

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

D. Garrison Hill, Circuit Court Judge  
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**RECEIVED**

MAY 13 2013

**S.C. Supreme Court**

ERNEST PRESSLEY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-000304

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RETURN TO PETITION FOR WRIT OF CERTIORARI  
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## INDEX

INDEX.....	1
STATE'S ISSUES PRESENTED ON APPEAL .....	2
COUNTER ISSUES PRESENTED ON APPEAL .....	2
STATEMENT OF THE CASE.....	3
ARGUMENT .....	4
CONCLUSION .....	15

## STATE'S ISSUES PRESENTED ON APPEAL

### I.

The Court of Appeals erred in determining that there was evidence of probative value to support the post-conviction relief court's finding that Counsel was ineffective for electing not to retain a DNA expert to assist him as a consultant or expert, where Respondent presented no evidence of deficient performance by Counsel for not procuring a DNA expert and failed to carry his burden of demonstrating prejudice.

### II.

The Court of Appeals erred affirming the post-conviction relief court's finding that Counsel was ineffective for not seeking a competency evaluation of the victim, where Respondent presented no probative evidence to support such a finding.

## COUNTER ISSUES PRESENTED ON APPEAL

### I.

This Court should deny certiorari because ample evidence supports the PCR court and Court of Appeals' rulings that respondent was prejudiced because trial counsel was deficient in failing to consult or retain a DNA expert.

### II.

This Court should deny certiorari because ample evidence supports the PCR court's finding that defense counsel was ineffective for not moving to have an independent evaluation of the complainant.

STATEMENT OF THE CASE

Respondent agrees with petitioner's procedural history.

## ARGUMENT

### I.

This Court should deny certiorari because ample evidence supports the PCR court and Court of Appeals' rulings that respondent was prejudiced because trial counsel was deficient in failing to consult or retain a DNA expert.

#### **Relevant Facts**

The alleged victim,<sup>1</sup> P.H., was fifteen-years-old at the time of the alleged incident. She was mentally disabled and in special education classes. She said she thought respondent Ernest Pressley ("Pressley") was her father's cousin. App. 47, l. 13 – 48, l. 21. Her competence to testify, and the incompetence of the SLED DNA analyst became the heart of respondent's PCR proceeding.

At trial, the complainant testified that on July 12, 2001, while she was sleeping on the couch, at Pressley's house, that he "stuck his private part in me." App. 48, l. 7 – 52, l. 17. She claimed Pressley "told me not to tell nobody." App. 52, ll. 9 – 12.

The complainant also said she told her sister and Pressley's wife the next morning. App. 52, ll. 12 – 15; App. 70, l. 21 – 71, l. 22. Dr. Kevin Grant, of the Aiken Regional Medical Center, testified the bruising to the teenager was "consistent with recent forcible sexual assault." App. 82, l. 14 – 86, l. 24.

Pressley submitted a DNA sample to the investigating officer. App. 186, l. 8 – 187, l. 23. Pressley testified at trial and he emphatically denied his guilt. Pressley said he did not understand the DNA evidence or how it could allegedly link him to the crime. App. 298, l. 21 –

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<sup>1</sup> For ease of reference, hereinafter she is referred to as "the complainant."

299, l. 1. Pressley repeatedly said he was not guilty of sexually assaulting the alleged victim and he did not know who had assaulted her, if anyone. App. 318, ll. 4 – 16.

At trial SLED Forensic DNA Analysis Lily Gallman (“Gallman”) testified over trial counsel’s objection that she was not qualified in the area of statistics. He later withdrew that objection after an *in camera* hearing. App. 144 – 158, App. 208-234, l. 13.; App. 238, ll. 22-23; App. 292. Gallman testified that the DNA samples showed “there was a match between him [appellant] and the semen that was found on the vaginal swabs and the suspected semen.” App. 221, l. 21 – 222, l. 3; App. 283, ll. 3 – 14. Trial counsel admitted that he did not understand the testimony that Pressley’s DNA was a match, “and I’m hopin’ the jury doesn’t understand frankly.” App. 234, l. 7 – 237, l. 24.

At the post-conviction relief hearing respondent presented the testimony of Dr. Ronald Ostrowski. Ostrowski gave the PCR court his background as follows:

- Q. Dr. Ostrowski, what is your educational background?
- A. I have a bachelor’s degree in biology with a minor in chemistry, a masters degree in biology with a dissertation in population genetics and a Ph.D. in biology with a dissertation in molecular genetics.
- Q. Would you explain to us in lay terms what a masters in population genetics means?
- A. As in law where you have subspecialties, tax law, criminal law, et cetera, geneticists have the same kinds of subspecialties. And two of them, these in particular, are - - the molecular genetics is self – explanatory, I think that’s the laboratory work, white lab coats, test tubes, et cetera. And population genetics is strictly a mathematical science. In a forensic situation, once it’s a so-called match, the next question is a population genetics question, how many other people on the face of the earth would also match the evidence.

