STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

DAVID DWIGHT SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000262

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT 2000-CP-42-1649
David D. Smith, 245760 Applicant, v. State of South Carolina, Respondent.	ORDER GRANTING POST-CONVICTION RELIEF

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A. PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 7, 2000. The Respondent made its Return on December 18, 2001, requesting that an evidentiary hearing be held on the issue of ineffective assistance of counsel. A hearing into this matter was convened on November 6, 2002 and January 27, 2003, in the Spartanburg County Courthouse. The Applicant was present at the hearing and represented by E.P. Bill Godfrey of the Greenville County Bar. The Respondent was represented by Douglas E. Leadbitter of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf, and Donald C. Gimdt also testified for the Applicant. Louis Cox testified for the State on November 6, 2002 and Thomas A. Belenchia and Assistant Solicitor Tommy Wall testified on January 27, 2003 for the State. This Court had before it copies of the transcripts of the proceedings had against the Applicant, the records of the Spartanburg County Clerk of Court, the records of the South Carolina Department of Corrections in the case, and the Application for Post-Conviction Relief.

The Applicant is presently confined at the Perry Correctional Institution. The Applicant was indicted at the April 1977 term of the grand jury for Spartanburg County for Murder and Possession of a Firearm or Knife During the Commission of or Attempt to Commit a Violent Crime. He was represented by T. Louis Cox, Esquire. On December 4, 1997, the Applicant was found guilty, after a trial by a jury. He was sentenced by the Honorable Joseph Derham Cole to life for the Murder and to five (5) years concurrent for Possession of a Firearm or Knife during the Commission of a Violent Crime. The Applicant appealed his conviction and sentence to the South Carolina Supreme Court. The Applicant was represented by Joseph L. Savitz, III, Esq. Of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court dismissed the appeal in an Order dated December 2, 1999, and the South Carolina Supreme Court denied the Applicant's petition for rehearing in an Order dated April 6, 2000.

B. ALLEGATIONS

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons: Ineffective Assistance of Trial Counsel and Failure to call an Expert Witness.

C. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony presented at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to *S.C. Code Ann.* §17-27-80 (1976).

As to the Applicant's allegation that he received ineffective assistance of trial counsel, this Court finds that the transcript speaks for itself. Counsel for the Applicant was not diligent in his representation of the Applicant, did not perform well within the range of competence

demanded of attorneys in criminal matters and did not perform within the range of reasonable professional assistance. *State v. Pendergrass*, 270 S.C. 1, 239 S.E.2d 750 (1977); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977); *Strickland v. Washington*, 466 U.S. 668, 104 S.CT. 2052 (1984); *Butler v. State*, 286 S.C. 441, 335 S.E.2d 813 (1985); *Hill v. Lockhart*, 474 U.S. 52, 106 S.CT. 366 (1985).

In *Strickland v. Washington, supra,* the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

Further, the proper standard for attorney performance is that of reasonable effective assistance. *Sosebee v. Leeke*, 293 S.C. 531, 362 S.E.2d 22 (1987), *citing Strickland v. Washington, supra.* This Court specifically finds that the representation provided to the Applicant by his trial attorney, both prior to and during the trial proceeding, was well outside the standards of competence demanded of attorneys in criminal matters and was outside the wide range of reasonable professional assistance.

The burden of proof in a post-conviction relief case rests squarely on the Applicant's shoulders, and the Applicant has carried his burden of proof. This Applicant demonstrated to this Court reasons why further action on the part of his attorney would have benefited him, how there would have been a reasonable probability of his coming out with a better result, and why his attorney should have acted in a way other than he did.

This Court will now address the specific grounds upon which the Applicant bases his allegation of ineffective assistance of counsel.

In reviewing the trial transcript, it is clear that the State's theory is that the Applicant was upset with the deceased because the deceased owed the Applicant money from a prior drug deal. (Tr. p 36, lines 2-17); Tr. p. 85, lines 21-24); Tr. p. 288, lines 13-24); Tr. p. 289, lines 10-22). The State was attempting to show ill will, hatred as it relates to the malice element of murder. The defense theory is that the deceased attacked the Applicant in an attempt to rob the Applicant of his drugs, that a scuffle ensued, and that Applicant's gun was used in self-defense and that the gun discharged accidentally. (Tr. p. 41, lines 5-22).

