

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

RECEIVED

NOV 15 2013

S.C. Supreme Court

SHARON SMITH,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2012-213022

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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QUESTIONS PRESENTED

I.

The PCR court erred in finding counsel was ineffective in regards to not objecting to solicitor's closing argument and in not further researching Respondent's degree of training as a nurse.

II.

The PCR court erred in granting relief on the basis of failing to interview or present various witnesses where these witnesses did not testify at the PCR hearing and evidence of prejudice from the alleged deficiency of counsel was not presented.

III.

The PCR court erred in granting relief on the basis that counsel was ineffective for failing to request a charge on accident where the trial court's instructions to the jury made clear that they had to find the State proved beyond a reasonable doubt that the act of stabbing the victim was deliberate.

IV.

The PCR court erred in finding that counsel was ineffective for failing to request a charge on evidence of good character.

V.

The PCR court erred in finding counsel was ineffective in regards to the trial court's consideration of adding instructions to the jury based on counsel's closing argument and in regards to the quality of counsel's closing argument.

VI.

Counsel's performance was not deficient for failing to confer with Respondent about whether or not to request a jury instruction on accident.

VII.

The PCR court erred in granting relief on the basis that counsel should have moved for a continuance concerning the State's rebuttal witness, particularly where no evidence of what benefits would accrue from further preparation were presented to the PCR court and where counsel's performance in cross-examining the witness was not deficient.

VIII.

The PCR court erred in finding counsel ineffective in regards to juror misconduct where no evidence was presented that the misconduct affected the jurors' impartiality and where Respondent failed to provide any additional affidavits or testimony from the other jurors to ascertain the possible prejudice from the misconduct.

COUNTER QUESTIONS PRESENTED

1.

The PCR court correctly found counsel was ineffective for failing to object to the solicitor's closing argument on inferring malice because respondent was a licensed practical nurse and let the victim bleed to death where defense counsel essentially admitted her own ineffectiveness on this issue since respondent was only a nursing student at the time of the incident.

2.

The PCR court correctly granted relief based on defense's counsel's failure to interview or present various witnesses where they could have collaborated respondent's testimony about the abusive relationship she suffered at the hands of the decedent.

3.

The PCR court correctly granted relief on the basis that counsel was ineffective for failing to request a charge on accident where respondent's testimony and the argument of counsel both centered on the fact that the aggressor decedent was stabbed by accident with his own knife.

4.

The PCR court correctly found that counsel was ineffective for failing to request a charge on evidence of good character since evidence of good character alone can be sufficient to form a reasonable doubt if considered along with the other evidence in the case.

5.

The PCR court correctly found counsel was ineffective for not objecting to the trial court's improper demand that she refrain from arguing the decedent was killed by accident or the court would charge voluntary manslaughter since changing jury instructions changed based on a defendant's closing argument was reversible error.

6.

Counsel's performance was deficient where she failed to confer with respondent about whether or not to request a jury instruction on accident where the heart of their defense was that the decedent was killed by accident.

7.

The PCR court correctly granted relief on the basis that counsel should have moved for a continuance concerning the state's rebuttal witness, where defense counsel admitted prior to trial she needed time to study DHEC discovery turned over just before the trial, where the "expert" testimony of the witness that the decedent had allegedly been dead for thirty minutes or longer was highly prejudicial to respondent's defense.

8.

The PCR court correctly found counsel ineffective where she moved for a new trial in General Sessions Court based on the juror misconduct of doing internet research on the law, and sharing it with the other jurors, since counsel failed to insure the trial court had jurisdiction to hold the post-trial hearing where she had already filed the notice of intent to appeal.

STATEMENT OF THE CASE

Respondent was indicted by the Richland County grand jury for the offense of murder. Her case came on for trial on June 20, 2005 before the Honorable Reginald I. Lloyd, and a jury. Deputy Public Defender April Sampson and Deputy Public Defender Debra Ahrens represented respondent. John Meadors and Todd Wagoner were the Assistant Solicitors. App. 1.

On June 23, 2005 the jury found appellant guilty of murder. App. 632, ll. 2-8. Judge Lloyd sentenced respondent to forty-eight years imprisonment. App. 651, ll. 9-10. A notice of intent to appeal was then filed and served from respondent's murder conviction and sentence. However, Counsel Sampson also subsequently filed a notice of motion and a motion for a new trial in the lower court based on after-discovered evidence of juror misconduct. Counsel also filed a memorandum in support of defendant's motion for a new trial, and attached an affidavit from Juror Mark Pleasant. App. 716-722.

