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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

EDWARD MAURICE DUNN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001944

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel when he failed to argue for the suppression of the DNA evidence on the basis that it was held in an illegal database operated by the Richland County Sheriff's Office, where Petitioner's illegally used and retained DNA matched with DNA from the scene and where all the evidence against Petitioner stemmed from that illegal DNA match?

STATEMENT

During the July 2011 term, the Richland County Grand Jury indicted Petitioner for armed robbery, kidnapping, and burglary in the first degree. App. 687 – 692.

On May 21st – 24th, 2012, Petitioner proceeded to trial before the Honorable G. Thomas Cooper, and a jury. App. 1. Victor Li and Dean O'Neil represented Petitioner. Id. Margaret Fent and Foster Matthews represented the state. Id.

Petitioner was found guilty of kidnapping, armed robbery, and burglary in the first degree, but not guilty of criminal sexual conduct in the first degree. App. 521, l. 16 – 522, l. 22. Judge Cooper sentenced Petitioner to thirty years' imprisonment. App. 546, ll. 11 – 18.

Petitioner argued on appeal that the trial court erred when it refused to suppress the DNA evidence and all evidence flowing from the retention and usage of the DNA evidence, which was taken while he was a juvenile, maintained in an illegal database, and used outside of the scope of consent[1] given. App. 548 – 563.

The Court of Appeals affirmed Petitioner's conviction and held the issue of the trial court erring when it refused to suppress the DNA evidence because the Richland County Sheriff's Office maintained an illegal DNA database was not preserved for judicial review as it was not raised before the trial court. State v. Dunn, No. 2014-UP-249 (Ct. App. 2014).

On January 16th, 2015, Petitioner filed an application for post-conviction relief (PCR) application where he alleged that trial counsel was ineffective for failing to argue that the DNA evidence should be suppressed because the DNA database maintained by the Richland County

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[1] Plea counsel O'Neil stated that he only challenged the admission of Petitioner's DNA on the grounds that the retention of the DNA exceeded the scope of consent that Petitioner gave. App. 651, ll. 19 – 22.

Sheriff's Department was illegal. App. 605 – 618; See S.C. Code Ann. § 23-3-640(D). The state filed its Return on July 8th, 2015. App. 619 – 623.

Petitioner's PCR hearing was held on July 11th, 2016 before the Honorable D. Craig Brown. App. 625. Jonathon Waller represented Petitioner. Id. Jessica Kinard represented the state. Id.

In an order filed on October 9th, 2018, the PCR court filed an order of dismissal denying Petitioner relief. App. 666 – 686. The PCR court ruled that "a challenge to the legality of the local DNA database could not have reasonably resulted in suppression of the [DNA] evidence at trial." App. 680. The PCR court further found that "trial counsel could not be ineffective, even if [Petitioner's] challenge to the legality of the Richland County Sheriff Office's DNA database was adequately preserved for review, [because] it is without merit." App. 682.

On June 3rd, 2019, undersigned counsel filed a petition for writ of certiorari. On October 21st, 2019, the state filed its return to the petition for writ of certiorari. On November 6th, 2019, the South Carolina Supreme Court transferred this case to this Court pursuant to rule 243(l) SCACR. On October 19th, 2021, this Court issued an order granting certiorari in this case and ordered direct briefing.

This brief follows.

STANDARD OF REVIEW

On appeals from a motion to suppress based on Fourth Amendment grounds, the appellate court reviews questions of law *de novo*. State v. Bash, 419 S.C. 263, 268, 797 S.E.2d 721, 723–24 (2017). "As to a circuit court's finding of fact, we must affirm if there is any evidence to support it, and may reverse only for clear error." Id. (internal quotations omitted)

ARGUMENT

Trial counsel provided ineffective assistance of counsel when he failed to argue for the suppression of the DNA evidence on the basis that it was held in an illegal database operated by the Richland County Sheriff's Office, where Petitioner's illegally used and retained DNA matched with DNA from the scene and where all the evidence against Petitioner stemmed from that illegal DNA match.

Relevant Facts

Over six months before the alleged incident in this case, Petitioner was a suspect in an unrelated burglary committed on September 20th, 2010. App. 85, l. 6 – 86, l. 16. Investigator Carwell of the Richland County Sheriff's Office asked Petitioner for a sample of his DNA to compare to the DNA they recovered from the scene of the September 2010 burglary. App. 87, ll. 2 – 7. Petitioner consented to give his DNA to the Sheriff's office for the limited purpose of comparing it to the DNA found at the scene of the September 2010 burglary investigation. App. 97, ll. 4 – 15; App. 630, l. 23 – 631, l. 4. Notably, Petitioner signed a consent form to give his DNA, but that form did not say his DNA could be for what ever purpose the Richland County Sheriff's Office saw fit or that his DNA would be retained after the September 2010 burglary investigation. App. 101, l. 13 – 102, l. 23.