In reviewing the testimony of trial counsel, Louis Cox, I find that trial counsel did not file a Brady motion in this case, but relied on the Brady motions that had previously been filed by the public defender and a previous retained counsel. However, trial counsel believed that he had all the discovery that was available. (PCR Tr. p. 8, lines 4-17). Trial counsel was presented with Applicant's exhibit number 2 and asked if trial counsel could identify the paper. Trial counsel advised that he had never seen the paper before. Trial counsel admitted that Exhibit number 2 would have aided the defense in making the defense case as Exhibit number 2 states, "That's when Finley (deceased) reached for Smith, he intended to take drugs from him." PCR Tr. p. 25, lines 3-20). This statement clearly indicates that the Applicant was being robbed of his drugs and potentially attacked by the deceased. At the continuation of the Post-Conviction Relief hearing Assistant Solicitor Tommy Wall testified that Exhibit number 2 is clearly from the solicitor's file, but that he did not know who in his office completed the interview with witness Otis Hyder, but that the interview notes were clearly generated from someone in his office. Wall further testified that he was not aware that the notes were in his file.

Exhibit number 2 would clearly have aided the defense in establishing that the Applicant was robbed and attacked by the deceased. This evidence goes directly to the lack of malice on the part of Applicant and helps to establish both his claim of self-defense and accident.

Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320 (1999) states," 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." In this case it is clear from the testimony of Assistant Solicitor Wall that the evidence was in the possession or known to the prosecution and that the evidence was never presented to the defense. It is also clear that based upon the contents of the interview notes that the evidence was favorable to the accused and was material to guilt or punishment.

The information contained in Exhibit number 2 would have corroborated, to some degree, the testimony of Morgan Ortez, who indicated in a statement to the police and testified that the deceased had attempted to rob a drug dealer earlier the day of the incident. (Tr. pp. 133- 134, lines 7-25 and 1-14). This is important because it goes to the lack of malice on the part of the Applicant and helps to establish Applicant's claim of self-defense and accident.

Furthermore, trial counsel did not call Investigator Mike Kitts as a witness for the defense. In Investigator Kitts' supplemental report (Applicant's Exhibit 10), he indicated that the deceased supposedly told someone that the deceased was going to rob a crack dealer for some crack. (PCR Tr. p. 45, lines 2-20). Trial counsel did not interview Investigator Kitts to determine where Kitts obtained the information about the plans of the deceased to rob a drug dealer. (PCR Tr. pp. 46-47, lines 24-25 and 1.) Trial counsel did not call Investigator Kitts as a witness in the defense case. (PCR Tr. p. 47, lines 2-4). Obviously this would be further corroborating testimony that Applicant was robbed and attacked by the deceased, which again goes directly to the lack of malice on the part of the Applicant and supports Applicant's claim of self-defense and accident.

Trial counsel did not obtain a ballistics expert to testify about the recovered bullet and the type of gun that fired the bullet. The Firearms Department Report of SLED (Applicant's Exhibit

number 9) determined that the bullet was a .25 automatic caliber and further named several models of guns that could have fired the bullet. Trial counsel admitted that he probably could have found an expert who could talk about the type of pistol that fired the bullet and the likelihood of an accidental discharge of the gun. Trial counsel admitted that if he had called such a witness that the testimony of the expert would have helped his case. (PCR Tr. p. 43, lines 1-24). This testimony, had it been presented at trial, would have helped to establish the defense of accident. The fact that no expert was contacted or called as a witness for the defense prejudiced the Applicant at trial and helped to lead to an adverse outcome for the Applicant.

Detective Steve Denton testified at trial that based upon the crime scene pictures there was no evidence of any struggle inside the home at all. PCR Tr. pp. 36-37, lines 23-25 and 1-5). Trial counsel admitted that he did not cross-examine Detective Denton about Denton's opinion that there was no struggle in the house, and trial counsel further admitted that he did not remember why he did not cross-examine Detective Denton about signs of a struggle in the house. (PCR Tr. p. 37, lines 2-10). Applicant's Exhibits numbers 3 – 8 are crime scene pictures. Trial counsel did not use the crime scene pictures at time of trial to establish that there was a struggle, but trial counsel did admit that if he had cross-examined Detective Denton about signs of a struggle that the testimony could possibly have helped the defense case. (PCR Tr. pp. 38-39, lines 2-25 and 1-2). The fact that trial counsel allowed the testimony that there were no signs of struggle to come in without challenge greatly prejudiced the Applicant. Further, trial counsel did not call a crime scene analysis and blood spatter expert in the defense case.

This Court finds that counsel should have retained an expert in crime scene analysis and blood spatter to testify at the trial. The Court finds that if trial counsel had retained a crime scene analysis and blood spatter expert that there would have been a reasonable probability of the

Applicant coming out with a better result and that this failure to retain a crime scene analysis and blood spatter expert was ineffective assistance of trial counsel, which prejudiced the Applicant.

