

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Horry County

The Honorable Kristi F. Curtis, Circuit Court Judge

2015-CP-26-02839

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Bruce A. Hill, #223106,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2019-001695

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. DID THE PCR ERR IN DENYING THE PETITIONER'S APPLICATION BECAUSE THE TRIAL COURT PERMITTED PETITIONER'S COUNSEL TO ASK QUESTIONS, PRESENT EVIDENCE, AND ARGUE SOMEONE ELSE COMMITTED THE CRIME HOWEVER, TRIAL COUNSEL NEVER DID ANY OF THESE AND DENIED THE PETITIONER THE OPPORTUNITY TO SHOW A CONNECTION BETWEEN HIMSELF AND GAGNON?
2. DID THE PCR COURT ERR IN DENYING THE PETITIONER'S APPLICATION AS COUNSEL WAS INEFFECTIVE WHEN HE STIPULATED TO THE CHAIN OF CUSTODY ON THE BLOOD EVIDENCE INSTEAD OF CALLING DEIDRE FAULK AS A WITNESS, WHEN FAULK HAD A PRIOR CONVICTION FOR BREACH OF TRUST THAT SHE COULD HAVE BEEN IMPEACHED ON?
3. DID THE PCR COURT ERR IN DENYING THE PETITIONER'S APPLICATION WHEN COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO IMPEACH GEORGE CARRICK WITH HIS PRIOR CONVICTION FOR BREACH OF TRUST THAT WAS EASILY FOUND ON THE PUBLIC INDEX, EVEN WITHOUT AN NCIC REPORT FROM THE SOLICITOR?
4. DID THE PCR COURT ERR IN DENYING THE PETITIONER'S APPLICATION AS COUNSEL WAS INEFFECTIVE WHEN TRIAL COUNSEL FAILED TO CHALLENGE THE QUALIFICATIONS OF THE STATE'S EXPERT WITNESS BY CALLING HIS OWN EXPERT WITNESS TO CHALLENGE THE STATE'S PROCESS OF COLLECTING, HANDLING, AND PRESERVATION OF FORENSIC EVIDENCE.

## STATEMENT OF THE CASE

The Horry County Grand Jury indicted Petitioner on March 31, 2011, for two counts of murder (2011-GS-26-00987, 00988) and one count of burglary – 1<sup>st</sup> degree (2011-GS-26-01327) (App. pp. 689-699). Ronald W. Hazzard of the 15<sup>th</sup> Circuit Public Defender’s Office represented the Petitioner.

On September 1 and 12-14, 2011, the Petitioner proceeded to trial before the Honorable Steven H. John (App. pp. 1 - 427). On September 14, 2011, Petitioner was found guilty on all three counts was sentenced to life without parole on the two counts of murder and a concurrent thirty (30) years on the burglary – 1<sup>st</sup> degree (App. pp. 425 – 426).

A timely Notice of Appeal was filed from the conviction and sentence and an appeal was perfected (App pp. 428-429). Jonathan M. Hiller, Esquire represented the Petitioner on appeal. On October 28, 2013, the appeal was certified for review by the South Carolina Supreme Court (App. p. 508). The South Carolina Supreme Court affirmed the Petitioner’s conviction and sentence by published opinion on July 9, 2014 (App. pp. 510-519). State v. Hill, 409 SC 50, 760 SE2d 802 (2014). The Remittitur was issued on July 25, 2014 (App. p. 518).

Petitioner filed his application for post-conviction relief (PCR) on April 15, 2015. (2015-CP-26-02839). (App. pp. 520-526). The State filed its Return or about August 26, 2015, (App. pp. 579-583). Petitioner also amended his PCR application on September 1, 2017 (App. pp. 527 - 532), on September 14, 2017 (App. p. 533 – 569), and on October 4, 2017 (App pp. 570 – 578).

A hearing was held on November 27, 2018, before the Honorable Kristi F. Curtis at the Horry County Courthouse (App. pp. 584 – 649). Petitioner was present and represented by Matthew S. Swilley, Esquire. Assistant Attorney General Johnny E. James, Jr. represented the Respondent. On September 6, 2019, Judge Curtis dismissed the Petitioner’s PCR application. (App pp. 650 - 688). A timely Notice of Appeal was filed and this petition follows.

