by adding the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly prepare with Applicant for trial. See Applicant's Pre-trial Motion to Relieve. Tr. p. 11.

2. Ineffective assistance of trial counsel for failure to utilize Jannie Simmons and Ann Wallen (trial witnesses) as witnesses at the Jackson v. Denno hearing.

3. Ineffective assistance of trial counsel for failure to utilize Applicant as a witness at trial.

4. Ineffective assistance of trial counsel for failure to call witnesses on Applicant's behalf.

5. Ineffective assistance of trial counsel for failure to consult with and utilize a forensic pathologist.

6. Ineffective assistance of trial counsel for failure to raise inconsistencies in the purported original pathology report to the court pre-trial and during trial. Alternatively, prosecutorial misconduct and/or Brady violation if the original pathology report, not listing a 2cm defect under the description of the lungs (contained in the Coroner's File), was not turned over to the defense.

7. Ineffective assistance of trial counsel for failure to object to the State's repeated questions and comments regarding "stabbing"; failure to refute the alleged evidence regarding a "stabbing."

8. Ineffective assistance of trial counsel for failure to effectively cross-examine the State's witnesses on and argue to the jury about the inconsistencies in the reports regarding the fire scene and matters regarding the testing for accelerants.

9. Ineffective assistance of trial counsel for failure to make a pre-trial motion to exclude the testimony of Victoria Baskins. Ineffective assistance of trial counsel for failure to object to the State's comments regarding Victoria Baskins in closing argument. Tr. p. 580, lns. 19-22.

10. Ineffective assistance of trial counsel for failure to cross-examine Frank Colter.

11. Ineffective assistance of trial counsel for failure to raise a third party guilt defense.

12. Ineffective assistance of trial counsel for failure to effectively cross-examine the State's witnesses regarding the DNA findings.

13. Ineffective assistance of trial counsel for failure to effectively cross-examine Kareem Taylor.

14. Ineffective assistance of trial counsel for failure to effectively utilize the witnesses called by the defense.

15. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, specifically but not limited to:

    a. Applicant's Motion to Relieve Counsel. Tr. p. 11.

b. Jackson v. Denno hearing. Tr. p. 37

c. Defense counsel's objections to pictures. Tr. p. 100, 195, 240, 247.

d. Defense counsel's motion for a mistrial. Tr. p. 294.

e. Defense counsel's objection to the Coroner's "expert" testimony. Tr. p. 247.

16. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

App. p. 752.

On May 19, 2015, an evidentiary hearing was conducted at the Dorchester County Courthouse in front of the Honorable Maité D. Murphy. App. p. 756. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Clayton Mitchell, Assistant Attorney General. Petitioner testified along with Jannie Simmons, Ann Wallen, Sean Fogle, Deputy Coroner for Orangeburg County, Dr. John David Wren, Margaret ("Peggy") Hinds, Esquire, and Doug Mellard, Esquire. The lower court had before her a copy of Petitioner's admitted exhibits, the records of the Orangeburg County Clerk of Court, the trial transcript, the appellate court filings, and Petitioner's records from the South Carolina Department of Corrections. At the close of the hearing, the court asked the parties to prepare proposed orders. In response, both parties requested and were granted time to obtain the evidentiary hearing transcript.

Prior to the receipt of the evidentiary hearing transcript, the lower court requested that Respondent submit a proposed order. The lower court was reminded of the request to obtain the evidentiary hearing transcript, and Respondent complied with the lower court's request.

Thereafter, an Order of Dismissal was issued on August 31, 2015. App. p. 953. On September 21, 2015, Petitioner, through counsel, filed a Motion pursuant to Rule 59, SCRCP. App. p. 993. On March 29, 2016, Respondent filed a Return, which was served only on Petitioner, errantly stating Petitioner's Motion had not been filed. App. p. 1012. Thereafter, counsel for Petitioner addressed the omission from the filing in the Clerk's online database and wrote the lower court regarding the pending Motion on April 4, 2016 and August 30, 2016. App. pp. 1016-17. Respondent filed a corrected Return on February 8, 2017. App. p. 1018. An Order Denying Motion to Alter or Amend was issued on April 20, 2017, from which this appeal timely follows. App. p. 1021.