At the Post-Conviction Relief hearing held in this matter on November 6, 2002, Donald C. Girndt was qualified as an expert in crime scene analysis and blood spatter, and did testify on behalf of the Applicant. (PCR Tr. p. 88, lines 14-18).

The expert testified that there was a piece of molding missing from the door of the incident location by comparing the pictures in Applicant's exhibits 7 and 8. (PCR Tr. p. 89, lines 23-25 and PCR Tr. p. 90, lines 1-14). This would indicate that there was a struggle inside the house. The expert also testified that the Applicant could possibly have knocked off the hat of the victim during the struggle as the Applicant swung with his right hand and the hat is off to the right of where the victim is lying. (PCR Tr. p. 92, lines 1-8). This testimony corroborates the Applicant's assertion that he was being attacked by the victim.

The expert testified that the bullet that killed the victim was fired from approximately four inches away and went straight in through the eye of the victim causing his death. The victim was taller than the Applicant and for the bullet to enter the victim in a straight line through the eye, the victim would have to have been leaning forward and looking down. (PCR Tr. p. 93, lines 1-180). This testimony corroborates Applicant's position that the deceased was attacking him and that the deceased had grabbed Applicant and would not let go. Further, the expert testified that the victim did not have gun shot residue on his hands, which would be consistent with the victim having his hands on the Applicant at the time the shot was fired. (PCR Tr. pp. 93-94, lines 19-7). The expert indicated that a victim would likely put his hands up in a defensive position if someone were about to fire a shot at the victim. In other words, the hands of someone about to be shot would be close to the face as if to block the bullet. In this case the expert testified that since there was no gun shot residue on the hands of the victim, it would be consistent with the victim

having his hands on the Applicant about the shoulders and neck area and thereby the victim having his hands away from the gun so that no gun shot residue would be present on the victim. (PCR Tr. p. 94, lines 8-19).

The expert further testified that he was once employed in the regulatory section of SLED and his duties were to inspect gun dealers and pawn shops. (PCR Tr. p. 96, lines 22-25). The expert explained how the Firearms Department at SLED examines a recovered bullet and generates a report. Based upon the Firearms Report from SLED and his knowledge as a crime scene investigator and former assignment to the regulatory section of SLED, the expert testified that the guns listed on the Firearms Report as the likely weapons that fired the bullet are not well manufactured and could be unsafe. He further testified that as a class characteristic that the guns are generally not safe. (PCR Tr. pp. 96-98, lines 2-25, 1-15 and 1-2). Trial counsel did not elicit any testimony regarding the type of gun at time of trial and this prejudiced the defendant. If such testimony had been presented, it would have supported the defense of accident.

Thomas A. Belenchia testified that he was co-counsel for the Applicant at time of trial. Belenchia testified that he was Applicant's business attorney and did very little criminal law. When Applicant came to Belenchia requesting representation on the murder charge, Belenchia testified that he referred the case to Louis Cox for preparation and trial of the case. Belenchia did sit at counsel table with Applicant and trial counsel, Cox, during the trial, but the trial strategy was that of Cox and not Belenchia. Belenchia's only role at trial was to present favorable character evidence on the part of Applicant.

Applicant testified that he had just sold some crack and it was late at night. He was going home because he had a job to report to in North Carolina the next day. PCR Tr. pp. 69-70, lines 10-25 and 1-8). While he was driving home, his pager goes off and he recognizes the number. The house is close by so he drove there. (PCR Tr. p. 70, lines 9-25). When he arrived at the

house, Angie Smith came out and got into Applicant's car. She was giving Applicant the directions to where they were going. Applicant did not know whom he was going to meet. (PCR Tr. p. 70, lines 12-25).

When the Applicant and Angie Smith arrive at the house she directed Applicant to, Applicant gave Angie Smith the drugs to sell. Angie Smith went inside, but shortly came back out and advised that the deceased did not want to deal with her but rather with Applicant. (PCR Tr. p. 72, lines 2-15, Trial Tr. p. 84, ln. 22-23). Applicant put the drugs in his pocket and went into the house. The deceased advised that he wanted $50.00 worth of crack, and Applicant put it on the table so the deceased could check out the drugs. The deceased tells Applicant that he does not have any money, but will pay Applicant tomorrow. Applicant advises that he will not be in town tomorrow. (PCR Tr. pp. 72-73, lines 16-25 and 1-5).

The Applicant further testified that the deceased advised that he was just going to take the drugs. Applicant pulled out his gun and held it by his side. The Applicant asks for his stuff back. The deceased walks towards Applicant and tries to knock the gun out Applicant's hand and grabs Applicant in the chest. Applicant testified that he then threw his left hand and grabbed deceased in the chest and started hitting deceased with his right hand. (PCR Tr. p. 73, lines 10-19).

