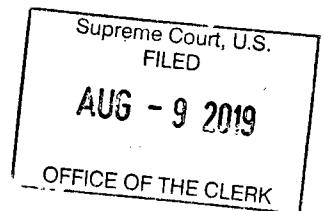


23-7087
IN THE
Supreme Court of the United States
ORIGINAL

TASHA BATES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent



Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Tasha Bates, Pro Se
#526437
TPFW Unit 1 East A-26
3881 Stewarts Lane
Nashville, TN 37218-3302

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court commit reversible error by failing to grant Petitioner's post conviction relief because of the introduction of evidence at her criminal trial of the results of a heat study of the Petitioner's vehicle when law enforcement moved her vehicle and doing the heat study without obtaining a search warrant authorizing that action in violation of the defendant's rights under the 4th Amendment to the United States Constitution?
2. Did the trial court commit reversible error by failing to grant Petitioner post conviction relief because of the introduction of evidence at her criminal trial of items purportedly used in the production of methamphetamine obtained by a search of the defendant's residence pursuant to a search warrant that was invalid under the 4th Amendment to the United States Constitution because lacked probable cause due to the staleness of the information?
3. Did the trial court commit reversible error by failing to grant post conviction relief because the Petitioner's criminal trial counsel was ineffective by failing to file motions to suppress as to evidence that was admitted that was prejudicial to the Petitioner's case, by failing to pursue motions in limine that he had filed, repeatedly failing to object to the testimony of witnesses who failed to demonstrate qualifications in the subject areas that they were permitted to testify about, and suggesting to the jury in his direct examination of the defendant that he did not believe that she was a credible witness resulting in the defendant failing to have legal counsel as prescribed by the 6th Amendment to the United State Constitution.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

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JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on May 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth (6th) Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall....have Assistance of Counsel for his defense." Also, the Petitioner cited under Article 1, § 9 of the Constitution of the State of Tennessee stating that due to the Petitioner's previous diagnosis of osteoarthritis and surgeries for Carpal Tunnel Syndrome she would have been unable to commence with the charges that she is convicted under.

STATEMENT OF THE CASE

Petitioner was convicted of two counts of first degree felony murder, two counts of aggravated child neglect convictions, and four counts of facilitation of the initiation of the process of manufacturing methamphetamine in Bradley County, Tennessee. The Petitioner's trial was held on August 27 through 29, 2013. After an abbreviated sentencing hearing, the Criminal Court sentenced the Petitioner to two life sentences for the death of her two children, a twenty-year sentence for each of the two aggravated child neglect convictions, and a three-year sentence for each of the four counts of facilitation of the initiation of the process of manufacturing methamphetamine. The trial court ordered that the two life sentences be served consecutively and that two twenty-year sentences to be served consecutively as well, with those sets of sentences to be serve concurrently with each other and with the drug-related convictions.

The convictions were appealed to the Tennessee Court of Criminal Appeals. On April 7, 2015, that court delivered its opinion. In that opinion, the court ruled that error was committed by the trial court when it failed to grant the defendant's motion to sever for trial the drug charges from the homicide and child neglect charges and ordered that the drug cases be remanded for a new trial. However, the court affirmed the convictions for the two aggravated child neglect charges and the two homicide charges. In addition, the appeals court upheld the trial court's consecutive life sentence on the homicide charges. The defendant filed a T.R.A.P. Rule 11 application for permission to appeal to the Tennessee Supreme Court. The application was denied on August 13, 2015.

During the remand proceedings of the drug charges the Petitioner filed a suppression motion with reference to the search of her residence on July 13, 2012

pursuant to a search warrant alleging that the search warrant was *without probable cause*.

On August 15, 2016, the hearing on the motion to suppress, the State of Tennessee filed a "Notice of Nolle Prosequi" and caused all of the remanded drug charges to be dismissed.

