

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Jun 12 2023**

S.C. SUPREME COURT

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Certiorari to Barnwell County

Honorable Maite Murphy, Circuit Court Judge  
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STEPHON ROBINSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001515  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT OF THE CASE.....2

ARGUMENT

The PCR court erred in finding trial counsel provided effective assistance when counsel failed to cross-examine the State’s key witnesses regarding the inconsistencies in their testimony where the case hinged on witness credibility and counsel could not articulate a strategic reason for failing to question the witnesses......9

CONCLUSION.....14

**ISSUE PRESENTED**

Whether the PCR court erred in finding trial counsel provided effective assistance when counsel failed to cross-examine the State's key witnesses regarding the inconsistencies in their testimony where the case hinged on witness credibility and counsel could not articulate a strategic reason for failing to question the witnesses?

## STATEMENT OF THE CASE

On February 20, 2011, around 2:20 in the afternoon Sergeant Eddie Thomas with the Barnwell County Sherriff's Office (BCSO) responded to the report of a home invasion at the residence of Eddie Williams. After assessing the scene, Thomas requested the on-call investigator be dispatched to his location. App. 50, l. 19-App. 51, l. 1. At approximately three o'clock in the afternoon, BCSO Investigator Jeff Croft responded to the scene. After speaking with Thomas and Williams, Croft processed the scene. App. 50, ll. 14-17; App. 51, ll. 4-21. He observed that the door jamb of the front door was splintered and there were pieces of the door scattered across the floor, along with a broken lock, which indicated forced entry into the residence. App. 54, ll. 2-8. He also observed four bullet holes in residence and was able to obtain two projectiles. App. 55, ll. 4-20; App. 58, ll. 9-21.

Williams initially told Croft that bullet holes were present when he purchased the residence and that he had not fired a gun during the incident. He eventually admitted that he had fired numerous rounds from his revolver at the intruders and stated he had initially lied because he thought he would get in trouble for having an unregistered weapon. App. 111, l. 3-App. 114, l. 14. Law enforcement ultimately recovered a .357 revolver that Williams had discharged during the incident which was discovered to be a stolen pistol out of Beaufort County. App. 59, l. 15-App. 60, l. 24. Williams stated that one of the intruders fired a single shot at him as they fled. App. 104, ll. 20-22.

Williams described the vehicle from the incident as being a white four-door Pontiac. He initially claimed that he only recognized Petitioner as one of the intruders but later stated he also recognized Reginald Felder, Petitioner's brother. App. 60, l. 25-App. 62, l. 9; App. 313-315. Based upon the statement Williams had provided, Croft traveled to the residence of Petitioner to

speaking with him about the home invasion. Petitioner spoke with Croft, denied any involvement in the incident, and said he had been sleeping. He stated he had driven his girlfriend's white Pontiac the night before but had returned it that morning. App. 62, l. 9-App. 64, l. 12. Croft also spoke with Felder, Petitioner's cousin, Arthur Wallace, and Petitioner's girlfriend, Leanna Gunnels during the investigation. App. 65, l. 24-App. 66, l. 6.

Five days after the incident, Croft returned to Williams's residence with three six pack photo line ups. Williams identified Petitioner and Felder as two of the three intruders who had broken into his home. He narrowed down the third suspect to one of two individuals but was not certain and therefore did not make an identification. App. 66, l. 7-App. 70, l. 17. Croft later returned with another set of photo line ups using more recent photographs of the suspects and Williams again identified Petitioner and Felder. App. 70, l. 18-App. 72, l. 12. No forensic evidence was collected in the case. App. 86, ll. 10-21.

Petitioner was indicted during the October 2011 term of the Barnwell County grand jury for one count of burglary first degree and one count of possession of a weapon during the commission of a violent crime. App. 232-235. The State, represented by A. Keith McAlister and David W. Miller, called the case to trial on November 1-2, 2011, before the Honorable Doyet A. Early, III, and a jury. Petitioner was represented at trial by Glen Walters. App. 1.

The two key witnesses for the State at trial were the complainant, Eddie Williams, and the owner of the car allegedly involved in the incident, Leanna Gunnels. Gunnels testified that she had been in an on again/off again relationship with Petitioner for seven years and that he was allowed to borrow her car whenever he wanted. She testified that on February 19, 2011, Petitioner borrowed her car and that he returned it the next day. When the State asked when the car was

returned, she replied “I guess around that afternoon.” Counsel Walters did not cross examine Ms. Gunnels. App. 94, l. 25-App. 97, l. 22.