Applicant testified that the first time he hit the deceased; it did not have any effect. The deceased still was grabbing onto Applicant. Applicant swung at the deceased again. The deceased started pushing Applicant and they fell out of the door. While they were in the air, Applicant's hand came down, and Applicant heard the gun go off. (PCR Tr. p. 74, lines 9-16). Applicant testified that he did not intend to pull the trigger. (PCR Tr. p. 74, lines 17-18).

Applicant got up off the ground, and he testified that he was shocked because Angie Smith took him there to sell drugs and he ends up being robbed and attacked. (PCR Tr. p. 74, lines 19-25).

Applicant testified that he did not receive effective representation from trial counsel because trial counsel failed to investigate any of the state witnesses and did not hire an expert witness. (PCR Tr. p. 77, lines 2-22). All of which the Applicant believes would have helped him in his defense of the charge and also in the presentation of his defenses of self-defense and accident.

The facts of the case at trial lead the trial judge to charge the law of murder, voluntary manslaughter, involuntary manslaughter, self-defense and accident to the jury. Trial counsel failed to investigate the witnesses, did not properly cross-examine witnesses, did not cross-examine based upon Investigator Kitts supplemental report and did not call Investigator Kitt as a witness for the defense. Clearly the testimony of the expert in crime scene analysis and blood spatter would have aided the jury in arriving at its decision. If these things had been done, there is a reasonable probability the Applicant would have come out with a better result. The failure of trial counsel to properly investigate, call witnesses, and retain and call an expert in crime scene analysis and blood spatter for the defense prejudiced the Applicant and is ineffective assistance of counsel.

D. CONCLUSION

In summary upon careful review of the transcript and upon hearing the testimony presented, this Court finds the Applicant's allegations are substantiated by the record and the testimony presented. Trial counsel for the Applicant was deficient and ineffective in not properly investigating the witnesses, in not fully and effectively cross-examining witnesses, in not calling witnesses favorable to the defense, and in not retaining an expert in crime scene and blood spatter analysis.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be granted; and

2. That the Applicant's conviction for murder and possession of a firearm or knife during the commission of a violent crime be reversed and remanded to the Court of General Sessions for Spartanburg County for a new trial.

AND IT IS SO ORDERED this 13 day of May 2003.

Donald W. Beatty
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina.

A CERTIFIED COPY

CLERK OF COURT
SPARTANBURG COUNTY
BY: D.C.
DATED 6/5/03

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Donald W. Beatty, Circuit Court Judge

Case No. 00-CP-42-1649

David D. Smith. . . . . Respondent,

v.

State of South Carolina, ... Petitioner.

PETITION FOR
WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the PCR Court err in finding that trial counsel was ineffective for failing to failing to file his own formal Rule 5/Brady motion?

2. Did the PCR Court err in finding that trial counsel was ineffective for failing to call a ballistics expert as a defense witness?

3. Did the PCR Court err in finding that trial counsel was ineffective for failing to call a crime scene analyst or blood splatter expert as a defense witness?

4. Did the PCR Court err in finding that trial counsel was ineffective for failing to interview or call Investigator Mike Kitts as a defense witness.?

5. Did the PCR Court err in finding that trial counsel was ineffective for failing to adequately cross examine Detective Steve Denton?

STATEMENT OF THE CASE

The Respondent is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Respondent at the April 1997 term of General Sessions for murder and possession of a firearm or knife during the commission of or attempt to commit a violent crime (97-GS-42-1639). T. Louis Cox, Esq. represented the Respondent.

On December 4, 1997, the Respondent was found guilty, after a trial by jury, of murder and possession of a firearm or knife during the commission of a violent crime. The Honorable J. Derham Cole sentenced the Respondent to life for the Murder and to 5 years concurrent for the Possession of a Firearm or Knife during the Commission of a Violent Crime. The Respondent appealed his conviction or sentence to the South Carolina Supreme Court. The Respondent was represented by Joseph L. Savitz, III, Esq. of the South Carolina Office of Appellate Defense. The South Carolina Supreme Court dismissed the appeal in an Order dated December 2, 1999 and the South Carolina Supreme Court denied the Respondent's petition for re-hearing in an Order dated April 6, 2000.

The Respondent subsequently filed an application for post conviction relief (PCR) on June 7, 2000 alleging that he is being held in custody unlawfully due to the ineffective assistance of his trial attorneys. Evidentiary hearings were convened at the Spartanburg County Courthouse on November 6, 2002 and January 31, 2003. By written order dated May 23, 2003 the Honorable Donald W. Beatty granted the PCR application. Petitioner filed a timely notice of appeal. The Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

A post conviction relief court's conclusions that are not supported by any probative evidence cannot be upheld. Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. The PCR Court erred in finding that trial counsel was ineffective for failing to failing to file his own formal Rule 5/Brady motion.