On July 28, 2016, the Petitioner filed a *pro se* petition for post-conviction relief. On August 2, 2016, the Criminal Court for Bradley County, Tennessee entered a preliminary order of colorable claim and appointed the Petitioner legal counsel to assist in the presentation of her petition. On September 2, 2016, through appointed counsel, the Petitioner filed an Amended Petition for Post Conviction Relief. On October 11, 2016, the State filed its answer to the Amended Petition for Post Conviction Relief.

The hearing on the merits of the case were heard on April 11, 2017, and the trial court rendered its decision on July 31, 2017 denying the Petition for Post Conviction Relief.

Petitioner files this Writ of Certiorari timely for this Honorable Court's consideration.

REASONS FOR GRANTING THE PETITION

I. **Did the trial court commit reversible error by failing to grant Petitioner's post conviction relief because of the introduction of evidence at her criminal trial of the results of a heat study of the Petitioner's vehicle when law enforcement moved her vehicle and doing the heat study without obtaining a search warrant authorizing that action in violation of the defendant's rights under the 4th Amendment to the United States Constitution?**

In her post conviction relief petition, the Petitioner raised the issue that her constitutional rights under the 4th Amendment were violated when the State, at the Petitioner's original trial, introduced evidence of a heat study performed on her automobile after it was removed from the impound lot at the Bradley County Sheriff's Department and transported to her residence. In her criminal trial, this evidence was presented directly to the jury through the testimony of Detective Scoggins and was likewise incorporated and used by Jan Null, a meteorologist qualified as an expert on the temperatures in enclosed automobiles, as a part of his testimony.

The authority used by law enforcement to conduct the heat study was a search warrant applied for and issued on July 2, 2012. Apparently, the vehicle was seized by law enforcement on June 29, 2012 after a consent search was conducted of the vehicle at the scene and transported to the Bradley County Justice Center where it was held by law enforcement. There is no indication in the record that the original seizure of the vehicle and the impoundment of the vehicle were undertaken with prior approval of the defendant or authority under a search warrant. The warrant, signed by the magistrate authorizing the search provides that a search of the vehicle be conducted "forthwith" at 2290 Blythe Avenue, where the vehicle was then located. There is no authority to move the vehicle to the defendant's residence, nor to place thermometers in the vehicle and monitor them. In addition, the warrant directed the search for "any items that would constitute involvement, participation, execution, or cover-up of the crime alleged...." There is no mention of the magistrate authorizing law enforcement to perform a heat study nor was there authority to move the vehicle.

As to this issue, the PCR trial judge did not specifically rule on the "stand alone" claim but addressed that issue in the context of the defendant's claim of ineffective assistance of counsel. In its ruling the trial court agreed that the heat study was outside

the scope of the warrant. However, the court found that the vehicle was "already in the custody of law enforcement" and, without citation to any authority, that the reading of the thermometers inside the car could have been done without a search warrant. The PCR trial court further held:

"It is not a search but rather an observation over time. Such observation evidence is more credible and fairer to the petitioner from use of her car than to have collected it from another car. Likewise, to collect the date from her yard rather than an alternate location in Bradley County is more meaningful."

The trial court cites to no authority other than *United States v. Jones*, Id, and *State v. Meeks*, 876 S.W.2d 121 (Tenn.Crim.App. 1993), stating that these cases are readily distinguishable from "the observations or measurements made on an item of evidence in police custody."

The trial court's analysis is not consistent with the application of the 4th Amendment's restrictions as described in the *Jones* case and is clearly error. The first thing that is significant is that the trial court holds that the placement of the thermometers was outside the scope of the warrant. As such, the 4th Amendment issue is clearly whether the "warrantless" actions of moving the vehicle and performing the experiment with the thermometers were a violation of the 4th Amendment. A review of the *Jones* case clearly supports the conclusion that these activities violated the defendant's 4th Amendment rights.

While the trial court places a great deal of weight on the fact that the vehicle was already in the custody of law enforcement, that does not *ipso facto* lead to a conclusion that the police lawfully had possession of the vehicle nor that they could do anything they wanted with the vehicle. Obviously, law enforcement felt that any further actions in searching the vehicle required them to get a search warrant. Why else would they have sought to obtain one on July 2, 2012. They had already seized the vehicle from the defendant's property. No magisterial authority, nor express permission from the defendant to "seize" the vehicle on June 29, 2012 is presented in the record at any time.