After Petitioner's DNA was taken, it was surreptitiously retained in an illegal database maintained by the Richland County Sheriff's Office that contravened S.C. Code Ann. § 23-3-640 (A)(D)'s requirements regarding the creation and maintenance of DNA databases in South Carolina. App. 92, ll. 15 – 25; See S.C. Code Ann. § 23-3-640(A)(D). At the time Petitioner gave consent to have his DNA compared to the DNA found at the September 2010 burglary scene, he was a minor and his mother was required to come to the sheriff's office with him to validate his

consent. App. 93, ll. 1 – 2. It is also worthwhile to note that Petitioner's DNA did not match the DNA found at the scene of the September 2010 burglary and he was exonerated as a suspect in that case. App. 91, ll. 22 – 25. The DNA database act requires the DNA of a suspect who has his charges *nolle prossed*, like Petitioner had here, to be destroyed. S.C. Code Ann. § 23-3-660(A).

However, in spite of Petitioner consenting to give a DNA sample for the limited purpose of comparison to the DNA found at the scene in the September 2010 burglary investigation and being exonerated of that crime, his DNA was stored in an illegal database operated by the Richland County Sheriff's Office and wrongfully used in an indeterminate number of subsequent investigations. App. 92, ll. 15 – 25. The current charges against Petitioner derived entirely from the alleged match between the DNA found at the scene of the present incident and the DNA Petitioner gave for the September 2010 burglary investigation that was retained in the illegal database by the Richland County Sheriff's Office without Petitioner's consent. App. 120, ll. 8 – 12; App. 386, ll. 22 – 23; App. 649, ll. 8 – 18.

The alleged facts underlying this case were that on May 28th, 2011, Indira Lonsdale, the complaining witness, was awoken in the early hours of the morning by a "bang." App. 199, l. 1 – 200, l. 2. She got up to investigate the noise and someone accosted her from behind. App. 200, ll. 3 – 11. Lonsdale never saw the person's face. App. 200, ll. 14 – 21.

The intruder then took Lonsdale to the bedroom and bent her over the bed. App. 200, l. 22 – 201, l. 2. Lonsdale was restrained and the intruder, "puts his penis between [her] legs," but, "he didn't penetrate [her]." App. 203, ll. 11 – 21. The intruder then had Lonsdale clean herself of with a "washrag." App. 204, ll. 2 – 25. Lonsdale never was able to see the intruder. <u>Id.</u>

The intruder's seminal fluid was found on the "washrag" inside Lonsdale's home. App. 343, l. 3 – 344, l. 18. Law enforcement performed DNA testing on the "washrag" and found a

match to Petitioner's DNA held in the Richland County Sheriff Office's illegal DNA database. Id.; App. 92, ll. 15 – 25; See S.C. Code Ann. § 23-3-640 (D). Without that DNA match, Petitioner would not have been made a suspect such that the rest of the evidence against him derived from the DNA match. App. 120, ll. 8 – 12; App. 649, ll. 8 – 18.

When the arresting officers approached Petitioner regarding this incident, they told him right away that they had a DNA match; however, they neglected to say the DNA would be developed by the Sheriff's Office and would be retained in an illegal database without Petitioner's consent. App. 30, l. 20 – 31, l. 5. The only reason Petitioner gave the police a strange, yet inculpatory, statement concerning his involvement in the present incident was because they told him they legitimately matched his DNA to samples from the crime scene. App. 100, ll. 21 – 24.

Petitioner filed a pretrial motion to suppress the DNA evidence and all the evidence that flowed from it. App. 24, ll. 8 – 23. Defense counsel's questioning during the pretrial hearing focused on the limits of the consent Petitioner and the Sheriff's Office exceeding that consent. App. 91, l. 9 – 94, l. 24. Defense counsel's arguments after the pretrial testimony also primarily concerned how the retention of his DNA sample exceeded the scope of any alleged consent. App. 101, l. 7 – 110, l. 9; App. 121, l. 5 – 123, l. 4.

Investigator Carwell testified during the pretrial suppression motion regarding the September 2010 burglary investigation and the circumstances under which Petitioner gave a DNA sample. App. 84, l. 24. On direct examination Carwell testified that he did not promise or coerce Petitioner to induce him to give a DNA sample. App. 88, ll. 7 – 18. Carwell claimed he made no express promise to Petitioner that his DNA would not be stored in Richland County's unauthorized DNA database. App. 88, ll. 15 – 18. Carwell also stated that Petitioner signed a consent form to give his DNA sample for the 2010 September burglary investigation. App. 87, ll. 9 – 20.

However, on cross-examination Carwell admitted he told Petitioner the purpose of him giving a DNA sample was compare to the DNA found at the scene of the September 2010 burglary. App. 96, ll. 8 – 13. He also admitted that Petitioner was never told that his DNA would be stored in the Richland County DNA database, or any other database. App. 92, ll. 15 – 25.

