STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable Bentley Price, Circuit Court Judge

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ABDUL FURQUAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001173

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# PETITION FOR WRIT OF CERTIORARI

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# INDEX

## ISSUE PRESENTED

Did the PCR judge err in finding that trial counsel was not ineffective where counsel failed to elicit testimony that Petitioner's DNA was excluded from the gun, gloves or bandanas that were allegedly used in the commission of the crime?

## STATEMENT

Petitioner was indicted in May of 2012 by the Horry County grand jury for burglary first degree, attempted murder, and unlawful possession of a firearm. App. 480. The solicitor served Petitioner with notice of his intent to seek a sentence of life without parole pursuant to S.C. Code Ann. §17-25-45 on July 23, 2013. App. 257.

On September 18, 2013, Petitioner's case was called to trial before the Honorable Larry B. Hyman, Sr. and a jury. App. 14. Petitioner was represented by Ryan Stampfle and the state was represented by Joshua Holford. App. 14. The jury found Petitioner guilty as charged. App. 256. The judge sentenced him to life without the possibility of parole pursuant to S.C. Code Ann. §17-25-45. App. 262, l. 22 – 263, l. 7.

David Moran testified at Petitioner's trial that on October 16, 2011 at around 11:30 p.m. he heard a knock on his front door. App. 188, l. 1 – 189, l. 13. Moran recalled: "I opened the door and I saw two gentlemen there, bandanas covering their faces . . . all I could see was pretty much their eyes." App. 189, ll. 15 – 25. Moran said that the two men forced their way into his house and one of them punched him in the face and the other shot him with a silver revolver. App. 190, ll. 1 – 25.

Tyler Topolski, Samantha Topolski,[1] and Lindsay Smith all testified that they were with Petitioner and Jeremy Fleming[2] the day of the alleged crime. According to Tyler and Samantha, Fleming asked them to give him a ride to someone's house so that he could get money. App. 76, l. 19 – 77, l. 3; app. 87, ll. 20 – 25. Lindsay recalled that she drove the other four individuals,

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1 Tyler and Samantha are brother and sister.

2 Fleming was Petitioner's co-defendant who testified against Petitioner at his trial.

Tyler, Samantha, Fleming and Petitioner, to Ivystone Apartments where Petitioner and Fleming needed to get money from somebody. App. 107, l. 15 – 108, l. 6.

Tyler, Samantha and Lindsay each claimed that when they got to Ivystone Apartments, Petitioner and Fleming got out of the vehicle and walked towards the apartment building together. App. 77, l. 10 – 14; app. 89, ll. 6 – 22; app. 108, ll. 9 – 11. They heard what sounded like a gunshot a couple of minutes later, followed by Petitioner and Fleming running back to the car. App. 78, ll. 11 – 21; app. 90, l. 21 – 91, l. 6; app. 108, ll. 11 – 18.

Tyler, Samantha and Lindsay each said that Petitioner was carrying a gun[3] in his hand when he got back to the car and that he pointed the gun at Lindsay's back and told her to drive. App. 79, ll. 8 – 21; app. 91, ll. 8 – 12; app. 108, ll. 18 – 22. Tyler testified that Fleming had on gloves with a skull design on them but that neither Fleming nor Petitioner had their faces covered when they got out of the car and approached the apartment. App. 78, ll. 3 – 10. Samantha said that Petitioner and Fleming were wearing hoodies and gloves; Lindsay claimed that they also both had bandanas covering their faces. App. 89, ll. 23 – 25; app. 108, l. 23 – 109, l. 4.

Petitioner's co-defendant, Fleming, testified against Petitioner. Fleming claimed that he went to Moran's apartment to buy marijuana but as soon as the door was opened, he ran away. App. 172, ll. 19 – 22. Fleming denied having a gun and said Petitioner had a revolver. App. 172, l. 25 – 173, l. 5. Fleming did however admit that he was wearing skeletal gloves but maintained that he never had any type of mask over his face. App. 173, ll. 22 – 25; app. 177, ll. 11 – 12. He also denied ever having the gun or shooting the gun. App. 174, ll. 1 – 2; app. 175, ll. 20 – 23; app. 176, ll. 2 – 3; app. 185, ll. 1 – 5.

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[3] Tyler described the gun as a silver revolver with a black handle. App. 79, ll. 12 – 16.

The Court of Appeals affirmed Petitioner's convictions on direct appeal. State v. Furquan, No. 2016-UP-479 (Filed November 16, 2016); App. 310.