The trial court's rational boils down to its belief that placing thermometers in the vehicle is not a "search". Under the *Jones* analysis that distinction is not the relevant question. In *Jones*, the United States Supreme Court specifically stated:

"It is important to clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the *Fourth Amendment* when it was adopted."¹

The Supreme Court made no distinction concerning the kind of information sought; the issue was did the Government (1) occupy space that belonged to the defendant, and (2) for the purpose of collecting information? In this case, the Government seized the defendant's automobile and moved it for the purpose of placing its own thermometers on the inside for the purpose of collecting temperature information. This was done without the defendant's permission or knowledge. In addition, the argument that the installation of the thermometers and/or its use was not a search. This argument was specifically rejected by the Supreme Court in *Jones*:

"Related to this, and similarly irrelevant, in the concurrence's point that, if analyzed separately, neither the installation of the device nor its use would constitute a Fourth Amendment search.... Of course not. A trespass on "houses" or "effects", or a Katz invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy." (Underline emphasis added).

Jones is clear, if there is an intrusion for the purpose of collecting information that constitutes a "search" under the *4th Amendment*. In this case, it is clear that law enforcement actions constituted a search for which they needed a search warrant. Unlike the trial court's holding, the type of device or kind of information is not material.

Recognizing that the actions of putting the thermometers in the vehicle was beyond the scope of the search warrant, law enforcement violated this Petitioner's *4th Amendment* rights and that evidence should and would have been suppressed had defense counsel raised the motion.² The trial court's holding that the moving of the vehicle to the Petitioner's residence and doing the test on her vehicle as opposed to using another vehicle because it was more realistic is not material to the *4th Amendment* issue. While all of that may very well be true, the *4th Amendment* requires the defendant to agree to the search of her vehicle or a magistrate to authorize it on probable cause.

¹ *Jones*, 565 U.S. at 404

² *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Daila v. United States*, 441 U.S. 238 (1979); *United States v. Wright*, 468 F.2d 1184 (6th Cir. 1972); *State v. Nunnery*, 2017 WL 2985084 (Tenn.Crim.App., July 13, 2017)

The trial court states that because of its legal conclusion that the placing of the thermometers in the vehicle was not a "search" but an "observation" demonstrates that the Petitioner was not prejudiced by the introduction of this evidence. That holding is not supported by the evidence. If his temperature study was not admitted, there would have been no direct link to establish the temperature in the defendant's car on the day of the children's death. The introduction of this evidence was highly prejudicial bases on clear and convincing evidence. Defendant's request for post conviction relief should have been granted by the trial court.

II. Did the trial court commit reversible error by failing to grant Petitioner post conviction relief because of the introduction of evidence at her criminal trial of items purportedly used in the production of methamphetamine obtained by a search of the defendant's residence pursuant to a search warrant that was invalid under the 4th Amendment to the United States Constitution because lacked probable cause due to the staleness of the information?

In her petition for Post Conviction Relief and at the PCR hearing, the Petitioner raised as a specific constitutional violation the fact that her residence was searched on July 13, 2012 pursuant to a search warrant that was constitutionally deficient under the 4th Amendment to the United States Constitution. This was because the affidavit for search failed to present facts to support a probable cause that there was evidence of drug use at the defendant's residence on July 13, 2012. As a result of the execution of that search warrant, the law enforcement identified a substantial amount of items in garbage found on the property and in the defendant's residence that was alleged to be evidence of the Petitioner's participation in the production of methamphetamine. The State presented forty disturbing photographs to the jury and referenced them in closing argument. In addition, they introduced the results of testing swabs off of objects in the residence processed through the Ion Scanner that purportedly demonstrated that there was methamphetamine, heroin and other serious drugs in the Petitioner's residence. All of the evidence was used repeatedly by the State to present and argue to the jury that the defendant was a meth producing drug addict who failed to take care of her kids because of her drug use.