When the questioning turned to the consent form, Carwell was forced to admit to the form's deficiencies. The DNA consent form signed by Petitioner gave no notification that his DNA would be used beyond the September 2010 investigation, nor did it notify him his DNA could be used in perpetuity and without limit. App. 98, l. 7 – 99, l. 16. The DNA consent form also did not notify Petitioner that his DNA would be maintained in the Sheriff's own illegal database nor any other database. App. 97, ll. 4 – 15.

Absent any indication to Petitioner that his DNA would be stored after the DNA analysis exonerated him for the September 2010 burglary Petitioner reached the reasonable conclusion his DNA sample was only being used in the September 2010 investigation and would be destroyed afterwards. Furthermore, that conclusion was especially reasonable in light of the DNA database act's requirement that the DNA of a suspect must be destroyed when they were not convicted of the crime for which they gave their DNA. See S.C. Code Ann. § 23-3-660(A).

Petitioner testified at the pretrial hearing. App. 97, l. 2. Petitioner was never told that his DNA profile would be entered and maintained in the Richland County Sheriff Office's DNA lab in perpetuity. App. 97, ll. 6 – 9. The only reason Petitioner gave consent for his DNA to be taken was to compare it to the DNA obtained from the scene of the September 2010 burglary. App. 100, ll. 8 – 24. Investigator John Carwell specifically informed Petitioner that his DNA was needed to compare to the DNA found at the scene of the September 2010 burglary which made Petitioner believe his consent was limited that purpose. App. 99, ll. 21 – 24. Had Petitioner been told his

DNA would be stored in a DNA database, he would not have given consent for it to be taken. App. 97, ll. 13 – 15.

Defense counsel argued Petitioner's DNA should be suppressed because it was used beyond the scope of consent Petitioner gave such that Petitioner's right to privacy was violated. App. 101, l. 10 – 102, l. 24. However, plea counsel failed to argue that Petitioner's DNA should be suppressed because it was retained illegally by the Richland County Sheriff's Office, in direct violation of the statute. App. 651, ll. 14 – 18; See S.C. Code Ann. § 23-3-640(A)(D). The state argued[2] that the scope of consent given covered usage in subsequent cases because "no one told [Petitioner] the DNA would be destroyed." App. 116, l. 24 – 118, l. 10. The state cited State v. McCord, 349 S.C. 477, 562 S.E.2d 289 (Ct. App. 2002) for the proposition that retaining Petitioner's DNA was not an impermissible search and seizure where the DNA was obtained during the investigation of an unrelated case, and where a defendant gave the sample without an express limitation on scope of his consent. McCord, at 485, 562 S.E.2d at 693.

Defense counsel attempted to distinguish the McCord decision from this case on two grounds. First, in this case the state limited the scope of consent on its own when Investigator Carwell told Petitioner that his DNA was needed to investigate the September 2010 burglary. App. 105, ll. 12 – 18. Second, was the language on the DNA consent form in McCord put McCord on

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[2] The state also argued that the DNA evidence should be admissible under the doctrine of inevitable discovery. App. 107, l. 5 – 108, l. 23. The state alleged without providing evidence that Petitioner's DNA was in CODIS from a 2007 conviction and that police arrested a man named Lavonne Arrington on separate charges who told police that he and Petitioner burglarized the complaining witness's house one week prior to the alleged incident and because of that the state would have gotten Petitioner's DNA inevitably. Defense counsel counter-argued that the fact that Arrington claimed he and Petitioner burglarized the same house one week prior does not give the state probable cause for DNA in this case so independently discovery would not be a basis for admitting Petitioner's DNA evidence in this case. App. 108, l. 24 – 110, l. 6. The judge properly ruled that there was not enough evidence in the record to substantiate inevitable discovery. App. 126, l. 25 – 127, l. 2.

notice that his DNA sample could be used for "what ever purpose the Violent Crime Task Force Department may see fit." Id. at 483, 488 n.2, 562 S.E.2d at 692, 695 n.2. However, the DNA consent form given to Petitioner in this case did not contain any language resembling that warning such that the sole, uncontradicted, indication Petitioner received to cajole him into giving his DNA was from Investigator Carwell that his DNA would be used for the limited purpose of investigating the September 2010 burglary. App. 101, l. 17 – 102, l. 23. Thus, McCord was inapplicable.

Importantly, defense counsel failed to argue that Petitioner could *never* have implicitly consented to the Richland County Sheriff's Office developing a DNA profile or retaining his DNA in their own database. The use of his DNA in the unauthorized database was illegal and no one, especially an unsophisticated minor, would expect the implicit contract they entered into with the state would have illegal terms in it. S.C. Code Ann. § 23-3-640(A)(D). Therefore, consent could not have been the state's justification for admitting the DNA evidence, and the evidence that flowed from it, in this case.