ARGUMENT

I. The Lower Court Erred in Failing to Grant a New Trial on Matters Related to an Undisclosed Pathology Report Contained in the Coroner's File.

A. Summary of the Record

1. Trial

At the outset of trial, Attorney Mellard informed the court that to his knowledge the State had provided full discovery. App. p. 32, lines 13-18. During opening argument, Attorney Mellard argued to the jury about the initial autopsy report (Applicant's Exhibit Seven) that listed the cause of death as "pending investigation" and the amended autopsy report (Applicant's Exhibit Eight) that listed the cause of death as "homicide." App. pp. 170-71. During opening, the State argued their theory of the cause of death, as follows:

> Now, this is just some, some of the evidence that you're going to hear about in this case. Because you're also going to hear, for example, about how after they arrested the Defendant on that Thursday, March Sixteenth, they read him his rights, after the Defendant was read his rights one of the first statements he makes is, I didn't stab my Mama, is how he referred to his grandmother, that he didn't stab his grandmother. Now, this is significant, ladies and gentleman, because the police, on Thursday, March Sixteenth, as you'll hear, they didn't know anything about a stabbing. All they know is that they had a burned body. They didn't know anything about a stabbing. It was so significant that one of the officers in the room called the pathologist right after that statement, moments after that statement, and you'll hear, the pathologist will testify to this, that even though Ms. Bell's body was so badly burned that she can't tell where she may have been stabbed on most of her body, that there is one place in her back, one place in her back where Ms. Bell has a stab wound.

App. p. 164, lns. 4-24.

When Dr. Janice Ross took the stand, she was qualified by the State as an expert in forensic pathology, without objection. App. p. 474. She acknowledged that she conducted the autopsy of the victim, provided general testimony about conducting an autopsy and stated – "we take pictures." App. p. 474, lns. 8-25. She illustrated how badly

the body was burned by showing a picture that was marked as State's Exhibit 7-D.[1] App. p. 475, lns. 3-14. When asked if any stab wounds were located, Dr. Ross explained that a stab wound was found "in the back wall of the left chest" with bruising, which indicated that the victim was alive at the time she was stabbed. App p. 476, lns. 5-25. She first informed law enforcement about the stab wound on March 16th after law enforcement had talked to Petitioner and they had "a suspicion that the victim had been stabbed." App. p. 477, ln. 12 – 478, ln. 1. She concluded that the cause of death was homicide due to factors, which included the stab wound. App. pp. 479-80. On cross-examination, Attorney Mellard questioned Dr. Ross about the evolution of the findings in her **two** reports. App. pp. 483-5.

Regarding the verbal statement by Petitioner on March 16th, Agent Collier testified during the Jackson v. Denno hearing, as follows:

> Question: Okay. Could you tell the Court what the extent of that verbal statement was on the Sixteenth of March?
>
> Answer: We were asking him about the case involving his grandmother, and Mr. Bell was asked if he was responsible for the death of his grandmother, and he said, he made the statement that he did not stab his grandma, at which time I was kind of taken aback because at that point we had not heard, or were aware of any stab wounds to the victim. I went outside and called the pathologist on the telephone and she advised that it was, indeed a stab wound to the victim. Shortly after that the Defendant invoked his right to an attorney.

[1] At the evidentiary hearing, Petitioner's counsel introduced an Affidavit from the Orangeburg County Clerk of Court's office affirming that State's Exhibit Seven could not be located. Applicant's Exhibit One. App. p. 918. While Dr. Wren was on the stand, Petitioner's counsel introduced pictures provided to Dr. Wren that were contained in the defense file that represented the condition of the victim's body. Applicant's Exhibits Four, Five and Six.