The specific allegations of deficiency as to the affidavit for search were specifically addressed in a Motion to Suppress filed during the criminal proceedings

addressing the drug charges remanded by the Court of Criminal Appeals. *This motion* raised the constitutional violation that the information from the informants was stale and failed to support a probable cause belief that the drugs were at the residence at the time the search warrant was requested. The remanded drug charges were later dismissed on the date of the suppression hearing. The State argued the merits of the issue that the affidavit for search at the time of the PCR hearing.

In ruling on the issue of whether sufficient evidence of probable cause was presented in the search warrant to justify the issuance of the search warrant to search for drugs, the trial court did not address the merits of this claim specifically but merged it with the claim of ineffective assistance of counsel. The trial court held that Petitioner's trial counsel should have filed a motion to suppress and that the results of the suppression would have resulted in the exclusion of the evidence. However, the trial court ruled that because the Court of Criminal Appeals had considered the manufacturing of meth evidence that was acquired in the July 13, 2012 search in the severance motion and that the Court of Criminal Appeals found that the introduction of the meth production evidence did not prejudice the Petitioner. Therefore the Petitioner had failed to prove by clear and convincing evidence that she was prejudiced by the introduction of this evidence. This contradicts the trial court's explanation that there is a difference between a severance motion and a motion to suppress.

Quite to the contrary, this conclusion supports the defendant's claims that the search of July 13, 2012 should have been suppressed, and if it had, the incredibly offensive photographs and test results that the State claimed demonstrated that the defendant was manufacturing methamphetamine would not have come into evidence. The trial court should have granted the request for post conviction relief on the merits of this issue, and this court should so rule.

As previously discussed in the "Statement of Facts" on July 13, 2012, law enforcement sought and received a search warrant to search the Petitioner's residence for among many things, methamphetamine or other controlled substances, tools that could be used in producing or processing drugs, documents, money, any other evidence that might be used in execution of the crime of aggravated child neglect or endangerment, cell phones or wireless communication devices such as computers. The "Affidavit for

"Search" presents as probable cause for the search facts associated with the discovery of the children on June 28, 2012, their condition, and notes that the authorities had a conversation with the defendant concerning her cell phone.

In support of this warrant, law enforcement acknowledged that they had conducted a consent search of the residence on June 28, 2012, and that they had again searched the property on July 3, 2012 pursuant to a search warrant. The factual statement included on the affidavit stated the law enforcement didn't know about several facts such as evidence of the manufacturing of methamphetamine as well as the use of marijuana and methamphetamine were later discovered and is the reason for the request. In reality, the statements contained on the face of the affidavit don't establish that there was any meth production or use occurring on the premises on the date of the search and that the use of marijuana was weeks before the date the search warrant was requested and was more than likely consumed.

As this court is well aware, a prime consideration in the determination of probable cause to support the issuance of a search warrant is that it contains an affidavit that recites "facts" from which a reasonable conclusion may be drawn that the contraband will be found in the place to be searched pursuant to the warrant. The affidavit must establish with reasonable certainty that the contraband sought to be seized or the illegal activity in question exists at the moment the search warrant is to be issued. Stale information cannot support probable cause.³ A primary consideration in making an evaluation as to whether the information about the purported activity is stale is whether the information was an isolated activity or protracted and continuous in nature, and the opportunity for those involved to dispose of the incriminating evidence.⁴ There are no facts in the affidavit for search of the Petitioner's property on July 13, 2012 that there was any contraband on the property at the time the search was requested. What information that was produced in the affidavit would suggest that it was there more than two weeks before and there would have been several intervening events that occurred that would distance any probable

³ *Sgro v. United States*, 287 U.S. 206 (1932); *State v. Tuttle*, 515 S.W.3d 282 (Tenn. 2017); *State v. Longstreet*, 619 S.W.2d 97 (Tenn. 1997); *State v. Vann*, 976 S.W.2d 93 (Tenn. 1998); *State v. Norris*, 47 S.W.3d 457 (Tenn.Crim.App. 2000); *State v. Curtis*, 964 S.W.2d 604 (Tenn.Crim.App. 1997).