Moreover, defense counsel failed to argue that *even if Petitioner gave explicit consent* to the Richland County Sheriff's Office to use his DNA beyond the September 2010 investigation the contract between he and the Richland County Sheriff's Office would still not be valid or enforceable. A term of the contract, developing and retaining the DNA in an illegal database, was illegal and illegal contract terms are not enforceable such that even Petitioner's express consent could not make the DNA evidence admissible. See Oscanyan v. Arms Co., 103 U.S. 261, 268 – 69 (1880) ("Whenever illegality in a contract sought to be enforced appears whether the evidence comes from one side or the other, the disclosure is fatal to the cause of action, and *no consent of the defendant can neutralize its effect.*") (emphasis added); see also Armstrong v. Collins, 366 S.C. 204, 224, 621 S.E.2d 368, 378 (2005) (holding that the general rule in South Carolina is that courts

will not enforce contracts that are illegal or violate public policy) (citing White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004)).

Judge Cooper ruled the DNA evidence, and the evidence that flowed from it, was admissible because under State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002) "the defendant had no possessory or ownership interest in the DNA profile, nor does society recognized an expectation of privacy in records made for public purposes from legitimately obtained samples." App. 127, ll. 3 – 21; See McCord, at 484 – 85, 562 S.E.2d at 693. As far as the limitation Petitioner put on the scope of his consent, the trial court ruled it would leave that issue "for another court to decide." App. 127, ll. 11 – 21. Petitioner was subsequently convicted of kidnapping, armed robbery, and burglary in the first degree; however, he was acquitted of criminal sexual conduct in the first degree. App. 521, ll. 16 – 17.

Petitioner, through Appellate Defender David Alexander, argued that the trial court erred when it refused to suppress all evidence flowing from the retention and usage of Petitioner's DNA, which was taken while he was a juvenile, maintained in an illegal database, and used outside the scope of his consent. App. 548 – 563. The Court of Appeals affirmed Petitioner's conviction in part because the argument that the DNA evidence should be suppressed because the DNA database was illegal was not preserved for judicial review as it was not raised before the trial court. State v. Dunn, No. 2014-UP-249 (Ct. App. 2014).

Petitioner testified at his PCR hearing that the consent he gave for the use of his DNA was limited to the September 2010 investigation. App. 629, l. 19 – 630, l. 13. Petitioner understood that his DNA would only be used in the September 2010 investigation because the investigating officer told him he needed Petitioner's DNA to compare to the DNA found at the burglary scene in the 2010 investigation. Id. Akin to what every other layperson's understanding would have been,

Petitioner thought that meant his DNA would only be used for the 2010 investigation and it would be destroyed after he was exonerated for the burglary, as the law required. App. 630, l. 23 – 631, l. 4; See S.C. Code Ann. § 23-3-660(A). Petitioner also testified that, during trial preparation defense counsel informed him the DNA database where his DNA was used and retained was illegal. App. 635, l. 22 – 636, l. 13. Thus, defense counsel knew about the illegality of the database prior to trial and simply failed to make the argument Petitioner's DNA should be suppressed on that basis during the suppression hearing. Id.

Defense counsel O'Neil testified as well. App. 646, l. 13. O'Neil stated that the entire case against Petitioner flowed from the DNA match at the illegal Richland County Sheriff's Office database. App. 649, ll. 8 – 18. Trial counsel explained "It's my understanding that [the Sheriff's Office], essentially, took samples from individuals if the individual *gave consent in a particular case and they kept it and did not destroy it.*" App. 649, l. 23 – 650, l. 4. (emphasis added)

O'Neil admitted that he did not object to the admission of Petitioner's DNA on the basis that the Richland County Sheriff's Office kept a database that was illegal because it was unauthorized and unregulated by the South Carolina Law Enforcement Division (SLED). App. 651, l. 14 – 18; See S.C. Code Ann. § 23-3-640(D). He explained that he argued for suppression of the DNA, and all the evidence that stemmed from it, because the DNA was retained outside of the scope of consent given by Petitioner. App. 661, l. 23 – 662, l. 7.

Although trial counsel admitted he did not raise the argument that the Richland County Sheriff Office's database was illegal, and the Court of Appeals held that that argument was not preserved for direct appeal review, the state curiously argued at PCR that "these arguments have been dealt with at trial, as well as through the appellate process." App. 663, l. 14 – 664, l. 6. The state also argued that it was "not [the PCR] court's job to decide the legality of the DNA database,"

despite the Attorney General's office declaring DNA databases were illegal if they were maintained outside the regulatory purview of SLED a year before Petitioner's trial. Id.; See Attorney General Op. dated April 7, 2011, 2011 WL 1740752. In an order filed on October 9th, 2018, the PCR court denied Petitioner's PCR allegations when it ruled "trial counsel could not be ineffective, [because] even if [Petitioner's] challenge to the legality of the Sheriff's DNA database was adequately preserved for review it [was] without merit." App. 666 – 686.

