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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

William A. McKinnon, Circuit Court Judge

JASON CASH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001437

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

In derogation of the Sixth and Fourteenth Amendments to the United States Constitution, did trial counsel provide ineffective assistance by failing to investigate, marshal, and use recordings of telephone conversations with an alleged victim to show that Petitioner was merely present during the crimes?

STATEMENT

Carey Mauldin was a drug dealer in Spartanburg County. App. 180, ll. 4-9. He provided drugs, including Suboxone, Subutex, and methamphetamine, to his girlfriend, Casey Scruggs, who lived with him. App. 163, ll. 12-13; App. 180, ll. 16-24. Mauldin also supplied Petitioner with heroin. App. 180, ll. 1-5. Mauldin allowed Petitioner to trade items, including a gun belonging to Petitioner's sister, for drugs. App. 186, l. 25 – App. 187, l. 2; App. 471, ll. 18-23; App. 472, ll. 11-21.

Mauldin allowed Steven "Scooter" Lewis to live with them. App. 165, ll. 3-10. Scooter lived with Mauldin until May 17, 2015, when he robbed Mauldin and Scruggs. App. 165, ll. 11-23; App. 185, ll. 6-25; App. 461, ll. 2-7. During the robbery, Scooter took the gun that Petitioner had traded for drugs. App. 185, ll. 12-25; App. 187, ll. 6-8.

Five days later, on May 22, 2015, Scruggs, an admitted user of methamphetamine, had been awake for one or two days. App. 180, l. 22; App. 181, ll. 13. Later that evening, Petitioner called Mauldin because he needed a "fix." App. 166, ll. 2-6; App. 438, ll. 12-16. According to Petitioner, when he arrived, he entered the home and purchased drugs. App. 438, ll. 16-19; App. 439, ll. 14-18. As was his custom, Petitioner began using his first dose while he was in the home shared by Mauldin and Scruggs. App. 439, ll. 17-20. Suddenly, Scooter appeared at the door. App. 441, ll. 6-7. Scooter was with some Hell's Angels. App. 438, ll. 21-23. Scooter forced his way into the home. App. 441, ll. 15-16. Mauldin ran at Scooter, and then two gunshots rang out. App. 442, ll. 3-5. Scooter ran past Petitioner to the bedroom where he duct taped Scruggs' hands and feet. App. 442, ll. 6-12. Another man then entered the home. App. 442, ll. 13-14. This man pointed a gun at Petitioner. App. 442, ll. 16-17. Petitioner was "taken hostage just like they were."

App. 449, ll. 5-6. Scooter and the unknown man started rummaging through the home. App. 443, ll. 13-18.

When Petitioner was able to leave the home, he got into his car, "trying to run from these people." App. 449, ll. 6-8. Scooter got into Mauldin's car and followed Petitioner to some land that belonged to Petitioner's grandfather. App. 449, ll. 12-16. Once Petitioner arrived at the land, Scooter pulled a gun on him and forced him to take Scooter to North Carolina, where Scooter lived. App. 449, ll. 22-23. Once the pair arrived in North Carolina, Petitioner bided his time until Scooter fell asleep, and he could escape. App. 449, ll. 23-25. Petitioner ran out the back door – fleeing Scooter – just as the local police arrived and arrested him. App. 449, l. 24 – App. 450, l. 8.

The jury never heard Petitioner's version of events because he did not testify at trial. App. 310, ll.16-17. Further, as explained infra, the jury did not hear evidence from Scruggs that would have corroborated Petitioner's story even without Petitioner testifying.

Instead, the jury heard Scruggs claim she awoke to Mauldin telling her to call 911. App. 166, ll. 2-11. As Scruggs tried to call 911, she heard two gunshots. App. 169, ll. 7-18. Then, Scooter ran to her bedroom and hogtied her with duct tape. App. 169, l. 19 – App. 171, l. 9. Despite having her "chin in the mattress," Scruggs could see Petitioner with a gun pointed at Mauldin in the living room. App. 171, ll. 13-23. Scooter then rummaged through her house. App. 172, l. 2-5. Hours later, Scruggs got free from the duct tape and tried to run for help. App. 172, ll. 9-23.

