

IN THE  
SUPREME COURT OF THE UNITED STATES

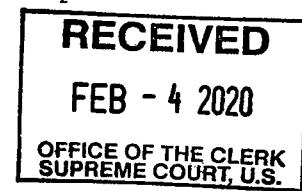
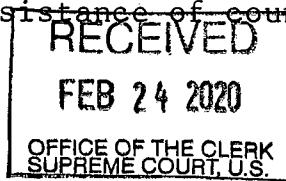
BRENT CURTIS SCHWERTZ )  
PETITIONER, )  
VS. ) CASE NO. 19-6495  
RICHARD JENNINGS )  
RESPONDENT. )

PETITION FOR REHEARING

COMES NOW, Petitioner, Brent Curtis Schwertz, pro se, and in forma pauperis, and pursuant to U.S. Supreme Court Rule 44, and respectfully moves this Court to grant rehearing. Petitioner requests of the Court for rehearing of its Order of January 13, 2020, and in support states the following:

REASONS MERITING REHEARING

1. This Court's Order is in conflict with Cravens v. State, 50 S.W.3d 290 (Mo.App.S.D.2001). Furthermore, the Court's order was based on an unreasonable determination of facts in light of the evidence presented in Petitioner's Petition For A Writ Of Certiorari. Additionally, the Court overlooked material matters of fact and law, because Petitioner clearly proved he was denied his rights to due process of law and to effective assistance of counsel.



GROUND ONE

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE, RESEARCH, PRESENT EVIDENCE, AND ARGUE THAT THE HANDGUN INVOLVED IN THIS CASE IS KNOWN TO BE DEFECTIVE IN NUMEROUS WAYS, INCLUDING DISCHARGING WITHOUT HAVING THE TRIGGER PULLED. EVIDENCE DEMONSTRATING NUMEROUS EXAMPLES OF ACCIDENTAL DISCHARGES OF THIS MAKE AND MODEL OF HANDGUN WOULD HAVE SUPPORTED PETITIONER'S DEFENSE OF AN ACCIDENT. COUNSEL'S INEFFECTIVENESS DENIED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6th AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION. PETITIONER WAS PREJUDICED BY COUNSEL'S INEFFECTIVENESS, AND THUS, THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, PETITIONER'S TRIAL WOULD HAVE HAD A DIFFERENT OUTCOME.

On January 28, 2016, the motion court held an evidentiary hearing on the amended motion, at which Kathleen Green, Firearms Examiner for the Missouri State Highway Patrol Crime Lab; David Mills, trial counsel; Eddie Schwertz and deborah Schwertz (Schwertz's parents); and Brent Schwertz (Petitioner) testified.

Schwartz's theory was that he shot (Tracy Weber) victim accidentally, after they had been arguing about an engagement ring victim refused to return to Schwartz when she broke off the engagement. When victim refused to give back the ring, Schwartz became "aggravated." Schwartz then made "the worst decision I've ever made in my entire life," and retrieved a silver Bryco Jennings Model Nine semi-automatic pistol in order to scare victim into giving back the ring. When victim still refused to return the ring, Schwartz loaded a round into the chamber. Victim then told him to put the gun down, they would talk, and she would give him the ring. Schwartz put the gun down on a countertop, but when victim lunged for the gun, he went for the gun as well, he "grabbed the gun" and "the gun went off." Schwartz admitted his finger "could have" been on the trigger, but denied it was his intention to shoot victim, and that it was an accident. Schwartz then called his father, telling him Tracy had been shot, and asking him to call 911. Schwartz also told law enforcement that victim was "shot."

Schwartz testified he told trial counsel at their first meeting to investigate potential issues with his model of gun being prone to accidental discharge, because it "just went off." Schwartz admitted he did not have specific information regarding potential accidental discharge issues with his gun until after the conclusion of his direct appeal.

Schwartz asserts that evidence demonstrating numerous examples of accidental discharges of this make and model of weapon would have supported his theory of an accident in this case, and there is a reasonable probability of a different outcome of the trial and/or 29.15 proceeding had trial counsel and/or PCR counsel presented and argued such evidence. See Affidavit of Arthur Allen MOBar #42762; Affidavit of Shawn C. Hanna (EXHIBITS 60 and 61)(App. F & G).