Discussion

Petitioner's DNA was retained in an unregulated DNA database whose existence violated state law and a had DNA profile developed in that illegal database. See S.C. Code Ann. § 23-3-640(D). The illegally retained DNA evidence was the only reason the state was able to make Petitioner a suspect in this case. App. 120, ll. 8 – 12; App. 649, ll. 8 – 18. The Richland County Sheriff's Office tested DNA found at the scene of the present incident with the DNA in their illegal database and discovered Petitioner was allegedly a match. App. 120, ll. 8 – 12. Accordingly, defense counsel provided ineffective assistance of counsel when he failed to argue during the pre-trial suppression hearing that Petitioner's DNA, and the evidence that flowed from it, should be suppressed as a violation of the Fourth Amendment, Article 1, § 10 of the South Carolina Constitution, and S.C. Code Ann. § 23-3-640(A)(D), because the Richland County Sheriff's Office DNA database was illegal. App. 651, ll. 14 - 18; See S.C. Code Ann. § 23-3-640(A)(D).

The Richland County Sheriff's Office kept its own DNA database where it illegally retained Petitioner's DNA, which was the basis for the entirety of the evidence against him in this case. The solicitor admitted as much in his opening statement. App. 120, ll. 8 – 12. The DNA database act states, "*SLED must conduct DNA identification testing, typing, and analysis...*" and "*SLED must store DNA samples.*" S.C. Code Ann. § 23-3-640 (A)(D). (emphasis added) The

samples also must be confidential and must remain in the custody of SLED or a private laboratory designated by SLED if the laboratory's standards for confidentiality and security are at least as stringent as those of SLED." Id. Critically, the DNA "record and profile" given by a suspect *must* be destroyed when the suspect is found not guilty of a crime or the charges are dropped. See S.C. Code Ann. § 23-3-660(A). (emphasis added) Thus, the Richland County Sheriff's Office DNA database maintained was in direct violation to the DNA database statute as it was not authorized by SLED to operate a DNA database, its standards for confidentiality and security were not regulated by SLED, and it did not destroy Petitioner's DNA "record and profile" after he was exonerated of the September 2010 burglary. Id.

The DNA database act provided comprehensive regulation of the development and retention of citizens' DNA profiles. See S.C. Code Ann. §§ 23-3-600 – 700. The statute strictly prohibited any attempt by local governments to create their own databases. See S.C. Code Ann. § 23-3-640 (D). Local authorities are preempted by state law from acting in areas that are comprehensively regulated by the state. See Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 486 n.2, 511 S.E.2d 361, 363 n.2 (1999) (noting that state regulation of motorized watercraft on navigable waters preempted any local encroachment in this area).

Notably, over one year before Petitioner's trial, the Attorney General issued an opinion that agreed with Petitioner's arguments here. See Attorney General Op. dated April 7, 2011, 2011 WL 1740752. The Attorney General stated, "Reviewing the language and purposes of the [DNA database] Act, there appears very little doubt the Legislature intended SLED, as the chief investigative agency in South Carolina, to implement and administer the collection of DNA samples." Id. "Given that the Legislature expressly empowered SLED to administer the collection of DNA samples, it is the opinion of this office that a DNA collection program outside the

parameters of the Act would be inconsistent with the legislative intent for uniformity in this area and is impliedly preempted." Id.

The record is well-defined, Petitioner's DNA was taken pursuant to the September 2010 burglary investigation where he was never charged. App. 629, l. 13 – 630, l. 24. Due to his exoneration, Petitioner's DNA profile should have been destroyed. See S.C. Code Ann. § 23-3-660(A). However, the DNA was stored in an unauthorized, unregulated, illegal database which allowed the Richland County Sheriff's Office to surreptitiously retain Petitioner's DNA after it should have been destroyed. App. 92, ll. 15 – 25. Accordingly, had trial counsel argued the DNA should have been suppressed on the basis that it was held in an unregulated, illegal DNA database there was a reasonable probability the outcome of the suppression hearing would have been successful.

"The benchmark for judging any claim of ineffectiveness must be whether 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). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687 – 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that 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." Strickland, at 694.

In Stone v. State, 419 S.C. 370, 798 S.E.2d 561 (2017) our Supreme Court held that trial counsel's performance was deficient for failing to object to the victim impact testimony of the law enforcement officers and the decedent's widow testifying about her suicide attempt. Id. at 387–90, 798 S.E.2d at 570–72. While Stone was a death penalty case, its Strickland analysis is still instructive outside of the death penalty context.