When she made it to her door, she saw Petitioner in her yard. App. 173, ll. 1-6. She then heard Scooter say he could not trust "this bitch." App. 173, ll. 7-8. Scooter grabbed her and dragged her through the house. App. 173, ll. 10-15. She was then shot from behind; she could not

see her shooter. App. 174, ll. 9-19. The bullet grazed the back of her head. App. 175, ll. 16-18. After seeing headlights, Scruggs ran for help again. App. 175, l. 21 – App. 176, l. 4. This time she made it to a neighbor's house, and the neighbor called 911. App. 176, ll. 2-4.

Scruggs told the paramedic that Petitioner and Scooter were involved. App. 114, ll. 2-16. The paramedic alerted law enforcement, who began searching for the two. App. 114, ll. 12-13; App. 190, ll. 2-21. Eventually, the police found Petitioner and Scooter at a home in North Carolina, where they were arrested. App. 235, ll. 10-15; App. 237, ll. 1-7.

In August 2015, a Spartanburg County grand jury indicted Petitioner for kidnapping, attempted murder, and murder. App. 543-544; App. 546-547; App. 549-550. Almost two years later and shortly before Petitioner's trial, a Spartanburg grand jury indicted Petitioner for armed robbery and burglary in the first degree in February 2017. App. 552-553; App. 555-556. The state, represented by Derrick Bulsa and Nicholas Sharpe, called the case to trial before the Honorable J. Derham Cole and a jury on February 27, 2017 – March 2, 2017. App. 1. Travis Moore represented Petitioner. App. 1. Ultimately, the jury found Petitioner guilty as charged. App. 369, l. 21 – App. 370, l. 6. Judge Cole sentenced Petitioner to imprisonment for the "balance of [his] natural life" for murder and burglary in the first degree, and to thirty years imprisonment for attempted murder, armed robbery, and kidnapping. App. 374, l. 7 – App. 375, l. 9; App. 545; App. 548; App. 551; App. 554; App. 557. He ordered the sentences for murder and attempted murder to be served consecutively. App. 374, ll. 18-19.

Petitioner appealed his convictions and sentences. Robert M. Pachak represented Petitioner by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on August 22, 2017. App. 377-388. The brief challenged the failure of the judge to grant a directed verdict based upon evidence that Petitioner was merely present. App. 377-388. The Court of Appeals dismissed

the appeal in an unpublished opinion on May 9, 2018. App. 389-390; State v. Cash, 218 UP-203 (S.C. Ct. App. filed May 9, 2018). Remittitur was issued on May 25, 2018. App. 391.

Petitioner filed an application for post-conviction relief (PCR) on May 1, 2019. App. 392-405. The state filed its return on August 7, 2019. App. 406-429. The Honorable William A. McKinnon convened an evidentiary hearing on September 17, 2017. App. 430-431. Rodney W. Richey represented Petitioner, and Chelsey F. Marto represented Respondent. App. 431. After taking the case under advisement, Judge McKinnon issued an order denying relief on November 24, 2021. App. 513-542.

On December 8, 2021, Petitioner served his notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

In derogation of the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to investigate, marshal, and use recordings of telephone conversations with an alleged victim to show that Petitioner was merely present during the crimes.

Relevant facts

During the PCR hearing, Petitioner testified that his mother and Scruggs, both of whom testified at his trial, could have corroborated his version of events. App. 451, ll. 5-23. However, trial counsel failed to elicit such testimony from these witnesses. App. 474, ll. 2-9; App. 475, ll. 13-22. Petitioner further explained that the recordings of the conversations between his mother and Scruggs would have corroborated his story. App. 477, l. 18 – App. 478, l. 8. Trial counsel informed Petitioner he would not use the recordings at trial because they were inadmissible, but trial counsel did not elaborate on why the recordings were inadmissible. App. 478, ll. 1-12.