Petitioner filed his PCR application on November 27, 2017. App. 360. The state filed its return and partial motion to dismiss on March 5, 2018. App. 374. An evidentiary hearing was held on March 29, 2019 before the Honorable Bentley Price. App. 383. Petitioner was represented by James Falk and the state was represented by Jacob Isenberg. App. 383. Testifying at the hearing were Petitioner and his trial counsel, Ryan Stampfle. App. 384. The PCR judge denied Petitioner's application for relief. App. 456.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in finding that trial counsel was not ineffective because counsel failed to elicit testimony that Petitioner's DNA was excluded from the gun, gloves or bandanas that were allegedly used in the commission of the crime.

**Relevant Facts**

SLED conducted DNA analysis on several pieces of evidence in Petitioner's case including a silver revolver found at Petitioner and Fleming's residence along with two bandanas and a pair of gloves. App. 454. The SLED DNA analyst concluded that Petitioner's DNA was not on any of these items. App. 454. This information was never presented to the jury at Petitioner's trial.

Stampfle testified at Petitioner's PCR hearing that he had considered eliciting testimony regarding the DNA report but decided not to because he did not want to lose last closing argument and that "it didn't exonerate [Petitioner]." App. 425, ll. 1 – 14. Counsel also claimed that when he spoke with the SLED agents about the DNA report in preparation for trial, they indicated that if they were called to testify by the defense, they would have pointed out that "there wasn't some smoking bullet in the DNA evidence that said [Petitioner] didn't do it." App. 426, ll. 19 – 24. Counsel continued: "It wasn't like it was a paternity test and he's either the father or not the father. Just that those particular items, he hadn't worn them, or they had been cleaned." App. 426, l. 24 – 427, l. 5. Counsel acknowledged that he did not cross examine the lead investigator regarding the absence of Petitioner's DNA on the gun, bandanas, and gloves. App. 427, ll. 6 – 24.

Petitioner's PCR counsel argued to the PCR judge that trial counsel could have cross examined the lead investigator regarding the lack of DNA connecting Petitioner to the scene in

order to get this information before the jury without losing last closing argument. App. 445, ll. 4 – 19. PCR counsel further pointed out that had the fact that Petitioner's DNA was not found on any of the key items allegedly involved in the crime, trial counsel would have been able to persuasively argue to the jury that Petitioner was not guilty. App. 446, ll. 1 – 4.

The PCR judge found that trial counsel conducted a reasonable investigation into the SLED DNA report by interviewing the SLED agents involved in testing the DNA samples and subpoenaing them for trial. App. 460 – 461. The PCR judge further found that Petitioner failed to show prejudice because there was overwhelming evidence that Petitioner was present at the scene. App. 463.

**Discussion**

In order to prove ineffective assistance of counsel, Petitioner must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

Criminal defense attorneys have a duty to conduct a reasonable independent investigation of the facts and circumstances of the case. Ard v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (2007). "[C]ounsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment." Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014).

In this case, counsel knew of the DNA evidence which excluded Appellant from very important items that were alleged to have been used in the crime and still failed to introduce this evidence to the jury. Counsel's reason for not wanting to lose last closing argument is belied by his admission that he could have elicited this favorable DNA evidence through cross examination of the lead investigator and thus would not have lost the right to last closing argument. App. 427, ll. 6 – 24.

Counsel's reasoning that he did not introduce the DNA evidence because it did not exonerate Petitioner is equally unpersuasive. Whether a piece of evidence completely exonerates the defendant is not the standard by which a reasonable trial attorney chooses to introduce it or not. The fact is that the DNA evidence showing that Petitioner was excluded from all the items alleged to have been involved in the crime would have likely changed the outcome of the case. DNA evidence is some of the most impactful testimony that can be introduced in front of a jury. There can be no doubt that had Petitioner's DNA been on any of the items tested, the state would have relied on it heavily. Conversely, because Petitioner's DNA was excluded from these items, a reasonable defense attorney would have raised this very important evidence to the jury in support of an acquittal.

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), this Court found that trial counsel was ineffective for failing to properly challenge the state's gunshot residue evidence.

Specifically, the state's expert at trial testified that there was no gunshot residue on the victim's hands. Id. at 322-323, 642 S.E.2d at 592. The state used this evidence to argue that the victim was not handling the gun which undermined Ard's accident defense. Id. at 325, 642 S.E.2d at 593.

At the PCR hearing in Ard, the gunshot residue expert who had testified at trial stated that had defense counsel cross examined him regarding the particles that were found on the victim's hands, he would have acknowledged that the particles were associated with gunshot residue while not "technically" meeting the SLED threshold for calling it a positive identification. Id. at 328, 642 S.E.2d at 595. The expert also admitted that the particles found on the victim's hands had two of the three required elements for gunshot residue which could indicate that she had handled the firearm. Id. This Court affirmed the PCR judge's grant of relief because trial counsel's failure to adequately challenge the gunshot residue resulted in significant prejudice to the defendant in the guilt phase of his trial. Id. at 332, 642 S.E.2d at 597.