Q. Could you explain to us what your degree, your doctorate, in developmental molecular genetics means?

A. It was involved with analyzing DNA synthesis in a cellular situation.

Q. And would that have been the first time when you started dealing with the testing of DNA?

A. Yes, sir, that was 1968.

Q. And have you been involved in that since that time?

A. Yes, sir.

Q. Have you been - - what is your professional experience? Where have you worked?

A. I was a - - until three years ago, I was a professor in the biology department at the University of North Carolina Charlotte where I taught genetics, genetics labs, medical genetics and DNA profiling.

App. 418, l. 9 – 419, l. 20. Dr. Ostrowski had worked on over four hundred DNA cases in six different states. App. 420, ll. 13 – 18.

Dr. Ostrowski said that Gallman's testimony was inaccurate because she stated on numerous occasions that there was nothing to exclude Pressley as the DNA donor. App. 456, ll. 21 – 24. Dr. Ostrowski also said Gallman was not a statistician, she was not a geneticist, and he strongly questioned her credentials. App. 455, l. 6 - 457, l. 24.

Dr. Ostrowski also said that Gallman's claim of the odds of Pressley not being the donor as one and one hundred thirty nine was not accurate. App. 442, l. 4 – 446, l. 18. Ostrowski noted that different individuals share some identical strands of DNA. Dr. Ostrowski explained in great detail to the PCR judge how the testimony was misleading the jury. App. 426, l. 12 – 457, l. 13.

At the PCR hearing, trial counsel admitted that the DNA evidence was the key to the case and that his understanding of the science was limited because of his failure to consult an expert:

Q. Obviously, you did the best you could with what you had?

A. I feel like I did.

Q. Had you had Dr. Ostrowski *or another expert, could you have done better?*

A. *Yes. Obviously, yes.*

Q. The PCR case law makes you take another step and that step is was he prejudiced by that. Do you feel, as the individual that was most intimately involved in all of this, that had Dr. Ostrowski or someone like him testified, there could have been a different result?

A. I mean, I'm under oath. I think Ms. Gallman did a terrible job in that she works for the State of South Carolina, that's - - I mean, she did a terrible job. The doctor today was much more eloquent. I don't see how he couldn't have helped. I think I can say under oath - - I mean, I can't say we were prejudiced, *but I think there's a very good chance there might could have been a different result.*

Q. Were you the only court official concerned about Ms. Gallman's testimony and her expertise?

A. No. Judge Keesley stopped the cross-examination, and, again, I thought I was doing a good job cross-examining her, and he basically said, Ms. Gallman, if you don't get it together, I'm going to exclude the DNA. And Ernest and I were very excited about that because *we really did feel like that was the key to their case* because I really felt like we had poked a lot of holes in the state's case, you know, leading up to the DNA. And then they took a break and when we came back, she tied it up good enough for Judge Keesley and he let it in.

App. 481, l. 3 – 482, l. 12. (emphasis added).

Trial counsel also said he thought “that I did a pretty good job with her [Gallman] . . . “*for not having an expert.*” Trial counsel also said, “And I know with what [Dr. Ostrowski] said today, which you brought out on cross, it could be Ernest’s DNA or it could be, you know, not Ernest’s DNA *and I didn’t understand the stuff well enough to ask that question. And to me, that was my biggest shortcoming was not being able to ask her that question.* The questions you just asked him I should have asked her.” App. 484, ll. 13 – 20 (emphasis added). On redirect-examination trial counsel acknowledged that Gallman’s DNA testimony “obviously hurt.” App. 490, l. 17 – 491, l. 8.

#### *The PCR Court’s Order Granting Relief*

In the order granting PCR the court wrote that “due to its nearly infallible accuracy, DNA is the most powerful forensic evidence heard in courtrooms.” App. 550. The PCR court noted Gallman’s testimony “that Pressley’s DNA was a ‘match’ for semen found in the victim’s vagina, and that ‘nothing’ excluded Pressley’s as a suspect.” App. 551. The PCR court found Dr. Ostrowski’s testimony “highly credible and compelling.” He demonstrated that Gallman’s assertion “that nothing excluded Pressley as a suspect was simply wrong in several fundamentally important respects.” App. 551.

The judge concluded that the jury was left with inaccurate information about respondent’s DNA from Gallman’s testimony. *These included her testimony that nothing excluded respondent as a suspect, and her overbroad “expert opinion” that respondent’s DNA was a “match.”* The judge also found the Gallman’s statistical frequency testimony regarding “the match” failed to disclosed significant facts. App. 556.