⁴ *Tuttle* at 301; *State v. Saine*, 297 S.W.3d 199 (Tenn. 2009); *State v. Reid*, 91 S.W.3d 247 (Tenn. 2002); *State v. Smith*, 868 S.W.2d 561 (Tenn. 1992); *Norris* at 470; *State v. Meeks*, 876 S.W.2d 121 (Tenn.Crim.App. 1993); *State v. Thomas*, 818 S.W.2d 350 (Tenn.Crim.App. 1991)

cause to believe that the purported evidence sought to be searched for and seized would even be there. In fact, as found as a matter of fact by the trial court, it would be more likely that evidence of drugs and their manufacture would have arrived after the Petitioner had vacated her residence after the death of her children.

The trial court acknowledged that the Petitioner had not been at the residence for days and if such items were located on the premises, they probably were brought to the property after the date of the search by law enforcement on June 29, 2012 and July 3, 2012.

The Petitioner's constitutional rights were clearly violated by the unconstitutional search of her residence on July 13, 2012. Based on this constitutional violation, the defendant should have this evidence suppressed and the case remanded for a new trial that would not include this evidence in the record.

III. Did the trial court commit reversible error by failing to grant post conviction relief because the Petitioner's criminal trial counsel was ineffective by failing to file motions to suppress as to evidence that was admitted that was prejudicial to the Petitioner's case, by failing to pursue motions in limine that he had filed, repeatedly failing to object to the testimony of witnesses who failed to demonstrate qualifications in the subject areas that they were permitted to testify about, and suggesting to the jury in his direct examination of the defendant that he did not believe that she was a credible witness resulting in the defendant failing to have legal counsel as prescribed by the 6th Amendment to the United State Constitution.

As previously discussed, in order for a criminal defendant to prevail on a claim of ineffective assistance of counsel in a post conviction relief proceeding, that defendant must establish by clear and convincing evidence both that, (1) that counsel's performance was deficient and (2) that such deficient performance prejudiced the defense.⁵

To prove that a lawyer's performance was deficient, a petitioner must demonstrate that their lawyer's conduct fell below an objective standard of reasonableness under prevailing professional norms. This objective standard of reasonableness includes a requirement that defense counsel must investigate and assert all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner.

⁵ *Strickland*, 466 U.S. at 686; *Pylant v. State*, 263 S.W.3d 854 (Tenn. 2008); *Goad v. State*, 938 S.W.2d 363 (Tenn. 1986).

It is a violation of this objective standard for defense counsel to deprive a criminal defendant of a substantial defense by their own ineffectiveness or incompetence. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations. If a defendant's counsel chooses not to raise substantial defenses, that is, as a matter of law, professionally unreasonable and counsel's performance is deficient.⁶ That is exactly what defendant's criminal trial counsel failed to do during her original criminal proceedings.

The second prong of the ineffective assistance of counsel is that the defendant must establish "prejudice" to the defense. This prong requires the petitioner to establish a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome or, in other words, the defendant was deprived of a fair trial and calls into question the reliability of the outcome.⁷

The Petitioner raised the issue of her constitutional rights being violated under the *Sixth Amendment* to the United States Constitution because in her amended petition she specifically identified: (a) that her defense counsel failed to file motions to suppress evidence that was obtained through unconstitutional searches; (b) failed to pursue motions in limine as to the introduction of evidence from the use of the "Ion Scan" because the State had failed to demonstrate that the equipment was reliable and produced scientifically valid conclusions and then raised it in the Petitioner's motion for new trial not realizing that he had not pursued the motion pre-trial or during the trial; (c) filing a motion in limine as to the introduction of a "urine screen" but later conceding to the introduction of the urine screen for the purpose of demonstrating that the defendant had methamphetamine in her system; (d) failing to object to the introduction of testimony by witnesses who were admittedly unqualified to testify about the subject matter they were asked to testify about; and, (e) direct examining the Petitioner in her testimony in a matter that suggested that he didn't believe her to be testifying truthfully.