The state filed a memorandum in opposition to defendant's motion for a new trial. A hearing on the motion for a new trial was held on August 15, 2005 before the Honorable Reginald I. Lloyd. App. 655-714. April W. Sampson represented respondent. John P. Meadors and Todd M. Wagoner were again the assistant solicitors.

Towards the conclusion of the new trial hearing, the judge stated his intention to issue a written order. "I will issue a written order on this." App. 708, ll. 24-25. "I understand the defense's continued point on that [limitations on arguing accident to the jury during closing argument where accident was not charged to the jury as a verdict option]. And I'll make sure y'all have a written order so the record is complete on my finding on this issue as well. Thank you, counsel." App. 713, l. 23 -714, l. 2.

On February 2, 2006 the judge issued a Form 4 order denying the motion for a new trial without explanation on a civil order form. App. 723.

On February 7, 2006 a notice of intent to appeal was filed with the Court of Appeals from the *denial of the new trial motion based on after-discovered evidence*. Later counsel filed an amended notice of intent to appeal noting incorrect indictment numbers and a sentencing date. This notice of intent to appeal purportedly covered both the trial and the motion for a new trial proceeding. App. 724.

Respondent's appeal from her murder conviction itself proceeded in the interim. A Final Anders Brief of Appellant was filed on July 19, 2006 in that case. This Court dismissed the appeal and granted counsel's motion to be relieved in State v. Sharon L. Smith, Up.-Op.-No. 2007-UP-2005 (filed May 22, 2007).

Undersigned counsel filed his two issue merit initial brief of appellant in the Court of Appeals on November 1, 2007, in the appeal from the motion denying a new trial based on after-discovered evidence. Counsel, based on memory and belief, thinks the state filed a motion to dismiss the appeal on the grounds that the lower court was without jurisdiction to hold the new trial based on after-discovered evidence hearing because respondent's murder conviction was already on appeal. The Court of Appeals dismissed the new trial based on after-discovered evidence appeal on May 5, 2008, ruling the motion for a new trial hearing that proceeded in the lower court while respondent's conviction was on appeal was a nullity. App. 725.

Respondent filed a post-conviction relief application on March 6, 2009. A return and motion to dismiss was filed July 2, 2009. The motion to dismiss was denied. An evidentiary hearing was held before the Honorable L. Casey Manning on October 10, 2010. Maura Dawson represented respondent. Brian Patrano was the Assistant Attorney General. App. 740-808.

Judge Manning issued an order granting PCR relief on seven different grounds dated September 12, 2012. App. 851-868. The state subsequently filed a petition for writ of certiorari on April 25, 2013.

This return of Respondent follows.

ARGUMENT

1.

The PCR court correctly found counsel was ineffective for failing to object to the solicitor's closing argument on inferring malice because respondent was a licensed practical nurse and let the victim bleed to death where defense counsel essentially admitted her own ineffectiveness on this issue since respondent was only a nursing student at the time of the incident.

Respondent was indicted for killing her live-in boyfriend, Charles Goodsen, on May 11, 2003. As will be seen infra respondent consistently maintained the stabbing was an accident after the decedent came after her with a knife. Defense counsel did not request a jury instruction on accident. App. 872.

As seen above, respondent's case was called to trial on June 20, 2005. She was represented by April Sampson and Debra Ahrens. John Meaders and Todd Wagoner were the solicitors. App. 1.

At the PCR hearing defense counsel Sampson testified that: "Normally I do a good job. Normally I'm here at the PCR's telling how I did a great job and you know, sorry, but that's what happened. In Sharon's case, it's the exact opposite and that would be why you're handling it because I felt so bad about what ended up happening that I wanted somebody to try and fix it and I can't fix it. Whether it's arrogance or stupidity, I screwed up. That's the best I can say." Sampson said she was a lot better lawyer at the time of the 2010 PCR hearing than she was at the time of respondent's trial in 2005 App. 794, l. 21 – 795, l. 5.