Trial counsel admitted Petitioner informed him that Scooter had an affiliation with the Hell's Angels, and that the two discussed "duress and Hell's Angels." App. 487, ll. 9-15. Trial counsel was well aware that Petitioner's mother and Scruggs were talking by phone and that some of these conversations were recorded. App. 487, ll. 16-23. He recalled discussing the recordings, but he could not "remember if [he] ever had a copy of them or anything." App. 488, ll. 1-3. To put a finer point on it, trial counsel did not "recall listening to the tapes" at all. App. 497, l. 20. Trial counsel did not remember the specifics of the recordings, but his "impression" was that Scruggs "either had regret or remorse or hesitancy about testifying." App. 496, ll. 1-7. Trial counsel admitted that taped recordings of Scruggs stating Petitioner was not there to hurt her would have benefited Petitioner's case. App. 488, ll. 14-24.

When trial counsel cross-examined Scruggs, his overall strategy was "to be polite to her" because she was "very sympathetic." App. 495, ll. 1-12.

Angela Ross, Petitioner's mother, testified at his trial and PCR hearing. App. 246, ll. 12-13; App. 499, l. 25 – App. 500, l. 1. Ross's PCR testimony revealed that she spoke to Scruggs "a lot" by telephone prior to Petitioner's trial. App. 500, ll. 2-8. During these telephone conversations, Scruggs corroborated parts of Petitioner's story. App. 500, ll. 18-22. For example, Scruggs mentioned the Hell's Angels. App. 500, ll. 18-22. Scruggs also stated that Petitioner was in fear for his life. App. 500, ll. 24-25. Petitioner also feared for the life of his family members, according to Scruggs. App. 501, ll. 7-9. Scruggs indicated that she would have feared for her life as well if she had a gun pointed at her. App. 501, ll. 10-18. In short, she substantiated some of Petitioner's story. App. 501, ll. 19-22. Ross explained that Scruggs testified "the total opposite" of what she said during the recorded telephone conversations. App. 505, ll. 21-24.

Ross and her daughter took a memory card with the recorded phone conversations between Scruggs and Ross to trial counsel. App. 504, ll. 7-13. At first, trial counsel acted like "it was a big deal." App. 504, ll. 13-14. Trial counsel informed Ross that he would allow the solicitor to listen to the recordings. App. 504, ll. 16-18. Thereafter, trial counsel told her to pick up the recordings. App. 504, ll. 18-19. Something in trial counsel's attitude changed after the solicitor listened to the recordings. App. 504, l. 21 – App. 505, 1. 12; App. 506, l. 15 – App. 507, l. 10.

At the conclusion of the PCR hearing, Petitioner's counsel argued trial counsel was "ineffective by not studying these tapes and cross-examin[ing] the victim[] on the information of all the tapes." App. 508, ll. 17-20.[1] PCR counsel explained that on the tapes Scruggs talked "about

[1] Although PCR counsel had the tapes at the time of the PCR hearing, PCR counsel did not introduce the tapes as exhibits or give them to the PCR judge to consider. App. 508, l. 23.

these other people coming over at the time that this happened," made references to the Hell's Angels, and said Petitioner was "afraid for his life and all this stuff." App. 509, ll. 1-8.

Counsel for Respondent "reviewed the tapes," and "found them to be quite mixed, and not quite as helpful as maybe indicated concerning talk about the hand of one, hand of all and things like that." App. 510, ll. 13-18. Counsel for Respondent offered no other argument regarding trial counsel's failure to cross examine Scruggs about the recorded conversations between Ross and Scruggs as those conversations corroborated Petitioner's story. Instead, Counsel for Respondent focused on other evidence of Petitioner's guilt. App. 509, l. 20 – App. 510, l. 12.