Trial counsel, David Mills called Kathleen Green, Firearms Examiner for the Missouri State Highway Patrol Crime Lab, to testify at trial, but did not consider asking her about problems with other guns of the same make and model (PCR Tr.37-38, 63). Mr. Mills recalled that Ms. Green testified that it was not easy to load the gun or to get the gun to eject a spent cartridge (PCR Tr.63). Ms. Green's report of her examination of the gun did not indicate anything about whether she checked the gun to see if it would accidentally discharge (PCR Tr.38). According to Mr. Mills, the issue of whether the gun would go off by itself, or whether it had a hair trigger, never came up (PCR Tr.38-39).

Mr. Mills did not investigate whether the gun, or guns of the same make and model, had problems with a hair trigger going off without being touched (PCR Tr.64). Mr. Mills agreed that evidence that the gun could go off accidentally could be relevant to Schwartz's claim that the gun went off by accident

(PCR Tr.70). Mr. Mills acknowledged that he was not limited in his investigation to matters suggested by his client (PCR Tr.71-72).

In Cravens v. State, 50 S.W.3d 290 (Mo.App.S.D.2001), the murder conviction was reversed for ineffective assistance of counsel; counsel failed to investigate the propriety of obtaining expert witnesses whose testimony would have supported defendant's assertions that the shooting was unintentional.

Reasonably competent counsel faced with the facts involved in this case, would have investigated the possibility that the handgun was defective and prone to accidental discharge, and would have presented such evidence to the jury, especially since his client insisted that the shooting was an accident. Counsel had no strategic reason for failing to investigate and present such evidence.

Ms. Green testified that she examined and test fired the gun that was recovered at the scene of the shooting (PCR Tr. 5-6). The gun was a Bryco Jennings Model Nine (PCR Tr.18). Ms. Green did not conduct an "accidental discharge test" on the gun (PCR Tr.16-17). The pistol did have problems with chambering cartridges and ejecting spent cartridge cases; it would not consistently chamber cartridges from the magazine (PCR Tr.9). Ms. Green was aware that the Bryco Company went out of business as a result of a 2003 lawsuit that was filed after a seven year old boy was accidentally shot (PCR Tr.14).

Christopher N. Robinson, Private Forensic Consultant has an extensive 21-year career regarding forensic examinations of firearms. Mr. Robinson specifically states: "I have worked numerous cases over my career involving the Bryco Jennings Nine 9mm pistol, in which the weapon has accidentally discharged. This weapon will discharge when dropped or jarred due to poor engagement between the sear and the firing pin. I have also completed testing and examination of this weapon where the shooter experienced what is known as bump off. This circumstance occurs when the weapon is bumped on one of its surfaces and therefore causes the firearm to discharge." See Affidavit of Christopher N. Robinson (EXHIBIT 62)(APP. H).

Mr. Robinson further states: "I also have first hand knowledge of just how dangerous these weapons are. On January 12, 2001, while working as a Firearms Examiner at the Georgia Bureau of Investigation in Decatur Georgia, I was test firing the Bryco "Jennings Nine" 9mm pistol into a water tank. I pulled the trigger of the weapon but, it did not fire. I removed the magazine from the weapon, took my finger away from the trigger, and placed my hand on the slide of the weapon to try and remove the cartridge from the chamber. As I began to pull the slide to the rear, the weapon discharged shooting me in the palmar surface of my left hand. This type of discharge is known as a "hang fire". "When I pulled the trigger of the firearm, the firing pin, which was under spring tension became

perched on the sear surface. After several seconds, the tension of the spring on the firing pin caused the weapon to fire, even without the trigger being pulled." See Affidavit of Christopher N. Robinson (EXHIBIT 62)(App. H).

Schwartz respectfully requests that this Court carefully read over the Affidavit of Christopher Robinson, because Schwartz was convicted based on the testimony of State's expert witness, Kathleen Green, MSHP Firearms Examiner who examined the gun in question, to testify at trial. However, Ms. Green did not conduct an "accidental discharge test" on the gun (PCR Tr.16-17). More specifically, Ms. Green testified that she had no reason to test the gun to see if it would discharge accidentally (PCR Tr.30). Never-the-less, Schwartz was convicted based on the testimony of Ms. Green. Although, Ms. Green lacked the experience, knowledge, and facts regarding the defects of the Bryco Jennings Model Nine 9mm handgun and guns similar to it.