App. p. 44, ln. 14 – p. 45, ln. 3. Interestingly, when Investigator Rodriguez was asked about the March 16th meeting with Petitioner, Investigator Rodriguez testified that only he and Sergeant Bonnet were in the meeting. App. pp. 62-3.

During trial, the State elicited testimony from Agent Collier about Petitioner's alleged statements and his discussion with Dr. Ross about the stab wound. App. pp. 453-454. Throughout the trial, the State used the term stab or stabbing at every possible opportunity. In closing, the State made it clear that their theory was Applicant stabbed the victim. App. pp. 613, 619, 622

2. Post Conviction Evidentiary Hearing

At the evidentiary hearing, Sean Fogle, Deputy Coroner, for Orangeburg County explained that he turned over the Coroner's file to PCR counsel, which contained the pathology report marked as Applicant's Exhibit Two. App. p. 762, 919. While on the stand, Deputy Coroner Fogle explained that any party (solicitor or defense) could request a copy of the Coroner's file as was done by PCR counsel. App. p. 763. He indicated that he typically receives a written request from the parties and then provides the documents to the requesting party. App. p. 763.

While on the stand, Attorney Hinds and Attorney Mellard were both adamant that they had never seen the report marked as Applicant's Exhibit Two until it was shown to them by PCR counsel. App. pp. 805, 817. Specifically, Attorney Hinds was asked if she would have wanted the report to properly prepare the case prior to trial, and she responded: "Absolutely. We were stunned that there was something of that nature that we were not provided." App. p. 805, ln. 23-24. Thereafter the following testimony was elicited:

Question: And why was that stunning? What's the importance of this report as far as Willie Bell's defense?

Answer: Well, just the fact that there would be another piece of paper that was in the coroner's file that didn't make it to us to discovery. I mean, you never know what it is you can use. But especially that this was not the report that we ultimately received.

Question: And I'll hand you Applicant's No. 7 and Applicant's No. 8. Are these two reports that you all did have and that you referenced at trial regarding the 2 centimeter stab?

Answer: That would be correct.

Question: And so at trial were you aware of the fact that there was a report that did not indicate there was a 2 centimeter stab – or 2 centimeter defect in the lungs or a stab wound?

Answer: Had no idea it existed.

Question: And at trial, and I'm sure prior to trial, you guys had prepared a rigorous cross, and Dr. Ross was cross-examined about her two reports. Would you all have prepared and cross-examined her about this first initial report that you did not have?

Answer: I believe we probably would have, yes.

App. p. 805, ln. 25 – p. 806, ln. 21.

When asked, Attorney Hinds agreed that she would have utilized an expert in forensic pathology if she had been provided the additional report. App. p. 807. Attorney Hinds further testified that the report and expert testimony would have refuted the State's theory of the case and aided the defense. App. pp. 808, 824. Recalling her opening argument that referenced two autopsy reports, she explained she had "absolutely" no idea the third report existed despite having a phone interview with Dr. Ross pre-trial. App. p. 824, ln. 23 – p. 825, ln.3, p. 826. She also stated that she would have "absolutely"

questioned Dr. Ross about it if she knew it existed, but she was relying upon the Solicitor to provide her all reports generated by their expert. App. pp. 825-26.

When the State called Attorney Mellard to the stand, he testified that discovery is usually received "piecemeal," but discovery would include the autopsy report. App. p. 902, lns. 18-24. He explained the Solicitor's Office was generally good about providing discovery and had an open file policy. App. p. 903. Thereafter, questions were asked about the report that was not received and his strategy in questioning Dr. Ross. App. pp. 903-906.