Stone argued at PCR that while trial counsel did object to the widow's testimony, he was deficient for failing to object on several other grounds. Id. at 389, 798 S.E.2d at 571. The Court agreed with Stone that, "both trial counsel and appellate counsel were deficient. At a minimum, trial counsel should have objected to the testimony as impermissible victim impact testimony." Id. at 390, 798 S.E.2d at 572.

In Stone, the Court held trial counsel's deficient performance did not prejudice Stone because "none of the five components of the officers' testimony, nor [widow's] testimony... were so compelling that the exclusion of the evidence was likely to result in the jury not making a recommendation of death." Id. at 391, 798 S.E.2d at 572. However, the holding in Stone showed that a defense counsel can be ineffective for failure to argue for suppression of evidence where they failed to raise an alternate argument for suppression, even though they did argue for suppression for other reasons.

Here, trial counsel failed to argue that the Richland County Sheriff Office's DNA database was illegal because it violated S.C. Code Ann. § 23-3-640's requirement that SLED must conduct all the identification testing, typing, and analysis as well as explicitly authorize and regulate all DNA databases in the state before the database can legally hold an individual's DNA. App. 651, ll. 14 – 18. Moreover, he failed to argue that the unregulated nature of the illegal DNA database allowed the Sheriff's Office to retain Petitioner's DNA profile and sample beyond his exoneration

in the September 2010 burglary investigation in violation of S.C. Code Ann. § 23-3-660(A). Trial counsel explained at PCR that his focus during the pretrial motions was exclusively on the "consent issue" with the DNA evidence. App. 651, ll. 19 – 22.

Thus, trial counsel here was deficient for the same reason as trial counsel in Stone. Trial counsel made an argument for the suppression of the DNA evidence, just not the right one. App. 651, ll. 14 – 22. However, regarding prejudice, Petitioner's case differs from Stone in that the entirety of the state's case rested on the DNA match to Petitioner from the illegal database. App. 661, l. 23 – 662, l. 7. Accordingly, Petitioner can show prejudice because had trial counsel objected to the DNA's admission on the grounds that the DNA database was illegal on its face, there was a reasonable probability of a different outcome for Petitioner's trial as the entirety of the evidence against him would have been inadmissible.

Since the retention and maintenance of an illegal DNA database by the Richland County Sheriff's Office was a flagrant violation of the South Carolina DNA database act, it is useful to discuss how to remedy the harm done to Petitioner resulting from the egregious violation of his right to privacy. A number of considerations arise when determining the proper remedy in this case and it is Petitioner's position that the proper remedy would be to suppress the DNA evidence, and all of the evidence that was derived from the DNA match, pursuant to the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643, 658 – 59 (1961).

The first consideration is whether Petitioner had a privacy interest in the wrongfully retained DNA evidence such that the retention of his DNA was a search under the Fourth Amendment and Article 1, § 10 of the South Carolina Constitution. The lower court erroneously ruled that Petitioner did not have a privacy interest in the wrongfully retained DNA he gave to the

Richland County Sheriff's Office. App. 126, l. 25 – 127, l. 21; See State v. McCord, at 484, 562 S.E.2d at 693 (citing Smith v State, 744 N.E.2d 437, 439 (Ind.2001)).

A "DNA sample" is the buccal swab containing *all genetic information* and a "DNA profile" is the analysis report of "junk DNA" derived from the sample which is used for identification purposes. See Maryland v. King, 569 U.S. 435, 442 – 444 (2013) (explaining that when a DNA profile is legally retained after an investigation, it does not violate a defendant's right to privacy in the DNA to use it for subsequent investigations; however, retaining DNA samples implicates privacy rights); See also State v. Smith, 744 N.E.2d 437, 439 (2001) (explaining the legitimate expectation of privacy in DNA samples versus DNA profiles). In this case *both* the DNA profile and DNA sample were illegally retained such that Petitioner did have an ownership right in the DNA retained by the Richland County Sheriff's Office and his privacy rights were violated by its wrongful retention. App. 5; App. 6; App. 311, ll. 4 – 9; S.C. Code Ann. § 23-3-640 (A)(D).

Further intensifying the violation of Petitioner's privacy interest in his illegally retained DNA was the inherently problematic nature of Richland County Sheriff's Office unauthorized and unregulated DNA database. In this case there were significant questions regarding how and where Petitioner's DNA sample and profile were retained. Part of the reason retaining DNA *profiles* for use in subsequent investigations are not considered invasions of privacy is because of the standards to which DNA laboratories are held. Since laboratories are subject to strict oversight, the courts can trust that no negligence, abuses of privacy, or malfeasance are occurring. See S.C. Code Ann. §§ 23-3-620 - 700. However here, due to the unauthorized and unregulated nature of the Richland County Sheriff's Office DNA database, we do not know if they followed the meticulous and

regimented procedures[3] that SLED demands of its authorized DNA databases. Accordingly, Petitioner maintained a right to privacy to not have his DNA, whether it be *sample or profile*, floating about an unregulated lab where it could be used or tampered with without anyone being able to discover the wrongdoing or negligence.