## STANDARD OF REVIEW

The reviewing court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the reviewing court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and this court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## ARGUMENT

On April 11-12, 2005, someone shot and killed of Charlie and Diane Gloria Parker. (App. pp. 111-127; 140-218; 220-251; 255-310; 311-316; 270-246). There were four blood samples collected from the scene. (App. p. 187, line 13 – p. 188, line 35). Horry County Police Department (HCPD) Investigator Caulder testified that he collected these blood samples at the scene and marked them as evidence items three, four, seven, and thirteen. (App. p. 193, line 24 – p. 194, line 10).

On April 21, 2005, Lambert, a DNA analyst at the South Carolina Law Enforcement Division (SLED) started testing the blood samples. (App. p. 260, line 21 – p. 262, line 1). On June 26, 2007, the results of the DNA testing were published and concluded that the blood samples all belonged to an unknown individual. (App. p. 268, lines 12-23.) Lambert's final action related to the DNA report was to upload this report to the Combined DNA Index System (CODIS) database. (App. p. 268, line 24 – p. 269 line 10).

On May 28, 2009, McClure, who was the SLED DNA Database Unit Supervisor received a report of a hit to the CODIS database that matched the DNA profile Lambert had earlier uploaded. (App. p. 273, lines 20-25). The CODIS hit was a DNA profile linked to the Petitioner. (App. p. 275, lines 10-18).

There were a few pre-trial hearings, but at the one on September 1, 2011, before the Honorable Steven H. John, the State requested a ruling that would prohibit any mention of Richard Gagnon's conviction for the same crime (App. p. 11, lines 25 – p. 12, line 21). After argument, Judge John ruled he would only allow the

Petitioner to cross-examine about whether or not there was another person who participated in the double murder. He ruled that Richard Gagnon's trial for the same crime was irrelevant to the Petitioner's trial and that it would invade the jury's role as fact finders to hear another person was already convicted of the same crime. (App. p. 18, lines 16-25). Judge John refused to allow the Petitioner to use Richard Gagnon's name at trial. (App. p. 21, lines 8-19). During the trial, Petitioner's trial counsel never cross-examined any witness about whether or not there was another person who participated in the crime.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. *U.S. Const. amend. VI*; Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a PCR applicant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To show deficient performance, an applicant must prove "counsel's representation [fell] below an objective standard of reasonableness." Id. at 688. To demonstrate prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Smith v. State, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010) (quoting Strickland, 466 U.S. at 694).

**The PCR court erred in denying the Petitioner's application because the trial court permitted Petitioner's counsel to ask questions, present evidence, and argue someone else committed the crime however, trial counsel never did any of these and denied the Petitioner the opportunity**

**to show a connection between himself and Gagnon.**

As noted above, trial counsel was invited to proceed on a theory of third-party guilt but could not use Richard Gagnon's name while doing so.<sup>1</sup> However, trial counsel failed to pursue this line of defense. [E]vidence that a crime was actually committed by someone other than the accused is admissible for the purpose of generating a reasonable doubt of the guilt of the accused. Ramsey v Commonwealth, 63 Va.App. 341, 354, 757 S.E.2d 576, 583 (Ct. App. 2014). *See also* Jordan v State, 406 S.C. 443, 752, S.E.2d 538, (2013); In Jordan, the evidence of third-party guilt was permitted but trial counsel never pursued this theory during the course of the trial. Trial counsel later testified at the PCR hearing he "was trying to throw mud any place [he] could that it would stick." Id. The appellate court ruled that trial counsel's testimony was at odds with his failure to pursue a third-party guilt defense." Id.

"The rule applicable to the admission of evidence of third-party guilt is well-established: Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party. State v. Floyd, 143, N.C. App. 128, 132, 545, S.E.2d 238, 240 (Ct. App. 2001).

Counsel testified he could find no connection linking Gagnon to the Petitioner. (App. pp. 593-595; App. p. 595, line 23 – p. 596, line 6). He also stated Judge John ruled he wasn't "allowed to talk about" the third-party guilt of Gagnon. (App. p. 611, line 9). Trial counsel further noted that Judge John's rulings were

“inconsistent.” (App. p. 611, line 10). If trial counsel understood Judge John’s ruling as he couldn’t mention anything about third-party guilt at all, that understanding was incorrect and thus trial counsel was ineffective.

