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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Honorable Doyet A. Early, Circuit Court Judge

Appellate Case No.: 2018-000065

David Lee Meggett, Petitioner,

vs.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES

I. The lower court erred in finding that counsel was not deficient nor was there resulting prejudice when counsel failed enter a challange pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

II. The lower court erred by failing to find counsel's trial strategy amounted to ineffective assistance of counsel when he argued two conflicting defense theories at trial and told the jury about Petitioner's version of events, in support of one theory, that was not offered through Petitioner's testimony during trial.

III. The lower court committed an abuse of discretion in denying Petitioner's request for expert funding.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law.[1] The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate

[1] Recently, in Smalls v. State, 810 S.E.2d 836 (2018), this Court held: "In numerous cases, this Court has incorrectly stated an appellate court "gives great deference to the PCR court's . . . conclusions of law." See, e.g., Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). The court of appeals repeated our misstatement, quoting Porter. Smalls, 415 S.C. at 496, 783 S.E.2d at 820. We clarify that appellate courts review questions of law *de novo*, with no deference to trial courts. While we uphold the analysis and result of the following decisions, we now direct that none of these decisions should be read to suggest an appellate court gives any deference to a PCR court's conclusions of law: Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017); Gibbs v. State, 416 S.C. 209, 218, 785 S.E.2d 455, 459 (2016); McHam v. State, 404 S.C. 465, 473, 746 S.E.2d 41, 45 (2013); Hyman v. State, 397 S.C. 35, 42, 723 S.E.2d 375, 378 (2012); Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011); Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011); Robinson v. State, 387 S.C. 568, 574, 693 S.E.2d 402, 405 (2010); Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010); Terry v. State, 383 S.C. 361, 371, 680 S.E.2d 277, 282 (2009); Jones v. State, 382 S.C. 589, 595, 677 S.E.2d 20, 23 (2009); Davie v. State, 381 S.C. 601, 608, 675 S.E.2d 416, 420 (2009); Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008); Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008); Harris v. State, 377 S.C. 66, 73, 659 S.E.2d 140, 144 (2008); Lorenzen v. State, 376 S.C. 521, 529, 657 S.E.2d 771, 776 (2008); Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 528 (2007); Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 643 (2006); Porter, 368 S.C. at 383, 629 S.E.2d at 356; Simpson v. Moore, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006); Bright v. State, 365 S.C. 355, 358, 618 S.E.2d 296, 298 (2005); Winns v. State, 363 S.C. 414, 417, 611 S.E.2d 901, 903 (2005); Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); Sellers v. State, 362 S.C. 182, 187, 607 S.E.2d 82, 84 (2005); Magazine v. State, 361 S.C. 610, 615, 606 S.E.2d 761, 763 (2004); Huggler v. State, 360 S.C. 627, 632, 602 S.E.2d 753, 756 (2004); Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)."

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).

"An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." Maybank v. BB&T Corp., 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016); see also State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." (quoting State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007))).

PROCEDURAL HISTORY

During the June 2009 term of the Charleston County Grand Jury, Petitioner was indicted for Burglary, First Degree, and Criminal Sexual Conduct, First Degree (2009-GS-10-4829, 4830). App. p. 848. On November 8, 2010, a trial was held in front of the Honorable Kristi L. Harrington and a jury. App. p. 1. Petitioner was represented by Beattie Butler, Esquire. On November 10, 2010, Petitioner was found guilty as indicted and sentenced to a term of thirty (30) years concurrently on both charges. App. p. 848.

A timely Notice of Appeal was filed, and the appeal was perfected by Breen Stevens, Esquire. The following issues were briefed on behalf of Petitioner:

1. The trial court erred by refusing Meggett's request for time to have a comforter examined for DNA, upon which he asserts a prior consensual encounter occurred between him and the complaining witness, and which, if positive, would have discredited the complaining witness's testimony regarding their relationship and prior sexual encounters.

2. The State's reference during closing argument to a lack of evidence supporting the interpretation of the defense's theory impermissibly shifted the burden upon Meggett as an indirect comment on the defendant's right to remain silent.

3. The trial court should have directed a verdict of not guilty for the offense of first degree burglary based upon the lack of evidence regarding Meggett's intent to commit a crime at the time he entered the dwelling.

App. p. 474. On June 5, 2012, an oral argument was conducted. An Opinion affirming Petitioner's convictions and sentences was entered on June 27, 2012. State v. Meggett, Op. No. 4994 (S.C. Ct. App. June 27, 2012). App. p. 544. The remittitur was issued on July 13, 2012.

On June 25, 2013, an Application for Post Conviction Relief was filed. App. p. 554. The State submitted a Return on December 11, 2013. App. p. 562. On September 8, 2014, Tricia A. Blanchette filed a Motion for Discovery, which was heard by the

Honorable G. Thomas Cooper, Jr., on that same date at the Charleston County Courthouse. App. p. 567. On September 29, 2014, the Honorable G. Thomas Cooper, Jr. issued an Order Substituting Counsel and Authorizing Discovery in Post Conviction Relief. App. p. 572.