⁶ *Strickland* at 466 U.S. at 688; *Plyant* at 868; *Baxter* at 933-934

⁷ *Nesbit* at 786-787; *Plyant* at 868-869; *Vaughn v. State*, 202 S.W.3d 115 (Tenn. 2006); *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999)/

In considering these claims the trial court generally found that the Petitioner's trial counsel had failed to perform his duties as defense counsel in a diligent manner. However, the trial court ruled that the defendant failed to establish that she was prejudiced by those failures. The finding that the Petitioner failed to provide evidence to support that she was prejudiced by the defense counsel's failure to act is not supported by the record and should be reversed.

As to the claim that defense counsel should have filed a motion to suppress the meth evidence and the ion scanner, the trial court ruled that "based on the totality of the circumstances" defense counsel "probably should have filed a motion to suppress the meth evidence found in the dumpster and challenged the ion scanner." The court noted that best practices for a criminal defense attorney requires that specific motions be filed and presented to the court and that counsel could not use the results of a severance motion to evaluate the merits of a motion to suppress.

The trial court clearly holds that a motion to suppress the July 13, 2012 was a valid motion, and that defense counsel did not meet an objective standard of diligence by failing to file a motion to suppress. The court clearly identifies that defense counsel's belief that the motion to sever was the equivalent of a motion to suppress was objectively wrong. The trial court noted that they are two totally different motions with different factors for a court to consider. Severance is an evidentiary issue and a consideration of common scheme and plan, relevance and balance relevance and prejudice.⁸ A suppression motion involves constitutional rights where there is not consideration of relevance or balance. A *4th Amendment* suppression motion deals with whether a constitutional right has been violated without any consideration of prejudice or balancing. All of the trial courts conclusions about defense counsel's failure to file a motion to suppress meet the *Strickland* test for a failure by defense counsel to provide effective assistance by an objective standard.

However, the trial court found that other "admissible evidence of meth in the defendant's system" went to the jury, and that the Court of Criminal Appeals had considered the "inadmissible meth evidence" was not prejudicial.

⁸ See *Bates v. State*

The idea that there was evidence of the defendant having methamphetamine in her system is true, by Melanie Carlisle, the T.B.I. Special Agent who testified about the results of the defendants blood draw testified that the quantity of meth in measured in the defendant's system was unquantifiable and that there was no way to express an opinion to a "reasonable degree of medical certainty" that it had any affect on the defendant at all. The lack of evidence to support a conclusion that the meth in the Petitioner's system had any physical affect on her, standing alone, may be enough for the jury to acquit the Petitioner. If the only evidence of neglect is that the defendant had meth in her system, that doesn't prove neglect because she wasn't under the influence of that drug. The jury was likewise concerned about the affects of meth on the human body. That is why the jury sent out the question about the effects of meth on the brain to the court.

Due to the fact that the Attorney General established that this case "is about meth" is how the State could overcome the lack of evidence in this case. The State had little to no evidence of neglect of two little boys dying and had to focus on the alleged use of methamphetamine. There is no evidence as to how long the boys were in the car. That is a critical question because to demonstrate neglect, the State is going to have to show that the mother was inattentive a sufficient period of time to be neglectful and to do that the State would have to show when and how they got into the vehicle and for how long. The evidence as to these issues are all circumstantial in this case and not very definitive. The way that you overcome that weakness is to argue that the mother was on "meth" and this case is about "meth".

In addition, a review of the photographs of the garbage are incredibly inflammatory. At the sentencing hearing, the trial court expressed outrage over the conditions the children were living in. That conclusion had to come from the photographs obtained in the July 13, 2012 search. In sustaining the consecutive searches, the Court of Criminal Appeals likewise made reference to the trial court's findings and concluding that the defendant was a "dangerous offender" quoting the trial court's findings about the circumstances that the children were living:

"Her children were introduced into a horrible place and around horrible goings on, and the jury found that she was a facilitator and so around horrible activity."