The lower court's reliance on McCord was misplaced because there were two significant differences between this case and McCord, along with the rest of the cases that hold it was permissible for law enforcement to retain DNA profiles for subsequent investigations, such that suppression of the DNA evidence here was warranted. The first difference was the DNA profiles in those cases were developed and retained in *legal* DNA databases, but here the Richland County Sheriff's Office developed and retained Petitioner's DNA in an *illegal* DNA database that was unauthorized and unregulated by SLED. See State v. McCord, 349 S.C. 477, 484, 562 S.E.2d 689, 693 (Ct. App. 2002); State v. Sanders, 388 S.C. 292, 298, 696 S.E.2d 592, 595 (Ct. App. 2009); Smith v State, 744 N.E.2d 437, 439 (Ind.2001); Varriale v. State, 444 Md. 400, 409, 119 A.3d 824, 830 – 31 (Md. App. 2015); Pharr v. Commonwealth, 50 Va. App. 89, 98 – 99, 646 S.E.2d 453, 457 – 58 (Va. App. 2007). Since the development and retention of any DNA in the Richland County Sheriff's Office database, both DNA sample and DNA profile, was illegal, it was an unconstitutional invasion of privacy as well as a violation of the DNA database act that warranted the suppression of the DNA evidence in this case.

The second significant difference was that because the Richland County Sheriff's Office illegal DNA database was unregulated by SLED it was able retain Petitioner's DNA from the September 2010 investigation after he was exonerated, which violated S.C. Code Ann. § 23-3-

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[3] We know at the very least the Richland County Sheriff's Office did not follow the procedure in S.C. Code Ann. 23-3-640(D) which required Petitioner's DNA to be destroyed after he was exonerated for the September 2010 burglary.

660(A). In contrast, law enforcement in the McCord line of cases all acted in accordance with the statutory schemes controlling the retention of DNA evidence. See McCord, supra. In this case, had the DNA database been authorized by SLED, and operated legally, it would not have been able to wrongfully retain Petitioner's DNA after his exoneration. SLED's oversight would not allow that violation to occur. Accordingly, Petitioner had a privacy interest in the DNA sample *and profile* once he was exonerated for the September 2010 burglary because at that point the DNA was being wrongfully retained in violation of the DNA database act. See S.C. Code Ann. § 23-3-660(A).

Even if Petitioner's DNA was validly obtained though his consent, it was held in an illegal database that, due to its illegal and unregulated nature, was able to wrongfully retain that DNA outside of SLED's oversight. Therefore, had trial counsel properly argued the DNA evidence should be suppressed because it was developed and retained in an illegal DNA database, he could have distinguished this case from McCord and the result of the suppression motion would have been different.

The next consideration is the applicability of the statutory remedy rather than the exclusionary rule. Petitioner anticipates that Respondent will argue that the statutory remedy within the DNA database act should apply rather than the exclusionary rule. However, that argument fails because a plain reading of the DNA database act shows that the statutory remedy was inapplicable to the wrongful *development* and/or *retention* of Petitioner's DNA. See S.C. Code Ann. §§ 23-3-640 (A)(D) -650(C)(D).

The statutory remedy, S.C. Code Ann. § 23-3-650(C)(D), specifically prohibits the wrongful "disclosing" and "obtaining" of DNA with a misdemeanor where the violator, upon conviction, "must be fined ten thousand dollars or three times the amount of any financial gain realized by the person, whichever is greater, or imprisoned not more than five years, or both." Id.

However, the statute is silent on the wrongful *development* and *retention* of DNA evidence such that the officers that flagrantly violated the DNA database act here could not be charged with that crime.

As far as Petitioner is aware, the state agreed with this interpretation of the statute because none of the officers here were ever charged or convicted of violating S.C. Code Ann. § 23-3-650(C)(D). Accordingly, since the statutory remedy for violating S.C. Code Ann. § 23-3-650(C)(D) is inapplicable, the only remedy left would be the exclusionary rule. If this Court refused to suppress the wrongfully admitted evidence here, there would be nothing to dissuade the creation of illegal DNA databases across the state where the Sheriff's Offices can develop and retain DNA evidence in perpetuity, without any oversight from SLED and without possibility of punishment.