Trial counsel was not ineffective for failing to file a Rule 5/Brady motion. Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland v. Washington. 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 v. State, 300 S.C. at 117-

18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In this case, the PCR Court's finding that trial counsel was ineffective for failing to make a Rule 5/Brady motion was error. Trial counsel took over the representation after the Respondent's first attorney was relieved. App. p. 505-506. Trial counsel received the discovery that had been provided to the prior attorney of record in response to his Rule 5/Brady motion. App. p.507, ln. 4-10. At the PCR evidentiary hearing, the Respondent presented a document that was taken from the Solicitor's file (Exhibit 2). App. p. 632. Trial counsel testified that he could not recall if he ever saw Exhibit 2. App. p.524, ln.3-13. Tommy Wall, the assistant solicitor that prosecuted the case testified that he did not think that Exhibit 2 was subject to Rule 5/Brady. Wall explained that the document was probably an investigator's notes from an interview, not a statement. App. p. 617, ln. 9-13; p. 623, ln. 12-22. Mr. Wall suggested that the document was attorney work product. App. p. 617, ln. 14-17. Petitioner submits that it is also just as likely that without authentication of where, when, and who generated the document, it could have been notes from the trial and is not probative of a Rule 5/Brady violation. Nevertheless, Wall further testified that Exhibit 2 may have been investigator's notes, was not exculpatory, and had no impeachment value because it simply reiterated the trial testimony. App. p. 618-619.

The PCR Court erred in granting relief on this ground for two reasons. First, the Respondent did not carry his burden to show that the document was subject to Rule 5/ Brady disclosure. Rule 5/ Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989 (1987); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). This rule applies to impeachment evidence as well as exculpatory evidence. State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1992). The only evidence adduced at the PCR evidentiary hearing concerning

Exhibit 2 was from Tommy Wall, who wholly refuted that Exhibit 2 constituted a Rule 5/Brady violation. Since the document was not subject to disclosure, the PCR Court erred in finding ineffective assistance from failing to make a formal Rule 5/Brady motion and granting the PCR application on this ground.

Second, even if the document was subject to Rule/5 Brady, the PCR Court erred in finding that the result of the proceeding would have been different had Exhibit 2 given to the defense. To show a Rule5/Brady violation, an applicant must show a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985). In this case, Wall testified that the notes on Exhibit 2 essentially mirrored the evidence that came out at the trial. App. p. 618,ln. 17-19. A review of the record clearly shows that Mr. Wall's assessment of the evidence from the trial and the contents of Exhibit 2 were essentially consistent. There was nothing new or different in Exhibit 2 that was exculpatory or had impeachment value. The PCR Court erred in finding probative evidence to support its conclusion that the Respondent carried his burden to show that turning the document over the defense would have lead to a different result at the trial. United States v. Bagley. Since the PCR Court erred in concluding that the Respondent carried his burden to show prejudice from the failure to make a formal Rule5/ Brady motion, the Court thus erred in its conclusion that trial counsel rendered ineffective assistance of counsel for failing to file his own formal Rule 5/Brady motion. Scott v. State; Strickland v. Washington. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the grant of post conviction relief.

II. The PCR Court erred in finding that trial counsel was ineffective for failing to call a ballistics expert as a defense witness.

Trial counsel was not ineffective for failing to call a ballistics expert. A defense attorney is not ineffective for making valid trial strategy decisions. Caprood v. State, 338 S.C. 103, 525

S.E.2d 514 (2000). Trial counsel explained that since the weapon was not recovered, he could not present evidence such as a ballistics expert to support an accidental shooting theory. App. p. 547, ln.13-21; 541,ln. 13-20. Trial counsel clearly articulated that he was presenting a self defense or manslaughter case on the theory that it was a "drug deal gone bad". App. p. 546, ln. 11-18; p. 551-552. Having a ballistics expert would not have supported the defense. Trial counsel's strategy decision not to get a ballistics expert was reasonable. Therefore, the PCR Court erred in finding that the Respondent failed to carry his burden to show that trial counsel's representation fell below the standard of professional reasonableness for a criminal defense attorney for failure to call a ballistics expert. Caprood v. State; Strickland v. Washington; Cherry v. State.