The PCR judge understood that Petitioner alleged counsel was ineffective for failing to investigate the taped evidence. App. 538. Nevertheless, the PCR judge determined counsel was not deficient because counsel "obtained and reviewed the tapes, and brought them to the prosecutor to review together." App. 539. The PCR judge highlighted Petitioner's testimony during the PCR hearing that counsel told him the tapes "would not be admitted at trial because they were inadmissible." App. 539. According to the PCR judge, trial counsel "testified that he reviewed the tapes but never located any evidence in the case that was particularly helpful in asserting a defense." App. 539. After making these findings of fact, the PCR judge concluded trial counsel "acted reasonably under the circumstances by reviewing the tapes and failing to admit inadmissible evidence at trial." App. 539. Further, the PCR judge held that because Petitioner "failed to play or otherwise enter the tapes in question into evidence at the PCR hearing, no prejudice [was] established." App. 539. In short, the PCR judge denied relief to Petitioner on this ground.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "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." Id. at 686. 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. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

In Strickland, 466 U.S. at 691, the United States Supreme Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." See McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) (providing that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State."); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (holding that "[w]ithout a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'") (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)).

The United States Supreme Court also held that "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 527 (2003). Specifically, "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and

circumstances of the case." Lounds v. State, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (internal quotations omitted). See e.g., Rompilla v. Beard, 545 U.S. 383-385 (2005) (concluding counsel's failure to examine Rompilla's prior conviction file was prejudicial deficient performance); Wiggins v. Smith, 539 U.S. 510, 523-533 (2003) (counsel's abandonment of investigation of Wiggins' background for purposes of mitigation); Williams v. Stirling, 914 F.3d 302, 314-315 (4th Cir. 2019) (holding counsel provided ineffective assistance by failing to present readily available evidence that Williams suffered from fetal alcohol syndrome); Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D. Fla. 1986) (holding counsel provided ineffective assistance by failing to cross-examine the state's gunshot residue expert and/or retain an independent expert in gunshot residue and by failing to investigate the co-defendant's background); Martin v. State, 427 S.C. 450, 456-457, 832 S.E.2d 277, 280-281 (2019) (failure of trial counsel to elicit the precise timing of an event from a witness called at trial in order to establish an alibi was ineffective assistance of counsel); Weik v. State, 409 S.C. 214, 235, 761 S.E.2d 757, 768 (2014) (reversing a death sentence where counsel failed to present evidence of Weik's background despite abundant social history evidence available); Walker v. State, 407 S.C. 400, 406, 756 S.E.2d 144, 147 (2014) (concluding trial counsel's investigate was inadequate where counsel failed to interview Walker's girlfriend, who could have provided an alibi); Ard v. Catoe, 372 S.C. 318, 334-335, 642 S.E.2d 590, 598-599 (2007) (holding trial counsel's decision to not cross-examine the state's gunshot residence expert was not an objectively reasonable strategy that prejudiced Ard); Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004) (holding counsel's investigating concerning Von Dohlen's mental state was not reasonable).

Admittedly, attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant; however, the decision not to investigate

must be reasonable. See e.g., Hinton v. Alabama, 571 U.S. 263, 274 (2014) (requiring strategic choices to be made after a thorough investigation); Wiggins, 539 U.S. at 533 (holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004) (holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "'major depressive episodes with severe symptoms of anxiety and possible prepsychotic features'").

During Ard's capital trial, the state called an expert in gunshot residue analysis to testify. Ard v. Catoe, 372 S.C. 318, 322, 642 S.E.2d 590, 592 (2007). The expert testified that swabs taken from the deceased's hands showed particles that were "very interesting," but there was not enough material for him to say the deceased had gunshot residue on her hands. Id. at 323, 642 S.E.2d at 592. The expert testified less equivocally when he claimed there was no gunshot residue on her hands indicating she had not pulled the trigger. Id. The defense did not cross-examine the expert. Id. A second witness who claimed to be the expert's supervisor and to having reviewed and confirmed the expert's conclusions. Id.

Ard presented an accident defense to the capital murder charge. Id. at 324, 642 S.E.2d at 593. Ard explained the deceased was suicidal as she held a gun. Id. Fearing she would kill herself, Ard leaned forward to grab the gun. Id. As he grabbed the gun's cylinder, it went off. Id. To defeat this defense, the state capitalized on its expert witness's testimony in its closing argument.