On December 21, 2015, Petitioner, through counsel, amended his Application by adding the following specific allegations to his original claim of ineffective assistance of trial counsel and added the claim of ineffective assistance of appellate counsel:

1. Ineffective assistance of trial counsel for failing to properly prepare and conduct a reasonable investigation into Applicant's case prior to going to trial.

2. Ineffective assistance of trial counsel for failing to communicate with Applicant adequately and timely prior to trial regarding the State's case, specifically the DNA evidence, which resulted in counsel's failure to obtain a DNA expert and the denial of a continuance motion for the testing of "critical" evidence.

3. Ineffective assistance of trial counsel for failing to consult with Applicant on and articulate a clear defense strategy prior to and during trial. Ineffective assistance for providing the jury with the following alternate and incomplete defense theories that lead to confusion and prejudice to Applicant: 1) Applicant engaged in consensual sex with the victim, and 2) the DNA and physical evidence does not establish that sexual intercourse took place between Applicant and victim on the date in question.

4. Ineffective assistance of trial counsel for informing the court that Applicant would testify to prior sexual encounters and informing the jury during opening and closing argument that Applicant engaged in a consensual sexual encounter with victim, yet advising Applicant to not take the stand at trial to testify to such.

5. Ineffective assistance of trial counsel for failing to question victim about her knowledge of Applicant's prior profession and possible motive for the allegations.

6. Ineffective assistance of trial counsel for failing to make a reasonable argument for a directed verdict on the burglary charge.

7. Ineffective assistance of trial counsel for failing to put up a defense through witnesses and evidence.

8. Ineffective assistance of trial counsel for failing make the arguments made on direct appeal regarding the State's closing argument; thus, failing to properly preserve the issues for appeal.

9. Ineffective assistance of trial counsel for arguments made to the jury during opening and closing arguments that interjected consensual sex into the trial, help support the State's theory of the case and provided the jury with two conflicting defense theories.

10. Ineffective assistance of appellate counsel for failing to argue that Applicant had consent to be in the dwelling he was charged with burglarizing.

11. 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. 576. On April 1, 2016, Petitioner filed a Motion for Indigent Funds. App. p. 579.

On April 18, 2016, a hearing was held at the Charleston County Courthouse in front of the Honorable Doyet A. Early. App. p. 594. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Rutledge Johnson, Assistant Attorney General. At the conclusion of the hearing, Judge Early took the matter under advisement. Thereafter, Judge Early informed both parties that he intended to deny the motion and requested that the State submit a proposed Order. As was addressed on the record at the evidentiary hearing, a signed Order was not issued until November 30, 2016 and was filed on December 7, 2016. App. p. 622.

On December 7, 2016, an evidentiary hearing was conducted at the Charleston County Courthouse in front of the Honorable G. Thomas, Cooper, Jr. App. p. 624. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Alicia Olive, Assistant Attorney General.

At the start of the evidentiary hearing, Petitioner's counsel made a motion to verbally amend the Application to include a claim of ineffective assistance of counsel for failure to make a Batson challenge at trial. App. p. 632. Respondent objected. App. p. 633. After hearing from both parties and inquiring of defense counsel, the motion was granted. App. p. 634

During the evidentiary hearing, Petitioner took the stand and called the following witnesses: Bernard Kelly, Beattie Butler, Esquire, and Breen Stevens, Esquire. The State called Chad Simpson, Esquire. At the conclusion of the hearing, the court took the matter under advisement and requested proposed Orders from both parties. On September 18, 2017, an Order of Dismissal was issued by the Honorable G. Thomas Cooper, Jr. App. p. 770. Petitioner, through counsel, filed a timely Motion, Pursuant to Rule 59, SCRCP. App. p. 832. Respondent filed a Response. App. p. 839. On December 12, 2017, an Order Denying Applicant's Motion to Alter or Amend the Judgment was issued, from which this appeal follows.

ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel 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." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The

courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). 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." Cherry, 300 S.C. at 117–18.

I. The lower court erred in finding that counsel was not deficient nor was there resulting prejudice when counsel failed enter a challenge pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

Petitioner submits that the lower court erred in finding that counsel was not deficient nor was there resulting prejudice when counsel failed to enter a challenge pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). Petitioner submits that the lower court's findings fail to address the testimony offered and the evidence available in the transcript regarding the jurors that were struck and sat on the jury. As a result, the evidence in the record does not support the lower court's ruling and must be reversed.

At the evidentiary hearing, trial counsel was directed to the transcript, which reflected that four of the State's strikes were used on African Americans, and he was

asked about not making a Batson challenge. App. p. 10, 651. He responded that he could not recall a reason for not making a challenge, and he sometimes chooses to make a challenge and sometimes chooses not to make a challenge during a trial. App. p. 651.

On cross-examination, trial counsel indicated that he had skimmed through his file since gaining access to it that morning, and it did not shed any light on why he did not make a Batson challenge. App. pp. 696-7. The State also attempted to ask him about an African American female juror, with an incarcerated family member, that was struck. App. pp. 694-5. On redirect, trial counsel acknowledged that the State struck two African American females that answered that they had a family member in prison (Juror #134, 214), but the State sat a white female juror with a family member in prison and on probation (Juror #274). App. pp. 10, 47-49, 53, 55, 702-3. He further acknowledged that the State struck an African American male after seating Juror #274. App. pp. 702-3. He stated that he could have argued that the State's race neutral reason behind its strikes was pre-textual, but he did not make a Batson challenge. App. pp. 703-4.