The only evidence of a "horrible place and horrible goings on" is from the pictures of the garbage and the house, and the Ion Scan results that were made on July 13, 2012. The Court of Criminal Appeals described this evidence as "explosive". The strong reaction of the trial court and the Court of Criminal Appeals demonstrates by "clear and convincing evidence" that the defendant was prejudiced by the evidence obtained during the July 13, 2012.

Likewise the introduction through the evidence from the Ion Scan testing and analysis was highly prejudicial. The testimony of James Derry, the representative of the Tennessee National Guard Drug Task force, who operated the Ion Scan machine, specifically identifying that meth, heroin and other drugs were found inside the house and garage and testifying as to the strength of the results was devastating as it helps lead to a conclusion that the children were living where drug manufacturing and use was being conducted on a regular basis.

The trial court concluded the Petitioner's trial counsel should have filed a motion to suppress the heat testing by Detective Scoggins performed on the defendant's vehicle on July 3, 2012 because it was "outside the scope of the warrant." As noted earlier in the argument as to the stand alone claims as to the July 3, 2012 search and seizure of the vehicle, the evidence from this study should have been suppressed, the trial court's conclusions notwithstanding that a warrant wasn't needed to do the thermometer study.

However, the trial court concluded, without further discussion, that the Petitioner had failed to prove prejudice. Clearly, that unsupported statement must make reference to the legal conclusion reached by the court that no search warrant was required for the heat study. Although not addressed by the court, the introduction of this heat study was highly prejudicial to the Petitioner because it specifically tied extreme temperatures to the Petitioner's vehicle on the date of death. As described by Mr. Flores, the defense expert at the PCR hearing, this evidence tied the defendant personally to the instrument of death. It was highly prejudicial and leaves reasonable doubt as to the legitimacy of Petitioner's conviction.

The trial court did not address the issue of Petitioner's counsel's failure to pursue her motion in limine as to the Ion Scanner. The trial court did address unspecified "pre-trial motions" and noted that defense counsel didn't pursue them because he concluded

that they were "without merit". The failure of the trial court notwithstanding, this court should hold that the failure of defense counsel to pursue this claim constituted ineffective assistance with resulting prejudice to the defendant. Petitioner's counsel stated that he did a review of issued associated with the Ion Scan and didn't consider the issue had merit. This justification is belied by the fact that at the time of trial, he thought his co-counsel would be handling the issue and he ended up handling it and that he was unprepared to address the issue. Defense counsel didn't raise the issue at the criminal trial even though the trial judge was waiting for him to do so. In further support of the factual conclusion that defense counsel either forgot or was unprepared to address that issue defense counsel raised the court's alleged failure to not admit the evidence as part of his motion for new trial. For the first time defense counsel had to have the criminal trial court explain to him that he had "waived" the issue at trial. Apparently, the real reason he didn't raise the issue was because he forgot about it.

In an even more incredible rationalization of his lack of diligence, Defense counsel's justified his failure to pursue the motion in limine on the Ion Scan because the trial judge could have raised the issue and "if the court had no objection, then he had no objection." He acknowledged that if he had pursued the motion and was successful, it would have eliminated evidence of methamphetamine in the Petitioner's residence, a critical claim supporting Petitioner's negligence due to drug use in the care of her children. The idea that a defendant's counsel would justify their personal failure to act by laying blame on the trial judge's failure to object clearly establishes that at the least counsel was not diligent and perhaps even more significant didn't understand fundamental rules of judicial procedure. Lawyer's object and judges rule based on those objections. That is so rudimentary that any lawyer, let alone a competent criminal defense attorney should know and be diligent about that duty. The prejudice to the defendant of having specific evidence of methamphetamine and other serious controlled substances in her house was highly inflammatory and prejudicial.