In this case, not only could the argument for suppression of Petitioner's DNA because the DNA database was illegal have succeeded on its own merit, that argument also would have bolstered trial counsel's main argument that the retention of Petitioner's DNA beyond the September 2010 burglary investigation exceeded the scope of consent Petitioner gave. App. 650, l. 14 – 651, l. 22. Trial counsel failed to argue that retention in an illegal DNA database in and of itself exceeded the scope of consent given. Even if Petitioner gave Investigator Carwell expressly *unlimited consent* for his DNA to be used *for all time*, the DNA would still be inadmissible because Petitioner could not have contemplated his DNA would be retained in an illegal and unregulated DNA database. App. 121, l. 5 – 125, l. 16; App. 649, l. 23 – 650, l; 4. App. 650, l. 14 – 651, l. 22. Not Petitioner, nor any other reasonable person, could be expected to understand that he was consenting to an illegal contract. See Oscanyan v. Arms Co., 103 U.S. 261, 268 – 69 (1880). Accordingly, trial counsel could have buttressed his scope consent argument by pointing out that

no one can be expected to understand they are consenting to an illegal contract such that the scope of Petitioner's consent was necessarily exceeded by the actions of the Richland County Sheriff's Office.

Moreover, even if this Court believes the creation of an unregulated, illegal DNA database and the wrongful retention of DNA in that database was a statutory violation, rather than a constitutional violation, the exclusionary rule is still applicable. See State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014). In Adams, the police believed Adams was a drug dealer and, acting without a warrant, placed a Global Position System (GPS) device on a car driven by Adams. Adams, at 643, 763 S.E.2d at 343. After monitoring Adams' travel to Atlanta and back to South Carolina, law enforcement conducted a traffic stop of Adams with a drug canine unit. Id. Pursuant to the search cocaine was found in Adams' possession. Id.

In a pretrial hearing, Adams moved to suppress the cocaine where he argued that the warrantless GPS installation and monitoring violated the Fourth Amendment and S.C. Code Ann. § 17-30-140, which required law enforcement to obtain a court order prior to installing a mobile tracking device. Id., at 645, 763 S.E.2d at 343 – 44; See S.C. Code Ann. § 17-30-140. The state first contended that there was no constitutional violation because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Adams, at 645, 763 S.E.2d at 344. However, the state admitted that the officers violated S.C. Code Ann. § 17-30-140 by failing to obtain court authorization prior to installing the GPS device and admitted that the officers did not know the statute even existed. Id. Despite the officer's ignorance of the statute, the state claimed that "even if the officers violated the statute, suppression was not warranted absent a constitutional violation." Id. The trial court

ruled that the officers violated S.C. Code Ann. § 17-30-140, but since no constitutional violation took place, the statutory violation alone did not warrant suppression of the drug evidence. Id.

Adams appealed his conviction and the Court of Appeals held that the failure to obtain a warrant before installing the GPS device and monitoring Adams' movements was a violation of the Fourth Amendment; however, the exclusionary rule did not apply because "Adam's traffic violations were intervening criminal acts sufficient to cure the taint arising from unlawfully installing the [GPS] device and monitoring the vehicle." Adams, at 646, 763 S.E.2d at 344. Adams appealed the Court of Appeals' decision to our Supreme Court. Our Supreme Court disagreed with this Court's decision and held that Adams' traffic violations did not provide sufficient attenuation from the taint of the illegal search because the stop was "entirely predicated on the information obtained from the GPS device and law enforcement's desire to search Adams and his vehicle for drugs." Id. at 648, 753 S.E.2d 345.

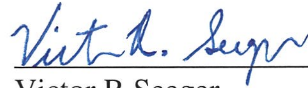
The state in Adams argued to our Supreme Court that the exclusionary rule should not apply because the officers relied in objective good faith on binding precedent that authorized the placement of a GPS device without a warrant. Adams, at 650, 763 S.E.2d at 346. The Court stated that the presence of the statute, S.C. Code Ann. § 17-30-140, and the absence of any binding precedent authorizing the placement of a GPS device without a warrant, compelled rejection of the state's good faith belief argument. Id. The Court held "Because the *only binding law in this case was a statute* that forbade law enforcement officers from installing a GPS device on Adams' car without court authorization," the exclusionary rule applied. Adams, at 653, 763 S.E.2d at 348. (emphasis added)

Accordingly, when the Adams reasoning is applied to this case it is evident that the proper remedy here is to apply the exclusionary rule and suppress the DNA evidence from Petitioner's

trial, "because the only binding law in this case was a statute that forbade law enforcement officers" from maintaining an illegal DNA database. See Adams, at 653, 763 S.E.2d at 348; S.C. Code Ann. § 23-3-640(A)(D). Here there was a reasonable likelihood that the suppression motion would have been successful had trial counsel argued the DNA evidence should be suppressed because the DNA database was illegal. Since the DNA match was the only way Petitioner was made a suspect in this case, and the rest of the evidence against him flowed from that DNA match, Petitioner was prejudiced by trial counsel's ineffective assistance of counsel and should be granted a new trial with the DNA evidence, and the evidence that derived from it, suppressed. App. 661, l. 23 – 662, l. 7; Strickland, at 694.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court vacate his convictions and remand his case to the Richland County Court of General Sessions for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of December, 2021.