When Breen Stevens, Esquire, took the stand he acknowledged that he was previously at the Office of Appellate Defense and handled Applicant's direct appeal. App. p. 706. He indicated that he was currently working as a public defender. He went through the process he utilized to identify and brief the issues presented to the appellate court.

He explained that he always would check for a Batson issue. App. p. 707. Referring to the transcript, he indicated that four out of five strikes used by the State were on African Americans, so he thought it was important to keep an eye on the basis for that – to see if there was a challenge on race or gender raised by the defense. App. p. 708. He

shared and explained his personal like of a good Batson issue on appeal. App. p. 708, lns. 17-23. When asked to address the viability of the issue on appeal if trial counsel would have made a Batson challenge, he responded positively and explained the argument available since the State struck two African American female jurors and sat a similarly situated white female juror. App. pp. 709-10.

Chad Simpson, Esquire, was called to the stand by the State. He recalled being involved in the prosecution of Petitioner's case. App. p. 755. He remembered being involved in voir dire and jury selection, but he specifically did not recall striking the jury. App. p. 755. He explained that he attempted to pull information from the file, but he could not find any information to shed light on why the strikes were utilized. App. p. 756. He shared some of the common reasons for striking a juror. App. pp. 756-58. When asked if he would have been prepared to defend a Batson challenge, he indicated that would have but he had no recollection of his mindsight at the time for striking the jurors. App. pp. 756-58. Based upon his general practice, he testified that he would have had a race neutral reason for striking the jurors. App. p. 759, lns. 5-8.

In State v. Inman, 409 S.C. 19, 25-27, 760 S.E.2d 105, 108-09 (2014), the South Carolina Supreme Court explained:

> "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a [juror] on the basis of race or gender." McCrea v. Gheraibeh, 380 S.C. 183, 186, 669 S.E.2d 333, 334 (2008) (citing State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001)); see also Batson, 476 U.S. at 89. The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause. See Purkett v. Elem, 514 U.S. 765, 767-68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).
>
> First, the [party asserting the Batson] challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is

made, the trial court will move to the second step in the process, which requires the [party opposing the Batson] challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination. The ultimate burden always rests with the [party asserting the Batson challenge] to prove purposeful discrimination.

State v. Giles, 407 S.C. 14, 17, 754 S.E.2d 261, 263 (2014) (internal citations omitted); see also Snyder v. Louisiana, 552 U.S. 472, 476-77, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (quoting Miller-El v. Dretke, 545 U.S. 231, 277, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)).

Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible. Purkett, 514 U.S. at 768; Randall v. State, 716 So. 2d 584, 588 (Miss. 1998). The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it." Giles, 407 S.C. at 21, 754 S.E.2d at 265; see., e.g., id. at 17, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to "assess the plausibility of the proffered reason for striking the potential jurors").

In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So. 2d 272, 290 (La. 1995); see also Batson, 476 U.S. at 93-94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508-09, 682 S.E.2d at 822; see also Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party proves that the "originally neutral reason was . . . a pretext because it was not applied in a neutral manner." State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989).

Here, Petitioner is African American and four of the State's five strikes were utilized on African Americans. As was addressed by both trial and appellate counsel at the evidentiary hearing, the State struck two African American females, who responded that they had a family member incarcerated (Juror # 134, 214). App. pp. 10, 53, 55. Thereafter, the State sat a similarly situated white female (Juror #274), who had several family members incarcerated. App. pp. 10, 47-49. With strikes remaining after seating Juror #274, the State struck an African American male (Juror #183). App. p. 10.

In the Order of Dismissal, the court found the testimony and evidence offered from the transcript amounted to mere speculation, yet the court relied upon the prosecutor's testimony despite his admission that he had no notes or independent recollection of striking the jury. When trial counsel was asked about the striking and seating of Jurors # 134, 214, 274 and 183, he responded that he could have argued that the State's race neutral reason behind its strikes (assuming one would be offered) was pre-textual, but he did not make a challenge at trial. Furthermore, Attorney Stevens recalled spotting the Batson issue when reviewing the transcript for the direct appeal and was concerned that counsel did not make a challenge under Batson. He indicated that he would have briefed an argument regarding the State's exercise of strikes if counsel would have made a Batson challenge at trial.

Petitioner submits that based upon the testimony and record, the lower court erred by failing to find that trial counsel was deficient when he failed to make a Batson challenge. Prior to the striking of the jury, counsel had just been denied a continuance to obtain testing of "critical" evidence, yet, he failed to raise a challenge under Batson. App. p. 16. As the record reflects, the State utilized two strikes on African American female

jurors and sat a similarly situated white female juror with strikes remaining to utilize on one more African American juror. Petitioner submits that the transcript provides "direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." Edwards, 384 S.C. at 508-09, 682 S.E.2d at 822; see also Haigler, 334 S.C. at 629, 515 S.E.2d at 91. Therefore, if counsel had made the motion, there was evidence in the record to prevail on each step of the Batson analysis at trial and/or appeal. Therefore, Petitioner was prejudiced by counsel's unexplained deficient performance.