Id. at 325, 642 S.E.2d at 593. The state argued the defense could not "attack" its expert and therefore, the expert's findings that the deceased did not have gunshot residue on her hands showed Ard's defense was not true. Id. at 325-326, 642 S.E.2d at 593.

At his PCR hearing, Ard called the state's expert witness from his trial as a witness. Id. at 327, 642 S.E.2d at 594. The expert explained that his trial testimony was based upon SLED's protocol at the time that a positive finding of gunshot residue only occurred when perfectly round particles were detected. Id. The protocol in place at the time of the PCR hearing required the expert to testify that the particles found on the deceased's hands meant the tests were inconclusive for gunshot residue. Id. This finding meant it was not consistent with a person firing a gun, but could be consistent with a person handling a gun. Id. at 327-328, 642 S.E.2d at 594-595. Furthermore, the expert testified that if he had been cross-examined at trial regarding his statement that several particles were interesting, he would have testified that although the evidence found on the deceased's hands did not satisfy the protocol for a positive result, the evidence "could have been associated with gunshot residue." Id. at 328, 642 S.E.2d at 595. Finally, the expert related that if he had been contacted prior to trial by defense counsel, he would have explained the evidence, including the particles on the deceased's hands meant she may have been handling a weapon. Id.

Additionally, Ard called his own gunshot residue expert at the PCR hearing. Id. at 330, 642 S.E.2d at 596. This expert positively identified the particles found on the deceased's hand as gunshot residue, which could have been placed there by picking up a gun, firing a gun, or being close to a gun going off. Id.

This Court held trial counsel provided ineffective assistance by failing to "further investigate[] and more thoroughly challenge[] the gunshot residue evidence." Id. at 332, 642

S.E.2d at 597. Testimony from trial counsel at the PCR hearing showed "how crucial the gunshot residue evidence was to [Ard]'s defense." Id. The negative gunshot residue test results produced by the state's expert significantly undermined Ard's defense. Id. at 332, 642 S.E.2d at 597. The Court noted that trial counsel's failure to discuss the gunshot residue analysis with the state's expert prior to trial resulted in trial counsel missing the opportunity of learning details that would have allowed for a more thorough and productive cross-examination of the state's expert. Id. at 333-334, 642 S.E.2d at 598. Most importantly, the state's expert would have revealed that his testimony was not inconsistent with the deceased handling a gun. Id. at 334, 642 S.E.2d at 598. According to this Court, counsel performed deficiently by failing to explore the gunshot residue evidence with the state's expert prior to trial. Id.

Furthermore, the Court explained how "[e]ven at trial, [the state's expert]'s testimony clearly alluded to some uncertainty in the evidence." Id. "Counsel should have cross-examined [the state's expert] as to what he meant by 'very interesting' and not 'enough material.'" Id. According to the Court, "[h]ad counsel asked these questions, [the state's expert] would have filled the 'hole' in the defense which they thought was created (but actually was not) by [the state's expert]'s ultimately conclusion of 'no gunshot residue.'" Id. The Court "counsel's decision to not cross-examine [the state's expert] on the gunshot evidence was not an objectively reasonable strategy." Id. Eliciting the favorable testimony from the state's expert would have prevented the state from attacking the defense theory as convincingly as it did in closing. Id. at 335, 642 S.E.2d at 598.

This Court held Ard's "counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense at the guilt phase." Id. at 336, 642

S.E.2d at 599. Additionally, the Court held there was a reasonable probability the jury would have had a reasonable doubt as to whether Ard was guilty of murder had the jury learned the meaning of the "interesting" gunshot residue test results as that would have supported Ard's defense.