The Respondent also failed to carry his burden of proof to show a reasonable probability that the outcome of the trial would have been different but for trial counsel's alleged failure to obtain a ballistics expert. Johnson v. State. Trial counsel admitted that he may have been able to find a ballistics expert to testify at trial concerning the types of weapons that can fire .25 ammunition and that testimony probably would have helped the defense if the gun had been recovered. App. 542, ln. 15-24. The PCR Court's finding that trial counsel admitted a mistake in failing to contact a ballistics expert is not supported by the record. Other than Girndt's unsupported and spurious opinion[1] about weapons, the Respondent offered no probative evidence to establish that ballistics evidence **pertaining to the gun that was used** would have benefitted the defense. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998)(an applicant that does not show what additional evidence counsel could have presented to support his defense or show what counsel could have discovered or what other defenses he would have requested counsel pursue cannot carry his burden to prove prejudice). No one knew what type of gun was used in this

[1] Girndt admitted that he was not a ballistics expert. App. p. 600, ln. 8-12. Therefore, Girndt's ballistics opinions have no probative value.

murder. Since the gun was never found, a ballistics expert could only speculate about statistics on gun reliability from a list of possible guns. Even if the expert could opine that some of the guns on the list were known to be unreliable, that testimony had no probative value because it was unknown what make the gun was or what the condition of it was. It is just as possible that the Respondent's gun was one of the reliable ones from the list or a perfectly functioning one from the list of unreliable guns. A ballistics expert opinion as to gun reliability would have had no probative value in this case. The PCR Court erred in finding that the Respondent carried his burden to show deficient representation and resulting prejudice as to the alleged failure to obtain a ballistics expert. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court's grant of the PCR application.

III. The PCR Court erred in finding that trial counsel was ineffective for failing to call a crime scene analyst or blood splatter expert as a defense witness.

Trial counsel was not ineffective for failing to call a crime scene analyst. A criminal defense attorney is not ineffective for failing to present evidence that is cumulative. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In this case, trial counsel's theory was to present a self defense or voluntary manslaughter case based on the theory that the Respondent and the victim fought as a result of a drug deal gone bad. App. p. 546, ln. 11-18; p. 551-552. A careful review of the trial transcript reveals that there was ample evidence adduced at trial concerning the victim and the Respondent scuffling and fighting. Girndt's PCR testimony as an expert added nothing to the defense.

As to Girndt's crime scene analysis opinions, Girndt admitted that he had not been to the crime scene itself and simply based his conclusions on the pictures of the crime scene taken by law enforcement. App. 633-635. Girndt testified that a crime scene analyst could have used the

pictures to opine that there was a scuffle between the victim and the Respondent. App. p. 588-590; 597-598. Girndt testified that a photograph of a hat lying on the ground next to the victim (App. p. 633) showed that the hat could have been knocked off during the scuffle. Girndt's "expert" opinion was that the picture of a hat on the ground was indicative of a fight. App. p. 590, ln. 20-25. Girndt further testified that a missing piece of molding from the trailer where the murder occurred (App. 635) also indicated that a fight could have occurred there. App. p.5 90, ln. 20-25. Obviously, since Girndt had never been to the crime scene, Girndt had no prior knowledge of the condition of the trailer prior to the murder. His "expert" opinions and conclusions drawn from browsing through a few crime scene photographs were unfettered speculation and clearly had no probative value, yet the PCR Court relied on this testimony in finding that trial counsel was deficient and the Respondent was prejudiced by not having a crime scene analyst expert to opine as to evidence from a few crime scene photos of a scuffle or fight.

Furthermore, Girndt's opinions concerning the various trajectories of the bullet (positions of the victim and Respondent while scuffling), lack of gunshot residue, and blood splatter were, again, wild speculation that had no probative value. Respondent submits that bullet trajectory opinions had no bearing on any issue in the trial that would have helped the defense. As a practical matter it is impossible to glean anything probative from bullet trajectory analysis where a shooting occurs during a fight. Common sense demonstrates that the bodies and the weapon could have been contorted in all manner of awkward directions or positions during the scuffle or fight. Thus, any type of "expert" conclusion about lack of malice, self defense or an accidental shooting gleaned from bullet trajectory analysis would have no probative value in this case.

The lack of gunshot residue on the victim's hands was equally worthless because the lack of gunshot residue could be explained by any number of reasonable hypotheses in the context of

the facts of this case. As in the bullet trajectory proof, the presence or not of gunpowder residue on the victim's hands had no probative value in contesting the State's proof of malice, supporting the self defense theory, or to prove the shooting was accidental.

Girndt's opinion concerning blood splatter was perhaps the most unsupported opinion offered to the PCR Court. Girndt offered little or no explanation of how a blood splatter expert opinion would have helped the defense attack the State's proof of malice, to support the self defense theory, or to prove the shooting was accidental.