The judge wrote that the courts have recognized “what scientists have long urged: that due to the similarity of most human DNA, a bare statement that one’s DNA ‘matches’ is

meaningless. As one federal court has remarked, ‘without the probability assessment, the jury does not know what to make of the fact that the [DNA] patterns match, the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa.’ United State v. Yee, 134 F.R.D. 161, 181 (N.D. Ohio 1991).” App. 556, n. 2.

The PCR judge rejected the state’s reliance on Frasier v. State, 306 S.C. 158, 410 S.E.2d 572 (1991). The judge here found that defense counsel Anderson’s cross-examination was insufficient in the absence of defense expert testimony. The PCR court noted that the DNA evidence in Frasier’s trial did not implicate him, but did implicate his co-defendant. App. 558. The court found “under these specific circumstances here, the cross-examination of Gallman was not an adequate substitute for a defense expert.” App. 558. The PCR concluded “trial counsel’s failure to obtain a DNA expert **for consultation** or to testify at trial rose to the level of deficient performance to prejudice the applicant.” App. 559. (emphasis added).

#### The Court of Appeals’ Opinion

After oral argument, the Court of Appeals affirmed Judge Hill’s thoughtful decision in an Rule 220(b)(1) unpublished *per curiam* opinion.<sup>2</sup> Supp. App. 76-77; see also SCACR 220(b)(1). The court found the DNA issue dispositive and did not address the competency issue pursuant to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). The court based its affirmance on the standard of review: “whether any evidence of probative value exists” to support the PCR court’s decision. Supp. App. 77; see also Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

## Discussion

The Court of Appeals correctly affirmed Judge Hill's decision because it was supported by ample evidence. The standard of review is whether there is any evidence to support the PCR judge's findings. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 626 (1989). The evidence presented at the PCR hearing clears this low bar by a high margin. Strong evidence showed trial counsel was deficient in his handling of the DNA evidence and this deficiency prejudiced Pressley. See Strickland v. Washington, 466 U.S. 668 (1984).

As shown above, trial counsel admitted he did not understand the underlying science well enough to properly cross-examine Gallman. After hearing Ostrowski's testimony, trial counsel stated, "I feel like the DNA is what killed us in the trial. And I don't know. I mean, I don't understand it great, obviously." App. 471, ll. 3 – 14. The State relies on Frasier for the proposition that effective cross-examination is all that is required of trial counsel. First, ample evidence supports the PCR court's ruling that trial counsel's cross-examination was not effective. The majority of the State's citations to the record to support its contention that trial counsel "vigorously" cross-examined Gallman are for questions that were asked *in camera*. The State does not provide a credible example of any effective questions asked of Gallman in front of the jury or how her testimony that Pressley was "a match" was discredited. (State's Pet. Cert. 7 – 9) While Gallman's testimony was lengthy and at times confusing, the one thing the jury understood from Gallman was that Pressley was "a match." The PCR court's holding in this regard is well-founded in the evidence.

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<sup>2</sup> The State argues in a footnote that a prejudice finding in this case "would likely affect a large number of convictions." State's Pet. Cert. at n.15. This "floodgates" argument ignores that the unpublished opinion of the Court of Appeals cannot be cited as precedent.

Furthermore, the State's reliance on Frasier ignores the concept that as our understanding of the science of DNA improves, the standard of what constitutes effective cross-examination becomes higher. Frasier and Strickland do not contemplate a fixed standard for measuring trial counsel's performance. See Padilla v. Kentucky, 559 U.S. 356 (2010) (recognizing that changes in immigration law increased the expectations of trial counsel's performance in advising defendants regarding collateral consequences of a guilty plea).

And while standards of performance evolve over time, the idea that an attorney needs to understand the science behind a critical portion of evidence is far from new. In Miller v. Anderson, the Seventh Circuit stated that it was "irresponsible" of trial counsel to not consult with expert witnesses when scientific evidence would form a key portion of the prosecution's case. 255 F.3d 455, 459 (7<sup>th</sup> Cir. 2001) (Posner, J.) *final order modified after settlement by the parties*, 268 F.3d 485 (2001). The court reversed the defendant's convictions in part based on the testimony of hair and DNA experts offered at PCR. Id. Similarly, the testimony of Ostrowski exposed the lack of preparation and understanding by Pressley's attorney for the weaknesses in the State's DNA evidence. See also Woolley v. Rednour, 702 F.3d 411, 423 (7<sup>th</sup> Cir. 2012) (finding trial counsel ineffective for failing to retain an expert witness on crime scene reconstruction); Paine v. Massie, 339 F.3d 11941203-04 (10<sup>th</sup> Cir. 2003) (holding trial counsel ineffective for failing to obtain expert testimony regarding Battered Woman Syndrome); Driscoll v. Delo, 71 F.3d 701, 708 (8<sup>th</sup> Cir. 1995) (finding trial counsel ineffective after admitting that he took no steps to learn about specific serology tests performed by prosecution expert).