When trial counsel fails to impeach a witness with prior inconsistent statements, deficient performance that prejudices a defendant results. See Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992). After Thomas was found guilty of first degree burglary and first degree criminal sexual conduct, he challenged his convictions in PCR alleging his counsel was ineffective by failing to impeach the alleged victim with statements she made to emergency medical personnel immediately after the attack that she did not know her assailant. Thomas, 308 S.C. at 124, 417 S.E.2d at 532. This Court found counsel's performance "deficient in failing to call the medical personnel who would have cast doubt on the sole witness' identification of the petitioner." Id. Based on the critical role of the witness – the only witness to the crime – this Court found counsel's deficient performance prejudiced Thomas. Id.

In Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995), the Eighth Circuit reversed Driscoll's convictions based upon trial counsel's failure to impeach a key witness with a prior inconsistent statement. Driscoll was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach an alleged eyewitness who claimed he saw Driscoll stab the guard and that Driscoll confessed to the murder. Driscoll's attorney knew the witness had told police that he only spoke to Driscoll after the stabbing and that Driscoll had not claimed responsibility. Id. at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration in finding the failure to impeach prejudicial. The court found the failure "was a breach with so much potential to infect other evidence, that without, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt." Id.

In a federal habeas case, the Third Circuit Court of Appeals granted relief to Berryman where defense counsel failed to impeach the state's sole eyewitness with her prior inconsistent statements. Berryman v. Morton, 100 F.3d 1089, 1097 (3d Cir. 1996). "Berryman's conviction rested solely on the victim's uncorroborated out-of-court identification, and her in-court identification two years later." Id. at 1097. Berryman was accused along with two others. Berryman was tried with one of his co-defendants, but the third man was tried separately. The first trials of all three ended in mistrials forcing re-trials. Thus, there were a total of four trials concerning the same set of facts and circumstances. Id. at 1092.

The descriptions of the three men given by the victim in the third man's second trial "differed radically from the actual height of each man, and differed from the identification testimony" she gave at the first trial of the third man. Id. at 1098. Despite these inconsistencies, Berryman's counsel never attempted to impeach her with her prior testimony. Id. Trial counsel explained his failure as "minor" because there were "a lot of major and substantial discrepancies in her story." Id. The Third Circuit concluded the explanation "simply does not wash" because the victim's identification was critical as it was the only evidence against Berryman. Id. at 1098-1099.

Concerning prejudice, the Third Circuit noted the jury never learned of the victim's previous descriptions of her assailants as vastly different from her testimony, meaning the jury was unable to properly evaluate the strength of her identification. The court noted the victim related the actions of her assailants according to their heights in respect to each other. However, she lacked the ability "to consistently describe the actions of Berryman who was nearly half a foot taller than one defendant, and nearly half a foot shorter than the other" and this was information the jury needed to weigh the accuracy of her identification. Based on the central role the

identification played and how it was tied to height, the court concluded the prejudice was "obvious." Id. at 1102.

The Arkansas Supreme Court held Peebles' trial counsel was ineffective for failing to present the jury with inconsistent statements made by the alleged child-victim in a criminal sexual conduct case. Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998). The alleged child-victim had accused Peebles of committing sexual acts against him; however, during a pretrial hearing, the child-victim denied repeatedly that Peebles had done anything to him. Id. at 535. The court explained that "defense counsel made no attempt to offer [child victim]'s inconsistent statements into evidence though this information would have been invaluable to the jury." Id. at 536-537. The court concluded that "[b]ecause the jury was not informed that the three-year old boy, who was the critical witness against Peebles, had recanted his story at a pretrial hearing, we conclude that Peebles did not receive a fair trial." Id. at 536; see also Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009)(remanding a case for a hearing where trial counsel failed to impeach a police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

The Supreme Court of Missouri held trial counsel provided ineffective assistance by failing to impeach three witnesses with prior inconsistent statements in a capital murder case. Black v. State, 151 S.W.3d 49 (Mo. banc 2004). The case arose out of the stabbing death of a man in front of a night club. Four eyewitnesses testified that Black stabbed the victim while the victim at in a truck. Id. at 52. Black testified that the victim got out of the truck and tried to hit him with a beer bottle. Black stabbed the victim in self-defense. Id. at 53. Two other witnesses confirmed Black's testimony. Further, the forensic evidence supported Black's version of events. Id. Although defense counsel impeached one of the state's witnesses with a prior inconsistent statement – he

initially told police that the victim got out of the truck before he saw blood. Id. However, defense counsel failed to impeach the other three state's witnesses with prior inconsistent statements, including one saying the victim hit Black with a beer bottle, another saying the victim and Black exchanged blows in the middle of the road, and the third one saying she saw the victim exit his truck prior to being stabbed. Id.