Mr. Robinson's testimony would have refuted much of Ms. Green's trial testimony and PCR hearing testimony, which as a whole completely minimized the dangers of the model of weapon in question. Mr. Robinson appears to have better knowledge and more experience with this model of weapon, and could have testified in detail about the problems with this particular model and the dangerous reputation of the model in question. It is clear and obvious that the testimony of Mr. Robinson

would have benefitted Schwertz at both his trial and his PCR hearing.

Schwertz asserts that his conviction was obtained by use of materially false testimony of Kathleen Green, State's expert witness, and this Court should consider a new trial be granted based on newly discovered evidence presented herein and under Rule 33, or an evidentiary hearing to present such evidence for review. See Mitchell v. United States, 368 U.S. 439 (1962).

In this case, at trial, Schwertz testified that he had purchased the handgun in mid-October 2009, and that he had never fired it (Tr.668:3-6, 669:14-15; PCR Tr.84:3-5)(State's Exhibit-A)(App. I).

"The facts of this case demonstrate the gunshot wound which Tracy Weber obtained on the date of the incident was not brought about by your intentional act; instead, it occurred as a result of the scramble for the gun which you described. These facts point in the direction of the matter being an accident" (MOVANT'S EXHIBIT-00)(App. J).

"Based on what you have told us, it is our position this case arises from an accident and that you did nothing wrong" (MOVANT'S EXHIBIT-ZZZ)(App. K).

Schwertz's trial counsel failed to even investigate whether the handgun in this case could have discharged accidentally, or whether this model of gun had a history of discharging accidentally. While Ms. Green indicated that she

had no reason to test the gun to see if it would discharge accidentally (PCR Tr.30), there was ample information available to alert both Mr. Mills and Ms. Green that the Bryco Jennings Model Nine 9mm handgun and guns similar to it, had problems that should have raised a concern that the gun could have fired with very little trigger pressure (PCR Tr.11-14, 18). If Mr. Mills had conducted any research or investigation into the operation of the gun involved in this case, he would have learned about the problems set out in both State's Exhibits B and D (App. L & M)(PCR Tr.11-14, 18), and would have been alerted that he should have Schwertz's gun checked to see if there were circumstances under which it could accidentally discharge. Even if Schwertz's own gun did not appear to have such problems, evidence that other guns of the same make and model had such problems, would have been relevant to the question of whether Ms. Weber was the victim of an accidental shooting.

Ms. Green acknowledged that the gun in evidence in this case is sometimes referred to as a "Saturday Night Special," which is a term used for a small caliber, cheaply made, low-priced firearm (PCR Tr.21). Mr. Mills knew or should have researched, so that he would know, that the gun in this case was essentially a Saturday Night Special. Had he conducted the necessary research, he would have known that the gun was cheaply made, and would have alerted to the problems that had plagued other cheaply made handguns. He would have known

to have the gun thoroughly examined for any defect that could cause the gun to discharge with little or no pull on the trigger. Trial counsel failed to investigate the handgun in this case, a Bryco Jennings Model Nine 9mm handgun (Tr.787). However, he did call the MSHP Firearms Examiner, Kathleen Green, who examined the gun in question, to testify at trial. However, he only used her to establish that the gun in question exhibited "jamming" or not ejecting and chambering the cartridges properly (Tr.787-790). No evidence was presented through her or any other witness about any history involving this manufacturer or the make and model of handgun.

Schwartz advised counsel that he did not recall firing the handgun when it discharged and struck the victim, and that the gun discharged as Schwartz and Ms. Weber both reached for and grabbed the weapon. Schwartz has steadfastly maintained that he did not intentionally shoot Ms. Weber, and that her death was the result of a tragic accident.

Given the circumstances surrounding the discharge of the handgun in this case; evidence that this make and model of handgun has been found to have defects that affect its firing, would have aided in Schwartz's defense, and would have supported his defense that the shooting was an accident. There is a reasonable probability that the jury would have found that the gun in this case discharged unexpectedly when it was grabbed from the counter, without anyone intentionally pulling the trigger.