The following occurred on direct examination of Defense Counsel Sampson at the PCR hearing:

- Q. Now, just a little bit about what happened after the trial?
- A. I need to put on the record before I forget that during the trial, most of this was going on at that minute **and as I saw it going bad, I started trying to make the record clear that I was becoming ineffective; that I could not make decisions that fast, but that I was having to, being stopped in the middle of closing and then the charges being changed and all of that. So I tried to put that on the record.**

When she received - - when she got the sentence, as I normally do, I called the jurors after wards. Once the jurors are released, they can speak to you as far as what happened in trial and whatnot. I was pretty upset about what had happened. It did not dawn on me whether it's arrogance, over confidence, whatever you want to call it, **I thought Sharon had a really good case. It did not dawn on me it would go as bad as it did.** So I don't know if she remembered or not, but I was crying when she got her sentence and she was not and I wasn't going to jail but she was and so I was very upset.

App. 787, ll. 1-21. (emphasis added).

Respondent testified that leading up to the trial Defense Counsel Sampson would see her coming into her office in a uniform. However, Counsel Sampson never talked with her about the extent of her nursing training at the time of the incident. App. 755, ll. 8-22.

Counsel Sampson testified that at the time of the incident: "I believe she just started school, if I remember correctly, at the time of the incident." Sampson said respondent may have only had "a year, tops, of nursing school when it happened." Counsel Sampson testified she did not expect "nursing" to become an issue. App. 769, ll. 13-19.

Counsel Sampson also stated that it was not until closing arguments that "he [the solicitor] made a big deal out of it, that the jury should infer malice from the fact that she would know how to stab him. He basically was stating that she was a nurse, she would know exactly what one would it

would take to kill you.” App. 770, ll. 7-16. The essence of Counsel Sampson’s testimony was this closing argument was misleading because respondent had far more training at the time of the trial than she did at the time of the incident. App. 771, l. 16 – 772, l. 7. Counsel Sampson said this closing argument by the solicitor was extremely prejudicial. App. 785, ll. 4-14.

The actual argument was:

Malice aforethought, it can either be expressed, I'm going to kill somebody; or it's permissible to infer it from the use of, yes, a deadly weapon. And that's what the law says. That's one reason I am going to ask you to infer malice but not the biggest reason. **The biggest reason, as I'll get to later, is this licensed practical nurse let him sit there and bleed to death. And I think there's overwhelming evidence of that. That's the true malice, the true meanness in this case.**

App. p. 530, line 24 - p. 531, line 8 (emphasis added).

In the order granting post-conviction relief the judge correctly found:“Ms. Sampson and applicant had approximately four meetings prior to trial.” The PCR judge noted that Counsel Sampson and respondent did not discuss the extent of respondent’s nursing training which was her only having completed her first semester at the time of the incident. App. 856-857.

While the state points to the fact that respondent testified she was an LPN at the time of the *trial* two years later, this essentially supports the PCR judge’s ruling that the inference of malice argument was not only misleading but highly prejudicial because respondent was only a first year nursing student at the time of the incident. There was ample evidence to support the PCR judge’s ruling that defense counsel was ineffective, especially since the standard is only “any evidence” to support his rulings. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The PCR court correctly granted relief based on defense's counsel's failure to interview or present various witnesses where they could have collaborated respondent's testimony that she suffered from an abusive relationship at the hands of the decedent.

Counsel admitted that respondent "did ask me to talk to the neighbors." Counsel said "oftentimes a defendant will want us to bring in character witnesses just to say I'm a great person. *I wouldn't do this.*" App. 772, ll. 8-21. (emphasis added).

In his order of dismissal the PCR judge correctly found that respondent asked counsel to speak with her neighbors about volatility of her relationship with the decedent, and the fact that the decedent was throwing respondent out of her own home at the time of the incident. App. 857.

The PCR court noted that respondent was the only living witness, and had the jury known of the abusive history respondent suffered at the hands of the decedent the verdict might have been different. The PCR court further found that respondent was a mother, a nursing student, an active church member, and a loving daughter who regularly visited her parents. The court also found respondent was prejudiced by defense counsel's failure to investigate.

Moreover, the court wrote that even if respondent had been convicted with the jury having a true picture of her being the victim of abuse, and her good character, she could have been eligible for one fourth parole eligibility pursuant the statute and State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000). App. 858-860. Again, there was probative evidence to support the PCR grant of relief on this issue pursuant to the "any evidence" standard. See State v. Cherry, supra.