The court found Black suffered prejudice as a result of trial counsel's failures because the impeachment evidence "went to the key issue of deliberation." Id. at 57. "The record ... show[ed] that the jury was focused on that issue." The jury requested definition of the term "cool reflection" in the first-degree murder charge. Id. The court further noted that the evidence was not overwhelming as it consisted principally of testimony of state's witnesses who claimed Black reached into the truck to stab the victim. Id. at 58. "Had that testimony been impeached, little would have remained to support the finding of deliberation." Id. The court concluded:

> The unoffered evidence, admissible both for impeachment and as substantive evidence, went to a central, controverted issue on which the jury focused during deliberations. If believed by the jury, there is a reasonable probability that the outcome of the trial would have been different. Accordingly, this Court determines that counsel's ineffectiveness was so prejudicial as to undermine this Court's confidence in the outcome of the trial.

Id.

Here, trial counsel performed deficiently by failing to investigate the recorded phone conversations. Contrary to the PCR judge's determination that trial counsel "testified that he reviewed the tapes," trial counsel actually testified he could not recall listening to the tapes. Cf. App. 539 with App. 497, l. 20. Thus, no evidence in the record supports this factual finding by the PCR judge. Trial counsel's failure to investigate the recorded phone conversations and use them to cross examine Scruggs was deficient performance. While no reason for the alleged inadmissibility of the recordings was offered during the PCR hearing, the recordings would have been admissible as

a prior inconsistent statement pursuant to Rule 801(d)(1)(A), SCRE. Furthermore, Petitioner's mother would have been able to authenticate the recordings as she was familiar with Scrugg's voice. See Rule 901(b)(5), SCRE. Therefore, the recordings would have been admissible at Petitioner's trial, and would have supported his version of events. Counsel was deficient in failing to investigate, marshal, and present evidence of the phone recordings of Scruggs supporting Petitioner's story.

The PCR judge held that because Petitioner "failed to play or otherwise enter the tapes in question into evidence at the PCR hearing, no prejudice [was] established." App. 539. This was error.

This Court also granted relief to Anthony Martin where trial counsel failed to present alibi evidence even where Martin did not present the alibi witness at his PCR hearing. Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019). The state alleged Martin robbed the Bank of America in North Augusta at 12:20 p.m. on April 23, 2009, along with three others. Id. at 453, 832 S.E.2d at 279. The *only* evidence linking Martin to the robbery was the testimony of his codefendants. Id.

Martin called his mother as a witness during the trial. Id. Mother testified that Martin lived with her in Snellville, Georgia, approximately thirty minutes outside of Atlanta. Id. Mother told the jurors that on the morning of the robbery, she dropped Martin off at a bus stop in Atlanta. Id. "Inexplicably, trial counsel did not elicit the precise drop-off time." Id.

This Court found as a matter of law that Martin's trial lawyers were deficient for not eliciting the specific timeline testimony from Martin's mother. Id. at 456, 832 S.E.2d at 280. Mother had told trial counsel that she dropped Martin off at the bus stop in Atlanta around 11:15 or 11:30 in the morning. Id. Trial counsel admitted he had a statement from mother in his file to

this effect. Id. This Court explained that "[w]ithout the specific timeline testimony, [Martin] failed to establish a legal alibi." Id.