On cross-examination, he recalled meeting with PCR counsel and first seeing the undisclosed autopsy report. App. pp. 910-11. He indicated that he would have questioned Dr. Ross about the report. App. pp. 911-12. He recalled his conversation with Dr. Ross pre-trial, and he explained he would have only questioned her about the documents he had been provided. App. p. 912. Thereafter the following testimony was elicited:

Question:	And, the report, Applicant's No. 2, I provided that to you and Peggy several months ago. Is that something you would have expected to have been turned over to you?
Answer:	Most definitely.
Question:	And in preparing and presenting Mr. Bell's defense as lead counsel, is that something you would have utilized?
Answer:	Oh, yes.
Question:	And if you would have known there was a first report, a second report, and a third report, would that have factored into your argument to the jury in this case.
Answer:	I thinks so.

App. p. 912, ln. 19 – p. 913, ln. 5.

At the evidentiary hearing, John David Wren, MD, Ph.D, was offered as an expert in anatomical, forensic and clinical pathology, and was found to be qualified, without objection from Respondent. App. p. 767-770. Dr. Wren explained that he reviewed the entire SLED file, photos provided by the Public Defender, Coroner's file, and the trial transcript.

First, Dr. Wren addressed Applicant's Exhibit Two. App. p. 776. Based upon his experience, Dr. Wren explained that Applicant's Exhibit Two may have been issued as a temporary report that was sent to the Coroner's Office, but he concluded that the lack of reference to a defect in the left posterior pleura but subsequently appearing in another report (Applicant's Exhibit Seven), which was relied upon at trial, was a glaring problem since much of the accusations depended upon that observation. Dr. Wren explained that it is a common practice that if a change is made to a report then a note of reference as to why the report has been changed is made within the report. App. p. 779. Here, that practice was not followed nor was it disclosed by the State's pathologist that the first report (Applicant's Exhibit Two) even existed.[2] When asked by Respondent about Applicant's Exhibit Two merely being a draft that mistakenly appeared in the Coroner's file, Dr. Wren responded that Applicant's Exhibit Two appeared to be a signed formal report and he could not contemplate why/how a draft would be sent to a Coroner's Office. App. p. 787.

Notably, the following testimony was elicited from Dr. Wren:

Question: Now, based upon the reports, all the information you reviewed, the and transcript, is there any indication that

[2] Dr. Wren also noted defense counsel's line of cross-examination about amending the reports (Applicant's Exhibit Seven & Eight) without re-examining the body, and he opined that he could have testified that this too was not normal procedure.

there was a second autopsy done and then the second report was issued finding the defect in the lungs?

Answer: No.

Question: In your opinion as an expert, should that have been done if such a change was made?

Answer: If a change was made and not without – without making a mention of it, it should have been somehow noted that it was amended, as well as, if photographs were taken of the defect, it should have actually been – I think it should have been measured a bit more.

Question: Now, you've read the trial transcript, and in your opinion – or in your report you stated that a majority of the accusation depend upon this finding regarding the defect, so upon your review do you find this to be a glaring issue?

Answer: Yes. It's certainly a strange omission on an original report, and then if one does get additional information to add it on and then put a lot of emphasis on that without being able to show a photograph of that area or even any more information about it other than a 2 centimeter defect, it doesn't say whether it's round or slit like or – or what could have caused it. It's just a – it just says it's a – initially it says a defect, and then under the amended report it says it's a stab wound.

Question: And that was going to be my next question. In the final amended report it evolves into a stab wound.

Answer: Yes.

Question: In your opinion is there a problem with that?

Answer: The problem is, if it was thought to be a stab wound to start with, I think they would have said that – I can't really tell exactly what it is without looking at a picture or without them describing it more than just a 2 centimeter defect. For instance, was it – was it a slit-like defect, or did it have any evidence around it that it was a sharp or blunt-edged weapon that did it, or exactly what they thought it was to start with. I don't have a problem if they described in a lot more detail and have a picture, but just to say it's a defect, it could have been caused by something falling on her,

since her back was exposed when she was – while the house was burning.

Question: And in your review did you see any evidence that confirmed that what this wound was?