The PCR court correctly granted relief on the basis that counsel was ineffective for failing to request a charge on accident where respondent's testimony and the argument of counsel both centered on the fact that the aggressor decedent was stabbed by accident with his own knife.

Respondent testified at the PCR hearing that defense counsel did not discuss jury instructions with her. She did not understand that she was entitled to a jury instruction on accident even though that was her defense as defense counsel attempted to tell the jury in her closing argument as will be seen *infra*. App. 756, ll. 4-17.

Respondent graciously did not attempt to blame defense counsel for her deficiencies. She noted that counsel had been pregnant: "She had just had the child and I just felt she did try to do the best she could at the time." App. 758, ll. 5-9. However, respondent stated the stabbing was an accident and defense counsel admitted "Judge Lloyd brought up that I did want accident."

However, the record shows that the trial judge put defense counsel in the untenable position of threatening her that if counsel again attempted to argue to the jury that the killing was an accident he would also instruct the jury on voluntary manslaughter which the defense did not want. However, defense counsel failed to object to being put wrongfully in this position. Further, defense counsel testified that neither she nor co-counsel were sufficiently familiar with the law to handle this situation. App. 777, l. 14 – 778, l. 14. Defense counsel testified in hindsight: "We would have wanted the accident charge. It fit." App. 778, ll. 18-23.

The PCR court found that defense counsel was ineffective in failing to obtain an accident instruction for respondent where there was evidence the harm was unintentional, respondent was acting lawfully, and exercised due care which nonetheless result in this tragic stabbing. The PCR

court also noted Counsel Sampson's testimony that she wanted a jury instruction on "accident." App. 498. The court also wrote that this Court had found counsel ineffective for failing to request an accident charge when the evidence supported it. See Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008). App. 860-861.

The PCR court correctly found that counsel was ineffective for failing to request a charge on evidence of good character since evidence of good character alone can be sufficient to form a reasonable doubt when considered with the other evidence in the case.

At trial respondent testified she was thirty-three years old and had four children. She had always worked three jobs to try and make ends meet for her family. She had earned her Bachelor's Degree on May 5, 2005 despite all of these odds. App. 387, l. 10 – 389, l. 11.

The state contends respondent did not present any evidence of her good character. Petition for Writ of Certiorari at 13. However, the PCR court correctly noted respondent was the only witness to the incident. Further, evidence that a person who worked three jobs to support her family, and went back to school to better herself for the benefit of her family and others (as a nurse) is certainly evidence of good character.

The PCR court cited this Court's holding in State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (2000) which held that when requested, and when there was evidence of good character, a defendant was entitled to an instruction to the effect that evidence of good character and good reputation may in and of itself create a doubt as to guilt and should be considered by the jury, along with all other evidence, in determining guilt or innocence of the defendant. See, also, State v. Green, 278 S.C. 239, 294 S.E.2d 335 (1982). There was evidence to support to the PCR court's ruling on this issue. State v. Cherry, supra.

The PCR court correctly found counsel was ineffective for not objecting to the trial court's improper demand that she refrain from arguing the decedent was killed by accident or the court would charge voluntary manslaughter since changing jury instructions changed based on a defendant's closing argument was reversible error.

This is a strange case that undersigned appellate counsel also handled the direct appeal from the motion for a new trial. The Attorney General ultimately moved to dismiss because the trial court did not have jurisdiction to hear the new trial motion because Counsel Sampson did not have the case remanded for a hearing on newly discovered evidence. Appellate Defense was not aware of the new trial hearing until the notice of intent to appeal from that hearing was filed, and the transcript was ordered.

During Defense Counsel Sampson's closing argument she told the jury that respondent could have: "[J]ust said, I did it in self-defense. But she didn't. Ladies and gentlemen, it was an accident. You saw her up here. You've seen her." At this point there was a bench conference. App. 518, ll. 5-12.

The judge told Counsel Sampson that he would charge voluntary manslaughter instruction if she continued to use the word "accident" in her closing argument. App. 538, l. 1 – 540, l. 15. Defense Counsel Sampson said she ceased using the word accident based on the judge's threat. App. 539, ll. 13-18. The judge eventually only charged murder and the verdict options were guilty or not guilty. App. 587, l. 22 – 588, l. 14; App. 595, l. 7 – 596, l. 25.