Next, this Court held Martin suffered prejudice as a result of his counsel's deficient performance. Id. at 456-457, 832 S.E.2d at 280-281. "[C]ategorically reject[ing]" the PCR court's determination that Martin did not suffer prejudice due to overwhelming evidence of guilt, this Court explained "the only people" who placed Martin at the scene of the robbery were his codefendants, two of whom testified in hopes of getting a favorable deal and two of whom admitted to lying to police. Id. at 457, 832 S.E.2d at 280. This Court further noted that the jury asked to rehear the alibi testimony during its deliberations signifying the jury focused critical attention on this testimony. Id. Therefore, this Court concluded "counsel's failure to present the known and available alibi evidence – the specific drop-off time in Atlanta – undermined confidence in the outcome of [Martin]'s trial." Id. at 457, 832 S.E.2d at 280-281.

This Court's decision in Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) sheds light on what Petitioner was required to show in order to establish *prejudice* under Strickland. Pauling challenged his convictions for first degree burglary and first degree criminal sexual conduct. Id. at 607, 503 S.E.2d at 469. One of his allegations was that trial counsel failed to prepare a triage nurse as a defense witness. Id. at 607-608, 503 S.E.2d at 469. At trial, counsel questioned a doctor about notes prepared by the triage nurse. Importantly, the notes indicated the alleged victim told the triage nurse that there was no actual penetration. However, trial counsel's attempt to question the doctor about the notes drew a hearsay objection, which was sustained. Id. at 608, 503 S.E.2d at 470. At his PCR hearing, Pauling introduced the triage nurse's notes indicating the alleged victim said the assailant did not penetrate her vagina. Id. at 609, 503 S.E.2d at 470.

This Court rejected the state's argument that Pauling was required to call the triage nurse to testify at his PCR hearing in order to show prejudice. According to this Court, Pauling's presentation of the nurse's notes was sufficient under Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Id. at 610-611, 503 S.E.2d at 471. As explained by this Court, Pauling's introduction of the notes was evidence as to the nature of the nurse's testimony. Id. at 611, 503 S.E.2d at 471. It must be noted that Petitioner's claim is not that trial counsel failed to call Kimberly as a witness; rather, Petitioner's claim is that he failed to impeach Kimberly with her prior inconsistent statements. Kimberly was present at the trial and testified for the state. Thus, there is no question that she would have been available to testify and as to the substance of her testimony. At least one of her prior inconsistent statements was given to law enforcement and was readily available to be used as impeachment at the trial.

In Black, supra, the Missouri Supreme Court rejected the state's argument that Black "was required to have called each of the witnesses in question at his post-conviction motion hearing so that he could show what they would have stated had his counsel attempted to impeach them with their prior inconsistent statements." Id. at 57. The court held "a movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice." Id. The court found counsel's failure prejudiced Black because it went to the key issue of deliberation where the record showed the jury was focused on that issue based on its note requesting further information on "cool reflection." Id.

Although Petitioner did not introduce the recorded telephone conversations during his PCR hearing, this was not fatal. Petitioner presented evidence of what the recordings contained through his mother, Angela Ross. According to Ross, Scruggs confirmed parts of Petitioner's story,

including the involvement of the Hell's Angels and that Petitioner was scared for his life as he had a gun pointed at him. This showing was sufficient to carry Petitioner's burden of proof. Counsel for Respondent had listened to the recordings and conceded the recordings were beneficial to Petitioner, even if Counsel for Respondent's view of the recordings was of a "mixed" benefit to Petitioner. Trial counsel's deficient performance prejudiced Petitioner as the jury never learned of the evidence – from one of the alleged victims, no less – that Petitioner was not only merely present during the crimes, but he was a victim himself.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with full briefing, Petitioner respectfully requests this Court grant him a new trial based upon trial counsel's ineffective assistance.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of July, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Jul 18 2022

S.C. SUPREME COURT

Certiorari to Spartanburg County

William A. McKinnon, Circuit Court Judge

JASON CASH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Andrew Cash states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and she was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing before Judge William A. McKinnon, which was held on September 17, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Jason Andrew Cash.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of July, 2022.

RECEIVED

Jul 18 2022

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Susan B. Hackett

Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 18th day of July, 2022.