Answer: No.

App. p. 780 ln. 1 – p. 781, ln. 20.

Beyond his clear concern over the report that was not addressed at trial, Dr.Wren also took issue with the two reports that were addressed. Dr. Wren noted that Dr. Ross did not refer to any pictures of the wound in question nor had he seen any that confirmed the wounds existence. App. p. 797, lns. 22-24. He explained that if the wound was present prior to death (as was alleged by the State and found by Dr. Ross) then there should have been some blood within the pleural cavity, but none was mentioned in the report. Furthermore, the pleural defect was listed without re-examining the body and without photographic evidence to review. App. pp. 780, 788, 794.

In all three reports, Dr. Wren found that there was no mention of the fact that there is a possible burn artifact and skull fracture of the back of the head that can be seen in several photos at the scene and referred to in the investigator's notes from the scene. He also explained that he had serious questions about the lack of findings regarding the health of the victim. App. pp. 781-2. He concluded that she would have to have been one of the healthiest individuals at her age that he had witnessed in his decades of experience. App. p. 782. He further explained that there was no mention of edema fluid in the respiratory tree which indicates that there was a possible cardiorespiratory event associated with the death. He concluded, in his expert opinion, that even if there was a

stab wound, which he found to be unsubstantiated, the victim did not die from a stab wound. App. p. 781, 783, 797.

B. Argument

1. The Lower Court Erred by Failing to Find that Petitioner Was Entitled to a New Trial on the Basis of Prosecutorial Misconduct.

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). With this in mind, the Constitution requires only that a defendant receive a fair, not a perfect trial. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), Riddle v. Ozmint, 369 S.C. 69, 631 S.E.2d 70 (2006). In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the Supreme Court of the United States explained the importance of the prosecutor's role in the judicial process:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Here, Solicitor Pascoe was not called to the stand at the evidentiary hearing, but counsel entered into a stipulation that during a break in the proceedings the parties had been informed by Solicitor Pascoe that the pathology report marked as Applicant's Exhibit Two was not contained in the Solicitor's file.[3] The Order of Dismissal errantly finds that stipulation "dispositive of the allegation" and erroneously fails to address the

[3] Petitioner filed his Amendment alleging a Brady violation and/or prosecutorial conduct in October 2014, Respondent did not file a responsive pleading and/or put Petitioner on notice of the Solicitor's Office position / response prior to the evidentiary hearing.

absence of Solicitor Pascoe's testimony in the record to rebut the testimony offered to show prosecutorial misconduct. Instead of being shocked that the Solicitor nor the pathologist were called to refute such a serious allegation, the lower court erroneously found that "Applicant concedes the report was not suppressed by the prosecution." App. p. 972. The record does not support such a finding but it does support Petitioner's position that the State's expert concealed the pathology report in question, which can be directly impugned upon the Solicitor. The complete Coroner's file was easily obtainable by the Solicitor's Office, and no explanation was offered as to why Dr. Ross did not disclose the report to the State or the defense. Furthermore, the lower court committed an error of law in making such a conclusory finding. See Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007).

Petitioner submits that it was prosecutorial misconduct to not obtain and reveal all reports in existence that were generated by a testifying expert. See State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007) (Finding error in trial court requiring defense expert to generate report for the benefit of the prosecution but addressing that expert reports in existence are subject to discovery). In so much that the Order appears to excuse the absence of the inclusion of the report in the testimony of Dr. Ross at the trial on the basis that the report was merely "temporary," it must be noted that the State failed to call Dr. Ross at the evidentiary hearing and any findings related to her reasons for failing to disclose the report and the weight to be given to the report are speculative at best. Furthermore, Petitioner provided the testimony of a duly qualified expert that directly refuted the lower court's erroneous justifications for the clear prosecutorial misconduct.

In Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), the prosecution failed to disclose that a witness, whose credibility was already in question, was taken to the scene and gave an additional version of events. After Gibson pled guilty, the information was discovered during the course of a civil trial. The South Carolina Supreme Court addressed prosecutorial misconduct in the form of a Brady violation and reasoned:

> The prosecutor committed a Brady violation by not disclosing certain evidence to Gibson. A Brady violation is one type of prosecutorial misconduct. It is misconduct of a different type than, for instance, an attempt to introduce inadmissible evidence, tamper with the jury, or some other inappropriate action. E.g., United States v. Alderdyce, 787 F.2d 1365, 1370 (9th Cir. 1986) (finding no evidence of prosecutorial misconduct giving rise to a Brady violation); Buffington v. Copeland, 687 F. Supp. 1089, 1095-96 (W.D. Tex. 1988) (distinguishing Brady violations from other types of prosecutorial misconduct in which, for example, a prosecutor tries to inject prejudice into a trial by introducing inadmissible evidence or making inappropriate opening statements or closing arguments). We affirm the PCR judge's decision to set aside Gibson's guilty plea and grant him a new trial based on the Brady violation.

Id. at 528-9, 514 S.E.2d at 327.

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of, or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1565-69, 131 L. Ed. 2d 490, 505-10 (1995); Brady, 373 U.S. at 87, 83 S. Ct. at 1196, 10 L. Ed. 2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985).

By way of the Order of Dismissal, the lower court found the testimony of Attorney Hinds and Attorney Mellard to be credible. Nevertheless, the lower court failed to reconcile this finding to the ample evidence from their testimony that supported a finding that the report in question would have been favorable to the defense, was a report they would have expected to receive from the Solicitor's Office in discovery, was not disclosed in discussion with or during the testimony of the State's expert and was material to the issue of guilt. A simple review of the record, as summarized above, along with Dr. Wren's testimony demonstrates how the undisclosed report was vital to the defense and material to the issue of Petitioner's guilt and impeachment of Dr. Ross. Additionally, as argued, the State failed to call the Solicitor to explain why the complete Coroner's file was not in his file or turned over to the defense nor Dr. Ross to address her failure to disclose the report. It is clear that the evidence in the record does not support the lower court's justification of the prosecutorial misconduct resulting from the undisclosed report; therefore, Petitioner submits the lower court must be reversed due to an error of law and under the any evidence standard of review.

2. The Lower Court Erred for Failing to Find that Trial Counsel Rendered Ineffective Assistance of Counsel Requiring a New Trial Since Counsel Failed to Utilize a Forensic Pathologist and Obtain the Pathology Report in Question.

Alternatively, if this Court finds it possible to uphold the lower court's ruling regarding prosecutorial misconduct, Petitioner urges this Court to find that counsel was ineffective for failing to utilize a forensic pathologist and obtain the pathology report in question. Here, the report in question was obtained by Petitioner's counsel in preparation for the evidentiary hearing and as a resource for Petitioner's expert pathologist. The Deputy Coroner clearly testified that any party could submit a request for the Coroner's

file that contained the report. Additionally, defense counsel did not provide a reason for failing to request the Coroner's file and/or retain a pathology expert. Petitioner submits that such failure is inexcusable when the report counsel failed to obtain and utilize in Petitioner's defense undermined the State's theory of the case, aided in Petitioner's defense and called into question the credibility of the State's expert witness. Obviously, Petitioner was prejudiced by counsel's failure. Nevertheless, the lower court made a ridiculously improper finding that overwhelming evidence of guilt cured any deficiency established by Petitioner. This finding stands in contrast to counsel's testimony that the State's case was entirely circumstantial, as the record supports, and appears to be used as a blanket to smother issues that require the granting of a new trial.