All of Girndt's opinions were so specious that they could not have had any evidentiary value for the defense, yet the PCR Court relied on Girndt's various opinions in finding deficient representation and resulting prejudice from trial counsel not having experts render these outlandish opinions to contest the State's case at trial. Therefore, the PCR Court erred in finding probative evidence that trial counsel's representation fell below reasonable professional norms and resulting prejudice from failing to present an expert, such as Girndt, to give opinions as to crime scene analysis, bullet trajectories, lack of victim gunshot residue, and blood splatter. Scott v. State; Cherry v. State; Strickland v. Washington. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the PCR Court's grant of the PCR application.

IV. The PCR Court erred in finding that trial counsel was ineffective for failing to interview or call Investigator Mike Kitts.

Trial counsel was not ineffective for failing to interview or call Investigator Mike Kitts. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Id. Our courts are understandably wary of second-guessing defense counsel's trial tactics. Where counsel articulates valid reasons for employing a certain strategy, counsel's

choice of tactics will not be deemed ineffective assistance. Id. In this case, the PCR Court erred in finding deficient representation for trial counsel's failure to call one of law enforcement's investigators, Mike Kitts, as a defense witness. Trial counsel testified that he did not consider calling Kitts because police officers don't make good defense witnesses. App. p. 547, ln. 2-8.

Moreover, the Respondent did not call Mike Kitts at the PCR evidentiary hearing and simply speculated that his testimony would have been beneficial to the defense. The failure to call critical witnesses may be ineffective assistance of counsel if the applicant establishes prejudice. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The Respondent relied on information from the solicitor's file concerning a report that Kitts prepared during the investigation to then speculate as to what Kitts *may* have testified to. A PCR applicant's mere speculation what an alleged beneficial witness' testimony would have been does not satisfy the prejudice prong. Id. The PCR Court thus erred in finding the Respondent carried his burden to show that trial counsel's representation fell below reasonable professional norms and resulting prejudice from the decision not to call Kitts as a defense witness. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the grant of the PCR application.

V. The PCR Court erred in finding that trial counsel was ineffective for failing to adequately cross examine Detective Steve Denton.

Trial counsel was not ineffective in his cross examination of Detective Steve Denton. The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995).

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In this case, trial counsel testified that he did not cross examine Steve Denton more on the issue of the struggle or fight in the house because he had other evidence to support the claim of a fight in the house. App. p. 549, ln. 3-21. The PCR Court erred in not recognizing a valid trial strategy with regard to the cross examination of Steve Denton. Id. Moreover, the PCR Court erred in finding that cross examining Denton on the issue of the struggle would have produced a different result at the trial. Id. Respondent did not call Steve Denton as a PCR evidentiary witness, did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Therefore, the PCR Court's conclusion that trial counsel's representation was deficient and that the Respondent was prejudiced by the failure to cross examine Detective Denton was not supported by probative evidence. Scott v. State; Strickland v. Washington. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the grant of the PCR application.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the grant of post conviction relief. If this Court grants certiorari, the Petitioner asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

HENRY McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DOUGLAS E. LEADBITTER
Assistant Attorney General

P.O. Box 11549
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By: _____
ATTORNEYS FOR THE PETITIONER

Columbia, South Carolina
January 9, 2004

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
The Honorable Donald W. Beatty, Circuit Court Judge

DAVID DWIGHT SMITH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the petition for writ of certiorari and appendix has been served upon opposing counsel, Robert M. Pachak, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 9th day of January, 2004.

Marcia E. Ward
MARCIA E. WARD
LEGAL ASSISTANT

SWORN to before me this 9th
day of January, 2004.

_____(L.S.)
Notary Public for South Carolina.
My Commission Expires: 10/16/04

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Donald W. Beatty, Circuit Court Judge

DAVID D. SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201

ATTORNEY FOR RESPONDENT

INDEX

QUESTION PRESENTED

Whether there was any evidence to support the PCR judge's findings that trial counsel was ineffective in representing respondent?

STATEMENT OF THE CASE

Respondent was indicted for murder and possession of a firearm at the April 1997 term of the Spartanburg County Grand Jury. He was represented by T. Louis Cox, Esquire. Respondent proceeded to trial on December 4, 1997, before the Honorable J. Derham Cole and a jury. He was found guilty as charged. He was sentenced to life imprisonment for murder and to five (5) years for possession of a firearm.

Respondent appealed his conviction and it was dismissed by this Court on December 2, 1999.

Respondent filed an application for post-conviction relief on June 7, 2000. Petitioner filed a return dated December 18, 2001, and requested a hearing.

On November 6, 2002, an evidentiary hearing was held in the Spartanburg County Court of Common Pleas. The Honorable Donald W. Beatty presided. Respondent was present and was represented by E. P. Godfrey, Esquire. Petitioner was represented by Douglas E. Leadbitter, Assistant Attorney General. Respondent testified in his own behalf and presented the testimony of Louis Cox and Donald Gimdt. A second hearing was held on January 31, 2003, and Tommy Wall was called to testify for petitioner.