At the evidentiary hearing, the State presented [AFTE Journal - Spring 2001 Volume 33, Number 2] State's Exhibit-D. Said exhibit is regarding Petitioner's specific make and model handgun; a Bryco Arms model Jennings Nine 9mm LUGER caliber Semiautomatic Pistol. However, pre-trial, the State failed to disclose and release AFTE Journal - Spring 2001 Volume 33, Number 2, which states:

"WARNING: These pistols may create an EXTREMELY DANGEROUS CONDITION and a POTENTIAL FOR SERIOUS INJURY by firing without pulling the trigger."

In this case, the evidentiary hearing was held on January 28, 2016 (15PU-CV-00432). The following testimony of Kathleen Green (State's expert witness) established that Ms. Green was familiar with the AFTE Journal - Spring 2001 Volume 33, Number 2. Ms. Green testified as follows:

BY MS. DOLIN: (direct examination)

Q. Okay. Are you familiar with a spring 2001 AFTE article about this make and model weapon?

A. Yes, I have read that.

Q. Okay. All right. Kathleen, I'm going to approach you with what's been marked State's Exhibit D. Do you recognize that?

A. Yes. This is a copy of the AFTE article that I read.

Q. Okay. And the same foundational questions: It's something that people in your field rely upon because it's the same journal as before?

A. Yes.

(PAGE 12, LINES 19-25) (PAGE 13, LINES 1-2).

The AFTE Journal - Spring 2001 Volume 33, Number 2 states as follows:

"WARNING: These pistols may create an EXTREMELY DANGEROUS CONDITION and a POTENTIAL FOR SERIOUS INJURY by firing without pulling the trigger."

Kathleen Green (State's expert witness) committed perjury when she testified that, "I don't know of any situations where this particular gun would fire without pulling the trigger."

Kathleen Green (State's expert witness) testified  
BY MR. ALLEN: (cross-examination)

Q. Okay. I'll ask you globally. Is the Bryco Jennings Model Nine known to discharge without having the trigger pulled?

A. No, it is not.

Q. Are you aware of numerous examples of accidental discharges of this make and model weapon?

A. No. Well, accidental discharge to us means that it would fire without pulling the trigger. I don't know of any situations where this particular gun would fire without pulling the trigger.

(PAGE 15, LINES 24-25) (PAGE 16, LINES 1-6).

In addition, regarding this issue, please see "SUGGESTIONS IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT JUDGMENT" (9 page document) filed by Arthur Allen on May 6, 2016. See pages 6-8 (App. N, p.6-8).

Kathleen Green (State's expert witness) committed perjury when she testified that, "I don't know of any situations where this particular gun would fire without pulling the trigger."

§ 575.040 R.S.Mo., in relevant part, reads:

1. A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths.

Ms. Green apparently did not carefully read the Spring 2001 article she provided to the State as Exhibit-D, if she read it at all. According to that article, both malfunctioning Bryco Jennings Nine firearms displayed accidental discharges at a point when the trigger was not being pulled. The article described a number of such situations. In one example it occurred "when the slide was pulled to the rear and released to load a cartridge into the chamber, the firearm discharged without the trigger being pulled." The article went on to say that in one of the two examples involved, "the firearm could be discharged by just lifting up slightly on the side or bumping the rear of the slide."

Reasonably competent counsel faced with the facts involved in this case, including his client's steadfast position that the shooting was an accident, would have investigated the possibility that the handgun was defective and prone to

accidental discharge, and would have presented such evidence to the jury. Counsel had no strategic reason for failing to investigate and present such evidence, and there is a reasonable probability that had counsel done so, the result of the trial would have been different. Therefore, this Court must reverse Petitioner's convictions and sentences, and remand this cause for a new and fair trial.

#### CONCLUSION

The Petition For Rehearing should be granted because the (motion court) Circuit Court of Pulaski County's findings of fact are not supported based on the Affidavit of Christopher Robinson. Furthermore, both opinions issued by the Missouri Court of Appeals and the U.S. District Court are adopted from the motion court, wherein, the courts have overlooked material matters of fact and law. Herein, Petitioner has established by clear and convincing evidence that the courts' opinions are clearly erroneous. A manifest injustice or miscarriage of justice will result in the absence of relief.

Respectfully submitted,

Brent C. Schwartz

Date: January 30, 2020