In order to establish that counsel was ineffective, a PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

In Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978), the Supreme Court reversed the lower court's granting of post conviction relief on the basis of a Brady violation resulting from the prosecutor's failure to turn over an autopsy report. The State argued that the report was on file in the coroner's office and could have been obtained by the defense. Id. at 439, 249 S.E.2d at 122.[4] The court reasoned: "It is implicit that the

[4] It must be noted that Mr. Leeke was subsequently granted relief by the United States District Court, which was upheld by the Fourth Circuit Court of Appeal. Anderson v. South Carolina, 542 F. Supp. 725 (D.S.C. 1982), Anderson v. South Carolina, 709 F.2d 887 (4th Cir. 1983). Nevertheless, this Court has recently

Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defendant." Id. at 438, 249 S.E.2d at 122. Simply put, the Supreme Court concluded that "Brady does not shift to the State the burden of gathering evidence for the defense." Id. at 439, 249 S.E.2d at 122.

In the instant case, counsel not only failed to obtain the report at issue but counsel also failed to consult or utilize a pathology expert even though counsel testified that the primary defense was the State's inability to prove when, why and how the victim died. Counsel conceded that an expert pathologist and the report at issue should have been utilized and both would have impacted Petitioner's defense at trial. Despite finding counsel's testimony credible, the lower court found the report to be merely cumulative.

As the testimony at the evidentiary hearing established, the utilization of an expert by the defense in the capacity of Dr. Wren would have triggered the discovery of the report in question. Furthermore, Dr. Wren called into question the State's theory of the case and offered an alternative theory of death that was not explored at trial.[5] Dr. Wren also questioned the procedures utilized and the absence of findings regarding the victim's health. Petitioner submits that the lower court erred by failing to find that trial counsel rendered ineffective assistance when they failed to obtain and utilize a forensic pathologist, when an expert in Dr. Wren's capacity would have aided the defense arguments and directly called into question the State's theory of the case and the State's expert.

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relied upon the precedent set forth in Leeke and relied upon the instant case in Earley v. State, 418 S.C. 255, 792 S.E.2d 226, n.6 (2016).

[5] In closing, the Solicitor argued that the victim was stabbed. App. pp. 613, 619.

Petitioner submits that trial counsel was ineffective for failing to investigate the cause of death and/or pathology procedures and findings by utilizing an expert pathologist and obtaining the Coroner's file that contained Applicant's Exhibit Two. Petitioner urges this Court to find such failure to be inexcusable when the report counsel failed to obtain and utilize in Applicant's defense, along with Dr. Wren's testimony, undermined the State's theory of the case and called into question the credibility of the State's expert witness. Incredulously, the lower court reasoned that the report was merely cumulative. App. p. 974. Here, where the State informed the jury that Petitioner admitted that he stabbed his grandmother, which was confirmed by the pathologist's report and testimony regarding a stab wound, an undisclosed report omitting the alleged stab wound and the failure to present the testimony of Dr. Wren clearly amounts to prejudice that renders the result of Petitioner's trial unreliable.

CONCLUSION

As is argued in detail above, Petitioner would respectfully request that this Court grant certiorari and allow Petitioner to further address the above arguments via brief and/or oral argument. Ultimately, Petitioner would respectfully request that this Court reverse the denial of relief by the lower court and find that a new trial must be granted.

Respectfully submitted,

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This 18 day of December 2017.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

App. Case No.: 2017-001595

Willie Bell, Jr., #254817, Petitioner,

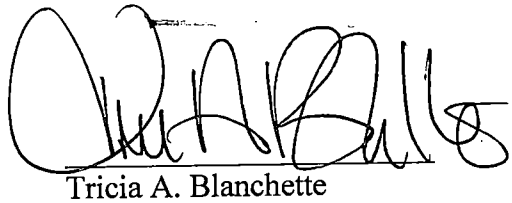
vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that a copy of the Petition for Writ of Certiorari and Appendices were hand delivered to Ruston W. Neely, Assistant Attorney General, this 18th day of December 2017 at the following address:

Office of the Attorney General
ATT: Ruston W. Neely, Ast. AG
1000 Assembly Street, 5th Floor
Columbia, SC 29201



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