On May 23, 2003, Judge Beatty issued an order granting respondent post-conviction relief.

Petitioner has appealed and filed a petition for writ of certiorari with this Court on January 9, 2004.

This return follows.

ARGUMENT

There was sufficient evidence to support the PCR judge's findings that trial counsel was ineffective in representing respondent.

This Court has repeatedly held that it must affirm the findings of the PCR judge if there is any evidence of probative value to uphold those findings. Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001); Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999); Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994); Jolley v. State, 298 S.C. 296, 379 S.E.2d 900 (1989); Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1988).

Respondent was tried in the shooting death of Robert Finley. The state's theory was that respondent was upset with Finley because Finely owed him money from a prior drug deal. (App. p. 36, lines 2-17; app. p. 85, lines 21-24; app. p. 288, line 13 – p. 289, line 22). Respondent shot Finley trying to collect the debt. (App. p. 625, lines 20-25). The defense's theory was that Finley attacked respondent in an attempt to rob him of his drugs. The two scuffled, respondent used his small .25 caliber pistol in his palm to hit Finley and the gun went off accidentally. (App. p. 41, lines 5-22; app. p. 192, line 4 – p. 193, line 23).

The trial judge charged the jury on murder, voluntary manslaughter, involuntary manslaughter, accident and self-defense. (App. p. 307, line 10 – p. 320, line 6).

At the PCR hearing, trial counsel testified that he did not file a Brady motion in this case, but relied on the Brady motions previously filed by others. (App. p. 507, lines 4-10). Trial counsel admitted that he had never seen Exhibit #2 (App. p. 632), where a witness stated, "That's when Finley reached for Smith, he intended to take drugs from him." Trial counsel acknowledged that the statement would have helped the defense's theory that Finley was trying to rob drugs from respondent. (App. p. 524, lines 3-20). The PCR judge found that the exhibit "would clearly have

aided the defense in establishing that the applicant was robbed and attacked by the deceased. This evidence would have gone directly to the lack of malice on the part of applicant and would have helped establish both his claim of self-defense and accident." (App. p. 649).

The PCR judge found that Exhibit #2 also would have corroborated the testimony of Morgan Ortez, who testified that Finley had tried to rob another drug dealer earlier that same date. (App. p. 650, citing app. p. 133, line 7 – p. 134, line 14).

Trial counsel failed to call Investigator Mike Kitts as a witness for the defense. In his supplemental report, (App. p. 638 – p. 639), Kitts wrote that Finley told someone he was going to rob a crack dealer for some crack. (App. p. 544, lines 2-20; app. p. 545, line 24 – p. 546, line 4). The PCR judge found that this would have further corroborated respondent's defense. (App. p. 650).

The PCR judge found that trial counsel did not obtain a ballistics expert to talk about the .25 automatic caliber weapon and its likelihood of accidental discharge. Trial counsel admitted that he could have found such an expert and that it would have helped his case. (App. p. 650 – p. 651, citing app. p. 542, lines 1-24).

Trial counsel also failed to cross-examine Detective Denton about signs of a struggle in the victim's house and did not use crime scene photos to show that there was a struggle. Counsel admitted that this could have helped his case. (App. p. 651, citing app. p. 535, line 23 – p. 536, line 10; app. p. 537, line 2 – p. 538, line 2).

Respondent also presented testimony from an expert in crime scene analysis, Donald Girndt. The PCR judge found that crime scene photos showed moulding missing from the door of the victim's house, indicating a struggle. Evidence also supported that the victim was leaning over

respondent with his hands on respondent. The absence of gun shot residue on the victim's hand also corroborated the fact that the victim's hands were on respondent. (App. p. 652).

These findings by the PCR judge more than satisfy the any evidence standard used by this Court in upholding the decision of a PCR judge. In addition, as in Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991), counsel admitted that his errors could have made a difference.

CONCLUSION

Petitioner's writ should be denied.

Respectfully submitted,

Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR RESPONDENT.

This 23rd day of February, 2004

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Donald W. Beatty, Circuit Court Judge

DAVID D. SMITH,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Douglas E. Leadbitter, Esquire, this 23rd day of February, 2004.

Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 23rd day
of February, 2004.

Sandra B. Wessinger (L.S.)
Notary Public for South Carolina
My Commission Expires: February 3, 2005

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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December 1, 2004

Assistant Attorney General Douglas E. Leadbitter
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Smith, David D. v. State

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

December 01, 2004."

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

CLERK

DES/klb

cc: Assistant Appellate Defender Robert Pachak