Even the SC Supreme Court noted that trial counsel did not elicit testimony about third-party guilt when it stated in its opinion “[Petitioner] never presented evidence, drew out on cross, or argued that someone else committed this crime. (App. p. 514). [Petitioner] could have presented evidence to this effect.... (Id). Because trial counsel could have asked questions about Gagnon’s *involvement* and not his *conviction* for the crime, trial counsel was ineffective for not raising that defense during the trial. It was trial counsel who asked for a ruling about that issue prior to trial. Therefore, the PCR Court should have granted the PCR based on this issue.

**The PCR court erred in denying the Petitioner’s application as counsel was ineffective when he stipulated to the chain of custody on the blood evidence instead of calling Deidre Faulk as a witness, when Faulk had a prior conviction for breach of trust that she could have been impeached on.**

Trial counsel did not object to the chain of custody on the blood evidence for HCPD when Diedre Faulk was the one who actually handled it, not Lori Rabon. (App. p 602, lines 8-12). However, Ms. Faulk was relieved of her employment with HCPD prior to Mr. Hill’s trial for falsifying records in the evidence room at HCPD. That information was never disclosed to trial counsel. (App. p. 642, lines 15-20). The PCR Order notes that the public index shows Ms. Faulk pleaded guilty on or about September 17, 2008, to breach of trust with fraudulent intent, 2008-GS-26-00141.

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<sup>1</sup> See also App. p. 19, lines 9-21.

(App. p. 663).

“Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.” Vail v State, 402 S.C. 77, 738 S.E2d 503 (Ct. Apps. 2013). In this instance, trial counsel didn’t articulate a valid reason for stipulating to Ms. Faulk in the chain- rather than challenging the chain and impeaching her credibility - other than he didn’t know about her conviction and firing from HCPD.

Trial counsel testified he “most definitely” would have used the information that Ms. Faulk was fired from HCPD for taking evidence out of the evidence room had he known about it. (App. p. 600, lines 1-9). Trial counsel noted that if he had been aware that Ms. Faulk had been convicted of a felony related to her duties and was fired before Mr. Hill’s trial, he would have tried to introduce that into evidence. (App. p. 602, lines 8-18).

“The tendency to impact credibility, in turn, determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness. State v Black, 400 S.C. 10, 732, S.E.2d 880 (2012). The PCR order noted that the public index shows Ms. Faulk pleaded guilty to breach of trust with fraudulent intent on September 17, 2008. (App. p. 663). Breach of trust with fraudulent intent is a crime of moral turpitude – lying, cheating, and stealing – that would have had great impeachment value on the witness, and ultimately on the chain of custody. For the foregoing reasons, the PCR Court erred in denying the Petitioner’s PCR application

based on this issue.

**The PCR court erred in denying the Petitioner’s application as counsel was ineffective when he failed to impeach George Carrick with his prior conviction for breach of trust that was easily found on the public index, even without an NCIC report from the Solicitor.**

Mr. Carrick was called as a witness in the case in chief (App. pp. 111 – 121) as well a rebuttal witness. (App pp. 321 – 327). He testified about the link between the Parkers and Khalil Moore and Bruce Hill<sup>2</sup>. (App. p. 321, line 24 – p. 326, line 25). Mr. Moore was “you know, another son of [the Parkers].” (App. p. 625, line 1). Mr. Carrick had worked at the Parker’s glass company and was ultimately convicted breach of trust prior to the Petitioner’s trial. (App. p. 112, lines 9-14; App. p. 642, lines 13-15).

At the PCR hearing, trial counsel noted again, that had he know of Mr. Carrick’s conviction for breach of trust, he most certainly would have used it to impeach Mr. Carrick on the stand. (App. p. 591, line 24 – p. 592, line 7). This would have been especially useful since trial counsel indicated he was “blindsided” by Mr. Carrick’s testimony connecting Khalil Moore to the Petitioner. (App. p. 612, line 23 – 2). “I guarantee I was thrown off as far as my cross examination of Mr. Carrick is concerned.” (App. 613, lines 2-4).

“Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.” *Vail, supra*. Carrick was convicted of an offense that can be used to impeach him as a witness. Just like with Ms. Faulk, trial counsel had no valid strategy for not using this information other than it wasn’t

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<sup>2</sup> Khalil Moore had worked with the Parkers at their glass business. Moore was also arrested with Bruce Hill a week

given to him, nor did he attempt to find out about prior to trial.<sup>3</sup> Based on this, the PCR Court erred in denying the Petitioner's PCR application.

**The PCR court erred in denying the Petitioner's application as counsel was ineffective when trial counsel failed to challenge the qualifications of the State's expert witness by calling his own expert witness to challenge the State's process of collecting, handling, and preservation of forensic evidence.**

Trial counsel was ineffective when he failed to call an expert witness to challenge the State's expert witness's qualifications and the process the State used to collect, handle, and preserve the forensic evidence. When a petitioner's ineffective assistance of counsel claim rests on trial counsel's failure to call particular witnesses, expert or otherwise, we require "a specific proffer . . . as to what an expert witness would have testified." Goins v. Warden, Perry Corr. Inst., 576 F. App'x 167, 173 (4th Cir. 2014). See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807, 809 (S.C. 1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial"); Porter v. State, 368 S.C. 378, 629 S.E.2d 353, 358 (S.C. 2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (S.C. 2018).

The State called Mr. Caulder as an expert witness at the trial. App. pp. 140. Caulder testified about the procedure once he reaches a crime scene. (App. p. 142,

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after the Parkers were killed. (App. pp. 111-128; 140-219; 220-251; 255-311; 316-347).

<sup>3</sup> A quick records search of the Horry County Public Index shows that Mr. Carrick was convicted on August 25, 2003, of breach of trust with fraudulent intent and received a five-year sentence suspended to probation, 2003-GS-26-02456.

line 21 – p. 144, line 12). Trial counsel did not adequately cross-examine Mr. Caulder during the trial about the State’s processes regarding forensic evidence. While trial counsel asked a few questions of Mr. Caulder regarding the 7-8 days it took for him to actually take the evidence to the police department (*see* App. p. 218, lines 15-25), Trial counsel didn’t ask much in the way of substantive questions challenging the forensic evidence collection process. That is the job of an expert witness. (“I was trying hard to point out the fact that [the evidence]” was not secure. App. p. 601, lines 1-2.) Trial counsel admitted he never tried to get an expert witness in crime scene analysis for this case. App. p. 601, lines 3-6.

At the PCR hearing, the Petitioner called Peter Wade, a private investigator and consultant on criminal trial litigation matters. *See* App. pp. 626 – 647. Mr. Wade was qualified as an expert witness in crime scene analysis. App. p. 632, lines 1-5. Mr. Wade indicated he found the chain of custody was “seriously breached.” App. p. 632, line 21. Mr. Wade noted that Mr. Caulder turned in the blood evidence eight days after he supposedly collected it. App. p. 635, line 17 – p. 636, line 9. However, Mr. Caulder testified that he placed in the evidence into storage at the Horry County Police Department that day. App. p. 201, lines 7-21. (“[E]vidence is secure from the time I get on scene and I collect...until it is released by evidence.” App. p. 203, lines 12-16.)

Even trial counsel noted he had issues with the collection of evidence in this case. He stated that he had concerns when the “evidence custodian who collects evidence at the scene... takes it and tosses it into what they refer to as a bucket, I

do not think in any way, shape, or form that that would be considered appropriate.” (App. p. 606, lines 13-17). Trial counsel also noted that he did not research or review the protocols of the HCPD, and only knew what he knew from “from training at CLEs and things of that nature.” (App. p. 606, lines 18-25).

The PCR order noted that an expert witness cannot be called to testify as to the credibility of another expert witness. However, Petitioner’s expert would not have been testifying as to the credibility of Caulder, rather the Petitioner’s expert would be testifying and challenging the State’s process related to the forensic evidence (and the lack of a process). Mr. Wade found serious issues with the chain of custody, lack of hair collection at the crime scene, and failure to comport with proper protocols in the collection and storing of evidence. If that testimony is at odds with Mr. Caulder’s it does not mean it’s a challenge to Mr. Caulder’s credibility. It’s a challenge to the DNA evidence to show that it wasn’t properly collected and stored prior to being tested. Therefore, the PCR Court erred in denying the Petitioner relief on this issue.

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## CONCLUSION

For the foregoing reasons, Petitioner submits this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



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