The PCR trial court failed to address the defense counsel's failure to object to the testimony of witnesses who clearly were not qualified to testify about the subject matter they were asked to testify about, some of whom acknowledged that lack of qualification. Those witnesses are: (1) Detective Dwayne Scoggins was permitted to testify about

devices used in the production of methamphetamine when he acknowledged that he was unqualified to testify about that subject; (2) Detective Heath Arthur who was permitted to testify without objection about how to cook meth but that testified that he was unqualified to testify because he had leaned what he knew about meth labs by talking to a "meth cook"; (3) Melanie Carlisle, The T.B.I. Special Agent who tested the defendant's blood and qualified as a expert in toxicology and blood testing was permitted to testify about the effects of meth on the human body; (4) James Derry, who was certified to operate the Ion Scan, but was permitted to testify concerning the manufacture of methamphetamine; and (5) Patrick Vasterling, an employee of the Tennessee Department of Children Services, who was permitted to testify, without objection, to the results of a ten panel drug screen that he opined indicated that the defendant tested positive for methamphetamine. Defense counsel failed to demand those qualifications prior to those witnesses being permitted to testify about either the effects of methamphetamine on the human body or the method of producing methamphetamine, or, like Mr. Vasterling, a social worker, the results of a scientific test. There is an objective standard for criminal defense counsel to be diligent in making objections to witnesses who are unqualified to testify about the subject matter they are asked to testify about. This level of diligence was not met by the defendant's defense attorney. The defendant was prejudiced by this evidence because it resulted in more and more evidence being admitted before the jury about methamphetamine and the defendant using it.

The trial court did address the issue of defense counsel's method of direct examination whereby he would ask her questions that accused her of lying. The trial court noted that defense counsel wanted to evoke an emotional response from the defendant. While the record cannot reflect an emotion, it clearly suggests that what was presented to the jury was an impression that everyone felt that the defendant was a liar, even her own attorney. When the defendant so desperately needed someone in the court room to say that the defendant had some credibility, her own attorney calling her a liar did not provide what was needed at the critical moment.

Clearly, looking at the totality of the circumstances of the trial of this case, the Petitioner's attorney failed to meet an objective standard of diligence. As stipulated by the United States Supreme Court in *Strickland*, and reiterated by Tennessee's Supreme

Court in *Plyant* and *Baxter*, if a defendant's counsel chooses not to raise substantial defenses; that is professionally unreasonable and counsel's performance is deficient.⁹ In this case, defense counsel repeatedly failed to raise substantial defenses associated with Motions to Suppress, Motions in Limine, and objections to witnesses testifying. In addition, the PCR trial court, looking at the totality of the circumstances at the criminal trial did find that defense counsel had failed to meet an objective measure of competence in raising those objections on most issues.¹⁰

The second prong in the *Strickland* evaluation is whether the defense counsel's failure resulted in prejudice to an extent that it calls in question the reliability of the outcome. Clearly, the requirement has been met by the Petitioner in this proceeding, the trial court's finding notwithstanding. Without the evidence of manufacturing of meth and meth in house, the only evidence that is before the jury about the defendant's physical condition is that the amount of meth in her system had no affect on her. In fact, with the unquantifiable level of meth in the defendant's system, that evidence may be subject to a *Tenn. R. Evi. 403* Motion in Limine because the mention of meth in her system, with no evidence that it affected her physically, would be unduly prejudicial. The elimination of the garbage evidence and Ion Scan evidence obtained from the defendant's residence on July 13, 2012, and the elimination of heat test from coming before the jury, may well have lead to the defendant's acquittal and seriously brings into question the outcome of her criminal trial. The lack of diligence by her criminal defense attorney clearly prejudiced the defendant to the extent that there is a serious question as to reliability of the juries' verdict.

⁹ *Strickland* at 466 U.S. at 688; *Plyant* at 868; *Baxter* at 933-934

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. Petitioner further respectfully requests that counsel be afforded to her under the Sixth (6th) Amendment as she is indigent due to her incarceration.

Respectfully Submitted,

Tasha Bates

Tasha Bates
#526437
TPFW Unit 1 East A-26
3881 Stewarts Lane
Nashville, TN 37218-3302

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed by U.S. mail, postage, pre-paid, to the following:

Supreme Court of the United States
Attention: Clerk of Court
1 First Street, N.E.
Washington, DC 20543

Solicitor General of the United States
Room 516
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

On this 20th day of October, 2023.

Tasha Bates
Tasha Bates