Interestingly, trial counsel informed the court at sentencing that Petitioner would not be speaking under his advice since "there's always the chance of an appeal." App. p. 467, lns. 11-14. Unfortunately, he did not preserve a Batson challenge for appeal nor ensure that Petitioner's rights under the Equal Protection Clause and Fourteenth Amendment were not violated. Therefore, Petitioner urges this Court to find that the lower court erred and a new trial is warranted.

II. The lower court erred by failing to find counsel's trial strategy amounted to ineffective assistance of counsel when he argued two conflicting defense theories at trial and told the jury about Petitioner's version of events, in support of one theory, that was not offered through Petitioner's testimony during trial.

By way of his Amendment, Petitioner made three separate allegations regarding counsel's trial strategy, including pre-trial preparation, opening and closing arguments and advice to Petitioner to not testify at trial. App. p. 576. As a result of the lower court's ruling, Petitioner submits that the lower court failed to find counsel's trial strategy amounted to ineffective assistance of counsel when he argued two conflicting defense theories at trial and told the jury about Petitioner's version of events, in support of one

theory, that was not offered through Petitioner's testimony during trial. In the Order of Dismissal, the lower court acknowledged that counsel offered facts in opening that he failed to establish when Petitioner did not testify. The lower court also acknowledged the shift or "subsequent change in trial strategy." App. p. 803. Yet, the lower court in his lengthy discussion justifying and/or excusing counsel's performance does not address that counsel failed to adequately advise Petitioner regarding the two conflicting defenses (consensual sex and no DNA evidence to establish intercourse) before pursuing the defenses at trial and counsel's failure to advise Petitioner regarding the implications of not taking the stand.[1]

In McKnight, the South Carolina Supreme Court held: "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

At trial and the evidentiary hearing, counsel admitted that he did not discuss the DNA evidence with Petitioner until the Saturday before trial. App. p. 11, 657. At neither proceeding did counsel offer a valid reason for waiting to address the DNA evidence with Petitioner or failing to look into evidence of prior consensual sexual encounters in advance of trial. App. p. 658.

While on the stand, Petitioner explained his surprise when counsel came to him on the Saturday before trial to discuss the DNA evidence. App. p. 729. During that meeting, Petitioner informed counsel that there were two comforters with potential DNA

[1] This matter was raised in Petitioner's Motion Pursuant to Rule 59, SCRCP. App. p. 832.

evidence of prior sexual intercourse with victim. App. p. 729. Even though counsel informed the trial court that he knew where the comforter evidence was located, Petitioner said counsel did not do anything to secure it or preserve it. App. p. 730.

At the beginning of trial, counsel informed the court: "I had reviewed all the evidence, and there was no probative DNA evidence at all that point from the rape protocol kit." App. p. 13, lns. 10-13. When asked about this statement, Petitioner explained that this conclusion was not conveyed to him. He explained that a proper understanding of the DNA evidence prior to trial would have factored into what strategy to pursue and whether he should take the stand.

Without a proper understanding of the DNA evidence, Petitioner explained that he understood the defense to be that consensual sexual intercourse occurred on the night in question. He understood that he was going to take the stand and testify about prior consensual sexual encounters with victim. He did not agree with victim's testimony regarding one prior sexual encounter.

When asked about the trial strategy, counsel agreed that it was to establish the sex was consensual. App. pp. 655-56. He remarked that he did not think the strategy "shifted from it being consensual to the sex didn't happen," but he could see how it could be interpreted as a shift or change in strategy. App. p. 656, lns. 8-9, ln. 19 – p. 657, ln. 3.

At the outset of trial, counsel moved for a continuance primarily due to his lateness in discussing the DNA evidence with Petitioner. During the continuance motion, he informed the trial court of the following: 1) the only issue before the court was whether the sex was consensual or not; 2) evidence of sex on several prior occasions would be introduced through his client; and 3) the rape protocol kit provided no probative

DNA evidence. App. p. 11, lns. 17-20, p. 13, lns. 7-20. In denying the continuance, the trial court reasoned that the testimony regarding other sexual encounters would come in through Petitioner's testimony. Transcript p. 9, lns. 9-22.

Thereafter, trial counsel made a motion to introduce testimony of the prior sexual encounters. App. p. 103. During the motion, counsel informed the court Petitioner intended to testify about six to eight prior sexual encounters and victim was likely only going to testify to one. App. p. 104, lns. 7-12. When asked about the trial court's ruling, counsel explained that it was his understanding that Petitioner would be allowed to testify to more than one prior sexual encounter. App. p. 655, 662-63.

During opening, trial counsel informed the jury that Petitioner and victim had consensual sex and had entered into a "less than desirable" agreement of sex in exchange for payment of a monetary debt. App. pp. 141-42, 667-68. He went onto provide the jury a very detailed account of the night in question and concluded by saying that Petitioner's DNA was not found inside of the victim since he did not finish. App. pp. 141-43, 667-8.

As anticipated by counsel, victim took the stand and testified to one prior instance of sexual intercourse. App. pp. 148, 162-3, 167-8. Specifically, she testified she was drinking and "before it could even get fully started I got nauseous and told him to get off of me." App. p. 148, lns. 20-24. On redirect, her testimony concluded as follows:

Question: How many times did you and Mike have consensual sex?