Williams testified that he recognized the white car when it first pulled up to his house and that it was being driven by Petitioner. He alleged he knew Petitioner because he had come over to his house one or two times before, in the same car, to play video games with his nephew who stayed with him. App. 100, l. 4-App. 102, l. 25. He further stated he knew Petitioner’s parents and grandmother but did not personally know Petitioner. App. 103, ll. 6-11. He maintained that Petitioner was the individual that broke into his home and fired a single gunshot as he fled. App. 109, l. 23 – App. 110, l. 9.

On cross-examination, Counsel Walters only asked Williams about his inconsistent statements regarding the firing of his revolver. Williams admitted that he initially told law enforcement a different story, leaving out that he fired a gun at the intruders. He denied knowing that the revolver was stolen and only thought he would get in trouble for having an unregistered weapon. Williams stated that he had “said a lot of things, so hopefully, I’m telling the truth now.” App. 111, l. 3-App. 116, l. 13.

Petitioner testified in his own defense.<sup>1</sup> Petitioner testified that at the time of the incident he was at home with his brother and cousin. He stated that he had returned the car to Gunnels earlier in the day and had been at home ever since. Petitioner further testified he had been to Williams’s house on a number of occasions “to get things from them.” App. 131, ll. 1-25.

On cross-examination, Petitioner testified that he returned the vehicle to Gunnels around twelve or one in the afternoon on the day of the incident. He stated that he had borrowed the car

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<sup>1</sup> Wallace and Felder also testified for the defense. Their testimony was substantively the same as Petitioner’s regarding the events that occurred on February 19-20, 2011. App. 142-154.

to go to the club the prior evening with his brother and cousin. Petitioner stated that his brother took the car to the store the morning of the incident and that the owner of the car had it back in her possession at the time of the home invasion. App. 135, l. 12-App. 136, l. 20. When questioned about how he knew Williams, Petitioner stated that he had been purchasing marijuana from him for about a year and a half. He also stated that he did not play videogames and had never been over to Williams's house to play video games. App. 138, l. 17-App. 139, l. 21.

After deliberating for approximately ninety minutes, the jury returned verdicts of guilty as indicted to both charges. App. 186, l. 4-App. 187, l. 16. Petitioner was sentenced to twenty years incarceration on the burglary first charge and five years incarceration on the weapons charge, sentences to run concurrently. App. 197, ll. 8-13; App. 236-237. Petitioner appealed his convictions and sentences. The Court of Appeals remanded the case back to the trial court to perform a balancing test regarding the admission of Petitioner's prior convictions. State v. Robinson, Op. No. 2014-UP-068 (Ct. App. Filed February 19, 2014).

After a hearing on the admissibility of Petitioner's convictions, the trial court issued an order finding the convictions were properly admitted pursuant to Rule 609, SCRE, and State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). App. 224-231. Petitioner appealed the trial court's ruling. Our Supreme Court affirmed the trial court's ruling and Petitioner's convictions in a published opinion. State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019).

Petitioner filed the current PCR action on August 5, 2019, alleging ineffective assistance of trial counsel for failing to cross examine the State's witnesses and impeach them with their prior inconsistent statements. App. 238-246. The State filed a return dated December 12, 2019. App. 247-253. An evidentiary hearing was convened on May 24, 2022, via WebEx before the

Honorable Maite Murphy. The State was represented by Julianna E. Battenfield. Petitioner was represented by Nancy Fennell. App. 254.

Petitioner testified that he was incarcerated from May 27, 2011, until his trial in November 2011. He stated that he only met with Counsel Walters the Friday before trial was set to begin and that they discussed the elements of the offense but not trial strategy or the evidence in his case. App. 259, l. 20-App. 261, l. 22. Petitioner stated that Counsel Walters did not cross examine Williams regarding his prior inconsistent statement wherein he stated he could not identify the other individual, where he stated there were only 2 intruders, and where he stated that he did not realize that the intruders had fired a shot at him. App. 262, l. 2-App. 267, l. 25. Petitioner testified it was important to impeach Williams with his prior inconsistent statements because it was only his word that linked Petitioner to the crime. App. 268, ll. 1-6.

Regarding Gunnels, Petitioner testified that the State alleged he had driven her car to commit the burglary. However, he maintained that he had returned the car to Gunnels between twelve and one the day of the incident. He believed Counsel Walters should have cross examined her about her statement where she specifically said he returned the car between twelve and one that day when her trial testimony had been that he returned it sometime in the afternoon. Petitioner also testified that Gunnels had used the car to visit a friend after he returned it, but no one questioned her about that or contacted the friend to confirm the time frame. App. 268, l. 15-App. 271, l. 19.