The need to consult experts and understand scientific evidence was widely understood in South Carolina. As the Honorable Ralph King Anderson, Jr. noted in South Carolina Standard Criminal Defense Practice Manual, at p. 99 (2008):

Counsel will often have to retain experts due to the complexity of many areas of forensic evidence (e.g. DNA, ballistics, psychiatry, pathology, blood spatter, fingerprints, drug dogs). Counsel should be mindful that merely cross-examining a state's expert witness without a thorough understanding of the subject matter of his testimony is neither diligent nor effective representation. Experts are necessary to help counsel prepare for trial and gain a proper understanding of particular technical evidence. Experts also convey understanding to both the court and the jury. Counsel must make a tactical informed decision if expert testimony is required at trial on a matter or is necessary to rebut the state's expert. When retaining an expert, counsel needs to consult with experienced counsel regarding the reputation, credibility, and past courtroom performances of a potential expert witness in a relevant field. Credible experts are vital while unqualified or disreputable experts can only harm counsel's defense of the client.

Here, there was certainly evidence to support the PCR court's finding that counsel provided ineffective assistance of counsel in this case, and Petitioner's assertion there was "no evidence" to support the PCR court's ruling, respectfully, must be rejected. The Court of Appeals properly disposed of this case based on the standard of review. The PCR court's conclusions were drawn from evidence presented and credibility determinations. No error of law was committed. Therefore, this case does not present an issue worthy of a grant of the State's petition.

## II.

This Court should deny certiorari because ample evidence supports the PCR court's finding that defense counsel was ineffective for not moving to have an independent evaluation of the complainant.

The Court of Appeals did not address this issue, but the PCR judge also correctly found trial counsel ineffective for not moving to have the complainant evaluated for competency. The judge noted that the teenager had recently been found incompetent to stand trial in a juvenile case. Her full scale IQ was found to be fifty-two and also fifty-seven. App. 559. The juvenile case's forensic evaluation found the complainant to be incompetent and mildly retarded. It also noted she suffered from emotional and behavioral problems and that she had reported voices calling her name and she had stated that she sees "the spirits of dead people walking around my house." App. 559. The PCR court found the failure to request a mental evaluation under these circumstances could not be deemed a valid "strategy." App. 560.

As to whether or not the complainant was competent to testify, trial counsel's proffered reason for not challenging the State on this issue was "I think it was trial strategy to not make a big deal about the [alleged victim's] competency." App. 488, l. 1 – 490, l. 13. The State asserts this passes for a reasonable trial strategy. (State's Pet. Cert. at 15.) As the PCR court correctly noted, if the complainant was incompetent and could not testify, "the state's case is crippled." If the alleged victim was found competent "the defense lost nothing." App. 560. Such a hearing would have been conducted outside of the hearing of the jury and the defense would not have suffered any loss of sympathy or credibility for an attack on the complainant's competency.

The PCR court correctly held trial counsel should have sought an evaluation of the victim pursuant to In Re Michael H., 360 S.C. 540, 602, S.E.2d 729 (2004). Petitioner's argument that

defense counsel could not have anticipated the decision In Re Michael H. which came only two years after respondent's trial in 2002 ignores the fact that there has long been a procedure in place to challenge a child's competency. Harris v. Campbell, 293 S.C. 85, 358 S.E.2d 719 (Ct. App. 1987); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971); State v. Summer, 55 S.C. 32, 32 S.E.2d 771 (1899). There was case law from other jurisdictions allowing such an evaluation as this Court recognized in the case of In Re Michael H. See also Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003) (discussing the general boundaries of mental retardation and procedure for pre-trial hearing in death penalty cases regarding defendant's level of retardation).

CONCLUSION

For the above-stated reasons, this Court should deny the State's Petition and allow the decision of the Court of Appeals to stand.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 13th day of May, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

D. Garrison Hill, Circuit Court Judge

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ERNEST PRESSLEY,

RESPONDENT,

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STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2013-000304

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CERTIFICATE OF SERVICE

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I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also served upon Mr. Ernest Pressley #289489 Kershaw Correctional Institution 4848 Gold Mine Highway Kershaw, SC 29067-8069 this 13th day of May, 2013.




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David Alexander  
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 13th day  
of May, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013.