Answer: One time.

App. p. 201, lns. 23-25.

While Jennifer Clayton was on the stand testifying about her testing of the DNA evidence, trial counsel made the point that none of Petitoner's DNA was found on the

victim's vaginal swabs or fingernail clippings. App. pp. 310-11, 317-18. Counsel also brought out through questioning Clayton that the spot that was tested on the comforter did not contain a mix of Petitioner's and victim's DNA. App. p. 312, ln. 17 – p. 313.

During trial, the court went over Petitioner's right to testify. App. p. 273. After being afforded fifteen minutes following the directed verdict motion to reach a decision, Petitioner informed the court he would not testify. App. pp. 376-78.

At the evidentiary hearing, counsel explained he planned for Petitioner to testify and he was surprised when the trial judge did not give them additional time to discuss it. App. pp. 273, 376-8, 652-54, 669-70. He recalled the decision was made late in trial for Petitioner to not take the stand.[2] App. pp. 654-5. He explained that it seemed the right decision at the time, but it turned out to be the wrong decision. App. p. 671, lns. 18-19. On cross-examination, he stated that it was Petitioner's decision whether or not to take the stand, but the decision was made with his advice. App. pp. 691-2.

When asked why he went into the details of night in question during his opening argument if it was still an open question if Petitioner would testify to those details, he responded that he thought he knew for certain that Petitioner was going to testify. App. p. 668. He made it clear that he would not have gone into those details if he had known Petitioner would not testify. App. p. 668. He stated: "I would not have spelled out those specific things that could only come from David." App. p. 668, lns. 19-20. He said he found Petitioner's account to be credible and believable and did not solely pursue the lack of DNA argument because he planned for Petitioner to testify. App. p. 669-70

[2] At the evidentiary hearing, counsel recalled Petitioner's demeanor changing during the course of the trial and agreeing with several assistants that Petitioner should not take the stand, which was heavily relied upon in the lower court's analysis. Yet counsel attributed the decision more to how well the trial seemed to be going prior to closing argument than Petitioner's demeanor. App. p. 670-1, 692-3.

While on the stand, Petitioner recounted the details of the night in question. He said he was ready, willing and able to testify and anticipated he would take the stand. App. pp. 74-45. He described meeting with counsel and seven to eight people during trial about whether he should take the stand. App. pp. 736-7. He remembered a majority of the people saying he should not testify due to the "very good job" counsel had done. App. p. 737, lns. 3-16. He recalled counsel advising him not to take the stand but leaving the decision to him. PCR p. 114, lns. 17-20. He was adamant that if counsel had explained that he had already told the jury the details of the night and without his testimony the State could argue that the opening was not supported by the evidence presented at trial, he would have taken the stand and testified. App. p. 738.

Petitioner testified that he found the trial strategy to be confusing and he was not properly informed by counsel. App. pp. 732-34. He made it clear that if counsel had properly advised him about the DNA evidence, he would have not wanted counsel to go into the details of the night in question in his opening argument and would have wanted him to proceed solely on the DNA strategy. App. pp. 732-34.

Prior to closing arguments, the State made a motion to prohibit trial counsel from going into the factual assertions that were made in opening since closing arguments "are to confined to evidence presented at trial and the reasonable inferences therefrom." App. p. 388, ln. 16-22. The State further submitted: "I want to make sure we avoid any essentially testifying for the defendant in closing argument." App. p. 388, lns. 22-23.

After the trial court indicated that she expected trial counsel would follow the rules of evidence, the defense closed without mention of the factual assertions of consensual sex made in the opening argument. App. p. 389. Trial counsel argued that

Petitioner's DNA was not found inside or on victim and that the evidence indicates that Petitioner had sex with someone else on the comforter that was tested. App. pp. 394-395.

In closing argument, the State informed the jury:

> The important part about what was found on the comforter was David Meggett's sperm. And in the opening statement Mr. Butler told you, yeah, they had sex on that bed. That's been consented to.

App. p. 424, lns. 18-22. When asked at the evidentiary hearing about the State's assertion regarding his opening, he agreed that his opening corroborated victim's testimony.

During closing, the State further argued:

> The defense in their opening gave a story that completely defies all common sense that, oh, they had consexual (sic) – consexual sex – consensual sex on the bed, he stops midway through and then assaults her. Defies common sense.

App. p. 426, lns. 20-24. When asked at the evidentiary hearing about this portion of the State's closing argument, counsel concluded that he should have objected to the State's argument. App. p. 684, lns. 6-12. After being asked if he thought he opened the door to the comments, he responded – "Well, that's the question isn't it?" – he went on to testify that he either opened the door or failed to properly object. App. p. 684, lns. 13-17.