On cross-examination, Petitioner agreed that Counsel Walters had performed a limited cross examination of Williams regarding the gun he used during the incident and that he argued to the jury that Williams was a drug dealer. App. 283, ll. 7-14. When asked about Gunnels testimony

he agreed that her statement of “in the afternoon” could be interpreted to mean a lot of different things. App. 283, l. 20-App. 284, l. 6.

Counsel Walters testified that he did not remember what his strategy was for failing to cross-examine Williams more thoroughly. He recalled that there were inconsistent statements, and he did not know what Williams would say on the stand. He also testified that Williams was always consistent in his identification of Petitioner, and he thought it would be “absurd” to point out the inconsistencies in Williams’s statement regarding his failure to identify Felder. App. 295, ll. 18-25; App. 296, ll. 19-23.

Counsel Walters did not remember if he had spoken to Gunnels prior to trial. He testified that the decision to cross-examine a witness was within the discretion of the trial lawyer and was based upon many factors. He did not offer a specific reason for failing to cross examine Gunnels but did state that the alibi defense they had put up was a joke. App. 299, l. 21-App. 300, l. 23.

On cross-examination, Counsel Walters reiterated that he did not remember his discussions with Petitioner but testified as to how he normally handled alibi defenses. App. 302, ll. 2-16. When asked if he had reviewed the discovery with Petitioner, he testified that he could not remember if he went over “everything under the sun.” App. 304, ll. 3-10. He also testified that he could not remember if he met with Petitioner prior to his trial. App. 307, ll. 14-16. Counsel Walters did not refute that he failed to cross-examine Williams and Gunnels on the specific inconsistencies that Petitioner had testified about and that he could not articulate what his motivations for not cross-examining the witnesses were. App. 305, ll. 6-19. He concluded his testimony by stating that “strategically I did the work.” App. 308, ll. 3-10.

An order of dismissal was filed on October 3, 2022. Pp. 324-332. The order found that Counsel Walters had not cross-examined the witnesses based upon an “agreed upon defense

strategy” and that counsel’s decisions were strategic in nature. The order stated that Petitioner could not prove prejudice because Williams had always been consistent in his identification of Petitioner and because Petitioner had admitted to driving Gunnels car on the date of the incident. App. 331.

## ARGUMENT

The PCR court erred in finding trial counsel provided effective assistance when counsel failed to cross-examine the State's key witnesses regarding the inconsistencies in their testimony where the case hinged on witness credibility and counsel could not articulate a strategic reason for failing to question the witnesses.

The failure of Counsel Walters to fully cross examine Williams and Gunnels was deficient performance that was not excused by a valid trial strategy. Despite the wording in the order of dismissal, Counsel Walters consistently testified that he did not remember why he did not cross examine the witnesses to bring out their prior inconsistent statements and at no point was testimony taken to support a finding of "an agreed upon defense strategy." Petitioner was prejudiced by Counsel Walters's failure to thoroughly cross-examine Williams and Gunnels because the jury was deprived of vital testimony that was needed for the jury to be able to accurately judge the credibility of the witnesses. This Court should find that Counsel Walters provided ineffective assistance of counsel.

Cross-examining witnesses on inconsistencies between trial testimony and prior statements in order to attack the witnesses' credibility is both permissible and routine. "Considerable latitude is allowed in the cross-examination of an adverse witness to show bias." State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." State v. McEachern, 399 S.C. 125, 140-41, 731 S.E.2d 604, 612 (Ct. App. 2012). "Since it is the function of the jury to determine the credibility of witnesses and the weight to be given their testimony, as a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity

of a witness may be shown and considered in determining the credit to be accorded his testimony, and on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness.” State v. Brewington, 267 S.C. 97, 100-01, 226 S.E.2d 249, 250 (1976) (internal quotations and citations omitted).

The failure of trial counsel to impeach a witness with a prior inconsistent statement results in deficient performance that prejudices a defendant. See Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992); Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). In Rutland, the defendant was charged with murder. Rutland asserted that he acted in self-defense. A central issue in the case was whether the victim was armed at the time of the incident. An impartial witness to the incident, Kestner, told police and a news reporter that the victim came into her shop, pulled out a gun and then she heard two shots. Id. at 573-574, 785 S.E. 2d at 351. At trial Kestner stated she never saw the victim with a gun in his hand and it was only after Rutland shot the victim that she saw a gun on the ground near him. Id. Trial counsel for Rutland failed to impeach Kestner with her prior inconsistent written statement to police as well as with her verbal prior inconsistent statement that she had given to a reporter. Id.

This Court held that Kestner’s credibility as an impartial witness, considering Rutland was asserting that he acted in self-defense, was central to the trial. Failing to impeach the credibility of Kestner was ineffective assistance of counsel that resulted in prejudice to Rutland in that there was a “reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrated all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting.” Rutland, at 578, 785 S.E.2d at 353-354.