The PCR court held that defense counsel erred by not objecting to the judge's ruling and the untenable situation counsel had to deal with. The PCR court noted that in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), this Court held it was error to change jury instructions after counsel

had finished closing argument, and particularly where the change in the jury charge was based on the closing argument.

The PCR court ruled that had defense counsel properly objected here, respondent's case would have been reversed on direct appeal. The court wrote that the threat to alter a charge, based on a closing argument, was fundamentally unfair. See United States v. Kostoff, 585 Fed.2d 378 (9th Cir. 1978).

There was ample evidence supporting the trial judge's finding of ineffective assistance of counsel on this issue under the "any evidence standard." See Cherry v. State, *supra*; Strickland v. Washington, 466 U.S. 668 (1984).

Counsel's performance was deficient where she failed to confer with respondent about whether or not to request a jury instruction on accident where the heart of their defense was that the decedent was killed by accident.

As seen above, respondent testified at trial that she struggled with the decedent and knocked his arms away and that she never saw a knife in his hand. She did not mean to stab him or hurt him. All of this went to the fact that the stabbing was an accident. App. 415, l. 3 – 416, l. 15.

Respondent testified that Counsel Sampson never discussed jury charges with her and she did not understand she was entitled to a jury instruction on accident. App. 756, ll. 4-17. Counsel Sampson also admitted she did not fully appreciate or understand the defense of accident. App. 778, ll. 3-15.

An accident instruction in this case was critical and the PCR court correctly found defense counsel was ineffective for failing to even discuss this defense with respondent since it was the essence of their case. App. 863-864. An attorney has a duty to consult with her client regarding important decisions including questions of overarching defense strategy. Florida v. Nixon, 543 U.S. 175 (2004).

Further, the state's reliance on State v. Winkler, 388 S.C. 474, 698 S.E.2d 596 (2010), is respectfully misplaced since in Winkler the defense offered existing evidence in mitigation over the defendant's objection whereas here defense counsel and respondent were both on the same page. Defense counsel simply was unable to present a defense and obtain a jury instruction on a defense – accident -- counsel intuitively knew existed. As seen above, counsel stated that she try to put "on the record" during respondent's trial that she was rendering ineffective assistance of counsel. There

was evidence to support the PCR court's ruling on this issue. See Cherry v. State; Strickland v. Washington.

The PCR court correctly granted relief on the basis that counsel should have moved for a continuance concerning the state's rebuttal witness, where defense counsel admitted prior to trial she needed time to study DHEC discovery turned over just before the trial, where the “expert” testimony of the witness that the decedent had allegedly been dead for thirty minutes or longer was highly prejudicial to respondent’s defense.

Prior to trial defense counsel renewed her discovery request. She noted she was given a copy of a DHEC patient form for EMS when they came to the scene. The victim was dead on arrival, so he was not transported. Defense counsel requested that the DHEC form, or seemingly evidence flowing from it, not be allowed into evidence due to its disclosure on the morning of the trial. However, Solicitor Meadors responded that he turned the items over as soon as he received them, and he claimed he discussed the matter with Counsel Sampson the prior week anyway. Meadors said that witness Fortner was a potential witness in this regard. Sampson expressed her concern that she needed time to prepare to question Fortner given the last-second turning over of evidence of the DHEC form. The trial judge stated that he would deal with this matter if it became an issue. App. 9, l. 18 – 11, l. 10.

Fortner was indeed later called as a reply witness. He testified he had been to thousands of crime scenes. App. 467, l. 8 – 470, l. 5. Fortner was qualified as an expert in “pre-hospital medicine” without objection. App. 470, ll. 6-13.

Fortner testified that the decedent’s body was “cool to the touch.” App. 474, ll. 13-16. Fortner testified the decedent had been dead “at least thirty minutes” and that it “could have been more.” App. 480, l. 1 – 481, l. 2.

Defense Counsel's attempted cross-examination was less than one page long and did nothing to lessen the blow of Fortner's testimony where respondent had testified she called 911 *shortly* after the decedent was stabbed but where she testified EMS was slow to respond. App. App. 482, l. 16 – 483, l. 11; app. 488, ll. 4-16. Fortner's testimony was calculated to make the jury think respondent deliberated her actions before she called 911.

The PCR court correctly found that counsel made no meaningful challenge to the evidence of the decedent's body temperature and time of death. Counsel also did not renew her objection or seek a continuance so she could be prepared to handle and cross-examine witness Fortner. Her pre-trial motion to exclude this testimony was seemingly forgotten by the time Fortner was called as a reply witness.