In this case, trial counsel admitted at the PCR hearing that he and the assistant solicitor agreed to a "mere presence" instruction being given to the jury and mere presence was essentially the argument counsel made in closing to the jury. App. 231, l. 5 – 235, l. 12; app. 428, ll. 2 – 12. Had trial counsel elicited the testimony that Petitioner's DNA was excluded from the gun that was used to shoot the victim it would have significantly benefited his mere presence argument. This is especially true because three witnesses testified that it was Petitioner who had the gun when he and Fleming got back to the car after the shooting had occurred.[4] The DNA evidence could have been used to effectively contradict the testimony of these three witnesses.

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[4] Unfortunately, trial counsel commented in his closing argument that he did not dispute that Petitioner took possession of the gun after the shooting occurred. App. 234, ll. 1 – 6. However, had trial counsel been effective and elicited the testimony that Petitioner's DNA was excluded

Finally, trial counsel's testimony at the PCR hearing that he did not want to call the SLED agents to introduce the DNA evidence because they would testify that the absence of Petitioner's DNA from the tested items could have indicated that the items had been "cleaned" is also unavailing. Had these items been "cleaned," then there would have been *no* DNA found on them at all. However, there was DNA found on the gun, both gloves, and one of the bandanas. App. 454. While Petitioner was excluded from all these items, Fleming was not. This suggests that these items were not cleaned as was supposedly suggested to trial counsel by the SLED agents. It also suggests that Petitioner did not come into contact with these items, which were essential to the state's theory of the case.

In Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014), the Court of Appeals found that trial counsel was ineffective for failing to obtain DNA testing on blood that was found at the crime scene. The state had alleged that Bagwell committed a burglary and that the alleged victims had seen the defendant exiting through a glass door, which was shattered. Id. at 262, 763 S.E.2d at 632. Both alleged victims testified that Bagwell had blood on his face from an apparent cut. Id. The state also introduced a photograph of Bagwell allegedly taken after the burglary which showed him with blood on his face. Id. The state then argued in its closing argument that the cut on Bagwell's face came from the glass door at the scene of the burglary. Id.

In Bagwell, trial counsel testified at the PCR that she did not request DNA testing on the blood found on the glass door at the scene because she thought that the state was going to test it. At the PCR hearing, trial counsel said that the results of the DNA test would not have exonerated Bagwell but that it "may have affected" the outcome. Id. at 263, 763 S.E.2d at 632-633. The

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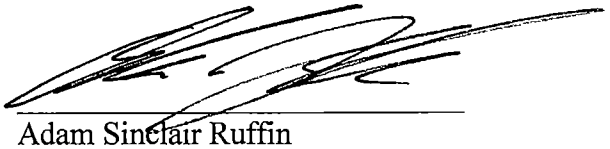
from the gun and Fleming's DNA could not be excluded from the gun, he would not have conceded that Petitioner was ever in possession of the gun.

Bagwell Court ultimately concluded that trial counsel was ineffective because her failure to obtain DNA testing was unreasonable since the state relied on the glass door and the cut on Bagwell's face as evidence of his guilt. Id. at 265, 763 S.E.2d at 634. Furthermore, Bagwell presented DNA evidence at his PCR hearing that showed his DNA was excluded from the blood on the glass door at the scene. Id. at 263, 763 S.E.2d at 632. As a result, the Bagwell Court found that trial counsel's failure to investigate and introduce this evidence at trial prejudiced the defendant. Id. at 268, 763 S.E.2d at 635.

As in Bagwell, the DNA evidence here was also important. In this case the state relied on the testimony of three eyewitnesses who stated that Petitioner was in possession of the gun when he and Fleming returned to the car after they heard the gunshot. The DNA evidence which excluded Petitioner's DNA from the gun but did not exclude Fleming's DNA from the gun significantly undermined the testimony of these three witnesses. The fact that Petitioner's DNA was also excluded from the bandana and the gloves also undermined these witnesses' testimony that Petitioner was wearing a bandana. Trial counsel was ineffective in failing to elicit this extremely important DNA evidence and Petitioner was prejudiced as a result. See Ard v. Catoe, 372 S.C. 318, 331-332, 642 S.E.2d 590, 597 (2007); Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (Ct. App. 2014).

## CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of March, 2020.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Abdul Furquan, #260214, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of March, 2020.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 19th day of March, 2020.

(L.S)

Notary Public for South Carolina
My Commission Expires: September 27, 2028.