Similarly, in Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992), this Court found trial counsel's performance deficient in failing to show that the victim had made a prior inconsistent statement. Thomas was convicted of first-degree burglary and first-degree criminal sexual conduct. Immediately after the assault the victim told the emergency medical personnel that she did not know her assailant. Id. However, several hours later while at the hospital, the victim identified Thomas as her assailant. Id. At trial, the victim testified that it was Thomas who had assaulted her and that she had recognized his face during the assault. Id.

Trial counsel failed to call the emergency medical personnel to testify to the victim's prior inconsistent statement. This Court again noted that, as the sole witness to the assault, the victim's credibility and identification of her attacker was crucial to the State's case. Id. at 124, 417 S.E.2d at 532. Accordingly, counsel was "deficient in failing to call the medical personnel who would have cast doubt on the sole witness' identification" of Thomas. Id.

There was no forensic evidence or any independent witnesses tying Petitioner to the home invasion. The State relied heavily upon the testimony of Williams, the sole witness to the incident, to make its case. His credibility and identification of Petitioner was crucial to the State's case and Counsel Walters should have impeached him with his prior inconsistent statements. Importantly, Williams initially stated that two intruders broke into his home, he also stated that he was not aware that one of the intruders fired a shot until later in the investigation – much less who fired the shot, and he never identified Petitioner's brother in his prior statements. However, at trial, Williams testified that there were three intruders, that he was positive that two of them were Petitioner and his brother, and that Petitioner had fired at him as he fled the home. These were important factual discrepancies that Counsel Walters should have used to attack Williams's credibility and identification of Petitioner.

The other critical piece of evidence was the white car that was driven to the home invasion. The State maintained the vehicle used in the incident was the white Pontiac belonging to Gunnels and loaned to Petitioner the day before the incident. Petitioner maintained that while he had driven the car the previous night, he had returned the car to Gunnels between twelve and one in the afternoon, prior to the home invasion occurring around two. In her written statement, Gunnels asserted that Petitioner returned her vehicle between twelve and one in the afternoon on the day of the incident and that she subsequently used her vehicle to visit a friend. However, at trial she only testified that Petitioner returned her vehicle in the afternoon. It was imperative that Counsel Walters clarify that in her original statement Petitioner had returned the vehicle to her prior to the incident and that she was using the vehicle at the time of the incident, making it an impossibility that Petitioner was driving her vehicle at the time of the home invasion. This *specific* timeline testimony was vitally important to Petitioner's alibi defense. See Martin v. State, 427 S.C. 450, 455, 832 S.E.2d 277, 280 (2019) (finding as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother because without the specific timeline testimony, Petitioner failed to establish a legal alibi). See also State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (“[A] purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all” (citation omitted)).

Critically, Counsel Walters admitted that he did not fully cross examine Williams and Gunnels and he could not offer any reason for this failure. The order of dismissals reliance upon an “agreed upon defense strategy” is not supported by the record as there was no testimony supporting such a finding. The testimony supported that Counsel Walters had no reasoning, could not remember why he did or did not do things, and cavalierly asserted that whether or not to cross examine a witness was within the discretion of the trial lawyer. While Counsel Walters was correct

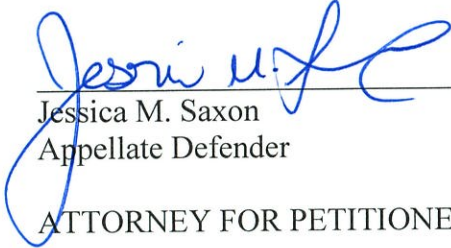
that the decision of trial strategy is left to the lawyer, this Court has held that trial counsel's decision to employ a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if *the reasons given for the strategy are not sound*. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) (emphasis added). Here, not only did Counsel Walters not offer a strategy, but he did also not offer any reasons to support his decision making.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “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.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, an applicant must show that counsel’s performance was deficient and that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

The failure of Counsel Walters to attack the credibility of Williams, the sole witness to the incident, was deficient performance that was not excused by trial strategy. Likewise, the failure of Counsel Walters to clarify Gunnels testimony regarding when her vehicle was returned and if necessary, impeach her with her prior statement, was also deficient performance that was not excused by trial strategy. Petitioner was greatly prejudiced by these failures as the State’s case hinged on the credibility of Williams and the assertion that Petitioner was in possession of the white Pontiac at the time of the incident. See Thomas and Rutland, *supra*.

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of this issue.

  
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Jessica M. Saxon  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 12th day of June, 2023.