At the evidentiary hearing, Breen Stevens, Esquire, was asked if he saw a "conflict" between counsel's opening regarding consensual sex and later argument regarding lack of evidence of sexual intercourse; he responded that he thought it was a daunting task in a CSC case to argue consent when the victim is a devout lesbian, especially in a case where the client did not testify. App. pp. 712-13. He explained:

> Again, your arguing consent, I think it's a bold defense strategy. And especially when the client doesn't testify. And I don't know how, when or why that decision was made. And I think it made it perhaps challenging. But by the same token, looking to close where I understand where Mr. Butler is coming from, where he thought it was all part of the consent

> argument, but my understanding of the mantra that was repeated utilized was, it didn't happen, it didn't happen, it didn't happen.
> So at that point, I mean, which theories are you really going with? And it's really hard to embrace both for a reasonable trial strategy on that.

App. p. 713, lns. 12-23. He testified that his job as an appellate defender is easier when there is a clear trial strategy going forward. App. p. 714, lns. 2-3. He explained: "There's always a risk when you try to shift on the fly; you are trying to embrace something broader or a little different. And that challenge is going to go throughout the case." App. p. 714, lns. 4-6. He indicated that he would have raised the issue regarding the State's comments about what counsel said in opening, but he opined that counsel likely opened the door to the State's argument. App. pp. 715-17.

Upon review of the record and the testimony offered, the lower court failed to consider that trial counsel admittedly did not discuss the DNA evidence with Petitioner until the Saturday before trial. As a result, counsel moved for a continuance for time to complete DNA testing on additional evidence. What counsel failed to mention in his motion for continuance and was missed by the lower court is that the lateness of the discussion of the "critical" DNA evidence not only affected the ability to obtain the additional testing, but it detrimentally resulted in the unreasonable trial strategy mocked by the State in closing.

At the evidentiary hearing, Petitioner was adamant that if counsel had explained the arguments available regarding the lack of DNA evidence, he would have wanted counsel to proceed solely on a strategy of attacking the DNA evidence and would not have considered taking the stand. Alternatively, he testified that he would have taken the stand if counsel had explained that he had made promises to the jury in opening and offered factual assertions that could not be substantiated without taking the stand.

While on the stand, trial counsel explained that he did not find the defense of consensual sex and attacking the DNA evidence mutually exclusive, but he, along with Attorney Stevens, did acknowledge that he opened the door to the State's closing argument. PCR p. 658. As Attorney Stevens explained, it was a daunting task to argue consent when the victim was avowed lesbian, especially in a case where Petitioner did not testify. Here, to the detriment of Petitioner, counsel chose to take on that daunting task, which ultimately lead to corroborating victim's testimony and being mocked by the State in closing.

In the Order of Dismissal, extensive reasoning is undertaken to excuse counsel's deficient performance since it is easy to agree with the State's closing argument that accepting Attorney Butler's factual assertions in opening defies common sense in light of the evidence offered at trial and counsel's shift in trial strategy. Additionally, the lower court ignored the evidence in the record that counsel failed to timely and adequately prepare with Petitioner prior to trial and identify a clear trial strategy prior and during trial, which directly affected the outcome of the trial and inhibited the appeal as testified to by Attorney Stevens.

Based upon the timeliness and inadequacy of counsel's discussion with Petitioner regarding the DNA evidence, Petitioner submits that trial counsel's strategy that shifted from factual assertions regarding a consensual sexual encounter and assault in opening to attacking the DNA evidence in closing was unreasonable. Counsel's only explanation at the evidentiary hearing was that he did not agree that he shifted strategies and he did not find the strategies to be mutually exclusive, yet the lower court focused on excusing counsel's clearly unreasonable performance.

Without adequately formulating a trial strategy with an informed defendant prior to trial, counsel embarked down the treacherous road of making factual assertions to the jury in opening that he did not back up during the course of the trial. As he admitted, he opened the door to the State's damaging closing argument.

As a result, Petitioner urges this Court to find that the lower court's denial of relief is not supported by any evidence in the record. Petitioner further urges this Court to find that trial counsel was deficient in the formulation and presentation of the defense strategy, as detailed above, and counsel's deficient performance prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18.

III. The lower court committed an abuse of discretion in denying Petitioner's request for expert funding.

On September 8, 2014, Petitioner, through counsel, filed a Motion for Discovery, which detailed that counsel had consulted with a DNA expert (Ron Ostrowski) and was requesting files he needed to further work on the case. App. p. 567. The Motion also explained that trial counsel had requested and been denied a motion for a continuance to obtain a DNA expert at the outset of trial. App. p. 567. On September 29, 2014, the Honorable G. Thomas Cooper, Jr. issued an Order Authorizing Discovery. App. p. 572.

On December 17, 2015, Petitioner, through counsel, filed an Amendment. App. p. 576. By way of the Amendment, Petitioner made the following pertinent allegations:

1. Ineffective assistance of trial counsel for failing to communicate with Applicant adequately and timely prior to trial regarding the State's case, specifically the DNA evidence, which resulted in counsel's failure to obtain a DNA expert and the denial of a continuance motion for the testing of "critical" evidence.

2. Ineffective assistance of trial counsel for failing to consult with Applicant on and articulate a clear defense strategy prior to and during trial. Ineffective assistance for providing the jury with the following alternate and incomplete defense theories that lead to confusion and prejudice to Applicant: 1) Applicant engaged in consensual sex with the victim, and 2) the DNA and physical evidence does not establish that sexual intercourse took place between Applicant and victim on the date in question.

App. p. 576.