An attorney has a duty to investigate and prepare to rebut scientific or allegedly scientific expert testimony. See Ard v. Catoe, 372 S.C. 318, 332-333, 642 S.E.2d 590, 597 (2007). The PCR court did not err in finding that defense counsel's inept handling of Fortner's testimony where she claimed surprise, and earlier demanded exclusion of the evidence, constituted ineffective assistance of counsel. See Cherry v. State; Strickland v. Washington. App. 864-865.

The PCR court correctly found counsel ineffective where she moved for a new trial in General Sessions Court based on the juror misconduct of doing internet research on the law, and sharing it with the other jurors, since counsel failed to insure the trial court had jurisdiction to hold the post-trial hearing where she had already filed the notice of intent to appeal.

Defense counsel filed a notice of intent to appeal when she became aware of jury misconduct. She subsequently filed a motion for a new trial. However, as seen above, the trial court did not have jurisdiction since a motion to hold the appeal in abeyance and remand was never filed. App. 866-867.

Undersigned appellant counsel filed his initial brief of appellant on this issue on November 1, 2007 in the Court of Appeals. Supp. App. 1-16. Undersigned counsel argued on direct appeal that the court erred by refusing to summon the jurors in for questioning after juror Mark Pleasant admitted misconduct in an affidavit filed with the trial court in support of the motion. Juror Pleasant shared with the remaining jurors his internet research that the case appeared to be “voluntary manslaughter where the jury was not given that verdict option. Supp. App. 7-8.

Appellate counsel argued that given the admission of juror misconduct, and the fact that the research had been shared with the other jurors, the court erred by not summoning the jurors in for questioning in compliance with the correct procedure cited in State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003). Supp. App. 11; Supp. App. 12-13.

Respondent was entitled to a verdict based on the evidence presented at trial and what occurred in the courtroom. This direct appeal issue was never considered, and the Court of Appeals dismissed the appeal, because the lower court did not have jurisdiction to hear the motion for a new trial based upon the after-discovered evidence of juror misconduct. The PCR court correctly found

defense counsel was ineffective in failing to assure the trial court had jurisdiction. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999).

The PCR court also correctly ruled that “it is impossible to imagine a more unfair deliberation than when a juror voluntarily does his or her own research, presents that research to the remaining jurors, and poisons the jury’s mind with information that is both incorrect and prejudicial.” App. 867. The jurors should have been concentrating on whether the state proved respondent killed the decedent with “malice aforethought.” It is strange -- and if this situation was not so serious -- ironic that the absence of malice which is the heart of voluntary manslaughter should have led the jurors to request further instructions from the trial court rather than merely assume, based upon juror Pleasant’s research, that because they did not have the verdict option of voluntary manslaughter the only thing to be done was to convict appellant of murder.

The state’s argument that no evidence was presented that the one juror’s improper legal research and misconduct “affected the jury’s duty of impartiality” is respectfully strange given that the issue the Court of Appeals never got to consider was the judge’s *failure to summon the remaining jurors in for questioning about the misconduct shortly after it occurred, and to ascertain whether respondent was prejudiced* as was done in State v. Bryant, supra. See Petition for Writ of Certiorari at 18.

The PCR court correctly found defense counsel ineffective for failing to ensure the trial court had jurisdiction over the hearing on the motion for a new trial based upon the after-discovered evidence of juror misconduct. There was evidence to support this ruling. App. 867-868. See Cherry v. State; Strickland v. Washington.

CONCLUSION

By reason of the foregoing arguments, there was evidence to support the PCR Court's ruling that defense counsel here provided ineffective assistance of counsel especially given the fact that defense counsel essentially admitted she was ineffective in this case on various grounds.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 15th day of November, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
L. Casey Manning, Circuit Court Judge

SHARON SMITH,

RESPONDENT,

V.

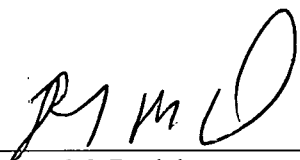
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2012-213022

CERTIFICATE OF SERVICE


I certify that a true copy of the return to petition for writ of certiorari and supplemental appendix in this case have been served on David Spencer, Esquire, this 15th day of November, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 15th day
of November, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023