On April 1, 2016, Petitioner, through counsel, filed a Motion for Indigent Funds. App. p. 579. By way of the Motion, Petitioner requested that the "Court enter an Order for Authorization of Payment of Expert Fees pursuant to S.C. Code Ann. §17-30-50(b) (2008) and Reeves v. State, Op. No. 5359 (S.C. Ct. App. filed November 12, 2015) (Shearouse Adv. Sh. No. 44 at 47)." App. p. 579. The Motion explained:

> By way of the discovery motion and at the hearing, counsel explained that she had consulted a DNA expert (Ronald Ostrowski) since Applicant's trial began with a request for a continuance to address matters related to DNA.[3] Counsel explained that Mr. Ostrowski had provided her with a list of case records/items that were necessary for him to work on Applicant's case. As a result of the Order Authorizing Discovery, Applicant was granted the opportunity to obtain the discovery requested by Mr. Ostrowski. In March of 2015, Mr. Ostrowski was retained by payment of $2,000.00 and the records were provided for his review. Thereafter, Mr. Ostrowski met with counsel and spent several hours thoroughly reviewing the case and sharing his initial findings. He also explained to counsel how his expertise could have been utilized at the trial stage and how his expertise could be utilized in preparation for and at the evidentiary hearing. As a result, Applicant, through counsel, filed an Amendment to Application for Post Conviction Relief making several allegations involving the DNA evidence and lack of DNA expert prior to and at trial.
>
> At this time, undersigned retained counsel has not received her full retainer fee due to medical issues of the contracted responsible party and the indigent status of Applicant.[4] Counsel has also been unable to provide

[3] A copy of Mr. Ostrowski's curriculum vitae is attached.

[4] Applicant will submit a completed Affidavit of Indigency at the motion hearing scheduled for April 18, 2016.

> Mr. Ostrowski the second portion of his fee to prepare for and testify at an evidentiary hearing.

App. pp. 579-80.

On April 18, 2016, a motion hearing was conducted at the Charleston County Courthouse in front of the Honorable Doyet A. Early. App. p. 594. Petitioner, was present and represented by Tricia A. Blanchette, Esquire. Petitioner was represented by J. Rutledge Johnson, Esquire.

After providing the procedural history, basic grounds and answering questions of the court, counsel addressed Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015) and explained:

> So in reading that case I felt that I had an obligation since I'm not defense counsel, I'm PCR counsel, sine I have consulted with Mr. Ostrowski, he has indicated to me how he could be used and given me his initial findings, I felt that I had a duty to my client under the reasoning in this case to make this request of the court that we get the additional funding for Mr. Ostrowki.

App. p. 602, lns. 17-24. Thereafter, counsel addressed Petitioner's Affidavit of Indigency, and the court questioned Petitioner about his income. App. pp. 603-606. 619.

In response, the State opposed the request for funding and deferred to Hugh Ryan, Esquire. App. pp. 606-7. Before Mr. Ryan took the stand, the court stated:

> And I have had an opportunity to talk to Mr. Ryan on a number of occasions just trying to get answers to questions dealing with indigent funds and for the record I went to state that he does an absolute excellent job. He is fair to the indigents, he's fair to the state and tries to do what is absolutely right. I appreciate everything you have done up there. Big responsibility with a small pot to grab from.

App. p. 607, lns. 4-12. Thereafter, the court questioned Mr. Ryan. App. pp. 610-615. Mr. Ryan stated that the "final analysis" for an expert or other services is whether "it is reasonable and necessary for the representation of the Defendant." App. p. 613, lns. 9-13.

After counsel's fee and retainer agreement were called into question by Mr. Ryan, counsel provided further explanation regarding her fee agreement with Petitioner and the court concluded that her fee was "probably on the low side." App. pp. 615-617. The hearing concluded with the court taking the matter under advisement. App. p. 617.

As was addressed at the evidentiary hearing, a written Order Denying Additional Funding was not issued until November 30, 2016, which was filed on December 7, 2016. By way of the Order, the court reasoned:

> Mr. Ryan explained that it is a rare instance for a retained attorney to request indigent funds. He also explained that he was not interested in starting a trend of awarding additional funds to retained counsel.
>
> This Court finds Mr. Ryan's testimony compelling and believes, in its discretion, that there is public policy to deny indigent funding to Applicant based on the facts of this case.

App. p. 622-23.

At the beginning of the evidentiary hearing, the State provided the procedural history. Thereafter, counsel for Petitioner informed the court about the motion, hearing and recently issued order regarding indigent funds. App. pp. 627-632. For record preservation and in further support of Petitioner's request, counsel renewed her prior argument and provided the court a copy of Reeves and Winkler v. State, 418 S.C. 643, 795 S.E.2d 688 (2016).[5] App. pp. 629-632. The court concluded that he would like to see Judge Early's ruling, but he could not reverse his ruling. App. p. 631.

While questioning trial counsel about trial preparation and the DNA evidence, Petitioner's counsel stated: "If I may note for the record, I intended to use a DNA expert and had planned to question Mr. Butler more thoroughly. But I am not qualified to do

[5] By way of the Rule 59, SCRCP, Motion, Petitioner addressed the omission of the denial of indigent funds from the Order of Dismissal. App. p. 836.

that." App. p. 671, lns. 20-24. When Petitioner took the stand, he addressed trial counsel's late discussion with him about the DNA evidence, and his desire for both trial and PCR counsel to utilize a DNA expert. PCR pp. 730-731.

In Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015), the South Carolina Court of Appeals reversed the denial of relief reasoning that trial counsel was deficient for failing to discuss hiring a medical expert to more thoroughly challenge the State's medical evidence presented at trial and finding that trial counsel did not present a legitimate trial strategy for failing to consult with an expert before trial or call an expert at trial. Following a jury trial, Reeves was convicted of CSC, first degree, with a minor, and lewd act upon a child. He received concurrent fifteen year sentences. Id.

By way of a Post Conviction Relief Application, Reeves alleged that trial counsel was ineffective in failing to investigate and present the testimony of a gynecological expert witness at trial. In support of this allegation, a gynecological expert witness was called at the evidentiary hearing. When asked about the retainer of an expert, trial counsel testified, "Sir, all I remember is there was a question about money. I know I never did talk to an expert, but whether [Reeves] and I talked about that, I cannot tell you." Id. at 375, 782 S.E.2d at 751. The PCR court found Reeves failed to prove trial counsel was ineffective for failing to interview and present a medical expert at trial. The PCR court noted trial counsel testified he had not retained a medical expert because Reeves did not have the funds to do so. Id.

The Court found "trial counsel was deficient because he should have discussed hiring a medical expert with Reeves to more thoroughly challenge the State's medical evidence presented at trial." Id. at 377, 782 S.E.2d at 752-3. The Court also noted the

availability of indigent funds via statute for cases whereby an indigent defendant lacks the financial resources to obtain a needed expert. Id. The Court also found prejudice resulting from the expert's testimony offered at the evidentiary hearing. Id. at 378, 782 S.E.2d 753.

In reliance on Reeves, counsel moved for indigent funding as detailed above. It appears the Honorable Doyet A. Early exercised his discretion and denied the request based upon public policy.[6] At the motion hearing, Mr. Ryan explained that funds for experts were only approved when the expert was reasonable and necessary for the representation of the Defendant. The lower court's order denying funding does not even address this factor, and Petitioner submits that the record establishes that the expert was reasonable and necessary. Furthermore, the records establishes that Petitioner's ability to present his amended allegations and counsel's ability to call and question witnesses to meet his burden of proof was directly impacted by the court's denial of funding.[7]

In Winkler v. State, 418 S.C. 643, 663-4, 795 S.E.2d 688, 697 (2016), this Court found the lower court abused its discretion in denying Winkler's request for a continuance for time to further develop an issue involving brain damage. This Court reasoned that a remand was necessary since the lower court's ruling "left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler's brain damage." Id. at 663, 795

[6] If public policy was the basis for the denial of indigent funds, it is rather ironic that undersigned counsel was appointed due to the conflict this issue presented for the Office of Appellate Defense and indigent funds are now being utilized to pay for counsel's representation on appeal.

[7] It must be noted that Ronald Ostrowski, DNA expert, died in late 2017, so his work on the case cannot be completed as it could have been at the time of the request for funding and evidentiary hearing.

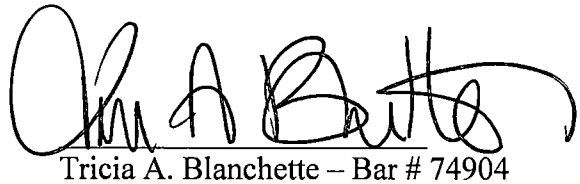
S.E.2d at 697. As a result, this Court vacated the denial of Winkler's claim and remanded for further proceedings. Id. at 664, 795 S.E.2d at 697.

Here, Petitioner was not able to present evidence to support his claims due to Judge Early's abuse of discretion in denying his request for funding. Therefore, Petitioner would urge this Court to vacate the denial of his claims and remand for further proceedings.

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/or remand as detailed above.

Respectfully submitted,



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Attorney for Petitioner

This 24 day of August 2018.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 24 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTONCOUNTY
Court of Common Pleas
Post Conviction Relief

Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Honorable Doyet A. Early, Circuit Court Judge

App. Case No.: 2018-000065

David Megett, 343610, Petitioner,

vs.

State of South Carolina Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I hand delivered this 24th day of August 2018 a copy of a Petition for Writ of Certiorari and Appendices to William Edgar Salter, III, of the Attorney General's Office, at:

Office of the Attorney General
Att: William Edgar Salter, III
Senior Assistant Attorney General
1000 Assembly Street, 5th Floor
Columbia, SC 29201

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August 24 2018

LAW OFFICE OF

TRICIA A. BLANCHETTE

RECEIVED

AUG 24 2018

S.C. SUPREME COURT

August 24, 2018
VIA HAND DELIVERY

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

RE: David Lee Meggett v. State; App. Case No.: 2018-000065

Dear Sir:

For filing in the above referenced appeal, please find an original, plus 6 copies, of a Petition for Certiorari, an unbound copy and one bound copy of the Appendices, and a Certificate of Service.

Please contact me if any additional information is needed. I appreciate your assistance with this matter.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: William Edgar Salter, III, Office of the Attorney General
David Meggett

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