

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
R. Keith Kelly, Circuit Court Judge

RECEIVED

AUG - 3 2015

S.C. Supreme Court

CHANNACK KEAM,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002696

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX 1

ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to elicit testimony and introduce evidence of third party guilt showing that the deceased was the victim of a drive by shooting involving a black Honda Civic, failing to introduce evidence that Alan Kennedy and Tyler Vichith were present in a black Honda Civic at the scene of the shooting, and showing evidence of animosity between Kennedy and the deceased and animosity between Vichith and Petitioner. 4

CONCLUSION 18

ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective in failing to elicit testimony and introduce evidence of third party guilt showing that the deceased was the victim of a drive by shooting involving a black Honda Civic, failing to introduce evidence that Alan Kennedy and Tyler Vichith were present in a black Honda Civic at the scene of the shooting, and showing evidence of animosity between Kennedy and the deceased and animosity between Vicith and Petitioner?

STATEMENT

In January of 2008, the Spartanburg County Grand Jury indicted Petitioner for murder, indictment #2008-GS-42-0129. On June 2, 2009, Petitioner proceeded to jury trial before the Honorable J. Derham Cole. John Reckenbeil represented Petitioner at trial. Robert Coler prosecuted the case. The jury found Petitioner guilty and Judge Cole sentenced Petitioner to thirty (30) years. A timely notice of intent to appeal was filed and the direct appeal perfected by J. Falkner Wilks. The issue raised on direct appeal involved the trial court's failure to charge involuntary manslaughter. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Keam, Op. No. 2010-UP-264 (filed April 29, 2010).

On May 6, 2011, Petitioner filed an application for post conviction relief. The State filed a return on May 2, 2012. J. Falkner Wilks represented Petitioner at the PCR hearing. Suzanne H. White represented the State. On November 4, 2014, an evidentiary hearing was held before the Honorable R. Keith Kelly. In a written order filed December 2, 2014, Judge Kelly denied relief and dismissed the application. A timely notice of intent to appeal was served on December 19, 2014. This appeal follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to elicit testimony and introduce evidence of third party guilt showing that the deceased was the victim of a drive by shooting involving a black Honda Civic, failing to introduce evidence that Alan Kennedy and Tyler Vichith were present in a black Honda Civic at the scene of the shooting, and showing evidence of animosity between Kennedy and the deceased and animosity between Vichith and Petitioner

The jury found Petitioner guilty of fatally shooting one of his best friends, Shane Easler, outside of Red's Bar and Grill. On September 21, 2007, Petitioner and Easler were drinking beer and taking totem poles, Xanax bars, at Petitioner's house. (App. p. 220, line 21 – p. 222, 223, lines 1-14). Later, Petitioner, Easler, Petitioner's girlfriend, Victoria Thongpane and her brother, Tyler Vichith were inside Red's Bar and Grill. According to Curtis Gosnell, an employee of Red's, Petitioner smuggled a beer into the bar in his pocket and was asked to leave when he refused to throw the beer away. (App. p. 70, line 16, p. 71, 72, 73, lines 1-13).

All four, Petitioner, Easler, Thongpane and Vichith, left the bar after Petitioner was asked to leave. According to Gosnell's trial testimony, the three males went in one direction and the female got in a car and drove toward them. (App. p. 74, line 24 – p. 75, lines 1-5). Petitioner told Detective Reid Lindsey they had driven his gray Lexus to the bar that night. (App. p. 183, lines 9-12). Petitioner could not remember who drove the car to the bar but testified that Valerie Thongpane drove the car afterwards. (App. p. 225, line 17 – p. 226, lines 1-5). Gosnell testified that shortly after the group left he heard gun shots. (App. p. 77, lines 14-16). Gosnell testified that after the last shots were fired he saw the car in which "the girl" had driven away come back down the road. (App. p. 79, lines 1-6). Another employee of the bar, Joshua Bailey, testified that after hearing the final shot, he saw a dark car with rims driving by. (App. p. 92, lines 9-12).

Teresa Bishop just happened to be driving by Red's when she noticed a body in the roadway and someone bent down with a cell phone over the body. (App. p. 96, lines 1-6). Bishop stopped to assist. The person bending over the body was Petitioner and the body was that of Shane Easler who had been shot in the chest. Petitioner told Bishop that "a car had come by and shot his friend." (App. p. 97, lines 1-7). Petitioner called 911 and told the operator there had been a drive by shooting. (App. p. 246, lines 16-23).

When police arrived on the scene Petitioner was not considered a suspect and police thought that he and the deceased may both have been the victims of a drive by shooting. (App. p. 111, lines 16-24). Deputy Steve Henderson with the Spartanburg County Sheriff's Department testified that Petitioner told him "it was a drive by." (App. p. 119, lines 20-22). Trial counsel failed to cross examine Deputy Henderson. (App. p. 121, lines 8-9). Petitioner told Deputy Travis McJunkin with the Spartanburg County Sheriff's Department that "someone shot his friend." (App. p. 108, lines 7-10). After talking with Petitioner, officers arrested him for public disorderly conduct because of his grossly intoxicated condition. (App. p. 127, lines 18-25). Sergeant Cockrell with the Spartanburg County Sheriff's Department searched Petitioner and found a gun in his right rear pants pocket. (App. p. 128, lines 1-7). The gun was in the open position but was no longer loaded. (App. p. 128, lines 7-9). At trial Petitioner admitted that the gun was his gun, but did not remember getting the gun out of his car the night of the shooting. (App. p. 239, lines 21-22; p 241, 242, 243, lines 1-5). When asked what he remembered after the shooting, Petitioner testified, "I asked – well, I asked Shane what happened and then somehow I reach in my back pocket and I felt a gun back there." (App. p. 227, lines 4-8).

According to Sergeant Cockrell, after finding the gun Petitioner blurted out, "Yeah, I shot him." (App. p. 128, lines 21-23). Later however, Petitioner said, "I didn't, I didn't shoot him, why

would I kill [m]y bro.” (App. p. 129, lines 22-23). Ten spent shell casings found at the scene matched the gun found in Petitioner’s back pocket. (App. p. 157, lines 14 – p. 159, lines 1-5). A gunshot residue kit for Petitioner was submitted and the agent testified that no gunshot residue was found on Petitioner’s hands. (App. p. 168, line 22 – p. 169, lines 1-18). The agent was shown a photo of Petitioner’s hands with blood on them. The agent testified that blood could affect the analysis. (App. p. 170, lines 3-10). The agent found gunshot residue on the right palm of the deceased. (App. p. 170, line 13 – p. 171, lines 1-13).

Despite the fact that the jury heard three statements from Petitioner: 1.) the statement to Teresa Bishop; 2.) the statement to Deputy Henderson; and 3.) the statement to Deputy McJunkin, that the deceased was the victim of a drive by shooting, trial counsel testified at the PCR hearing, “I don’t really think there was a drive-by shooting defense in this.” (App. p. 341, lines 22-23). Trial counsel testified, “I didn’t think [sic] needed to go to the jury.” (App. p. 342, line 4). Trial counsel also testified that, “I didn’t think they were going to find him not guilty; I was hoping they would find him guilty of voluntary or involuntary.” (App. p. 353, lines 20-21). There was, however, no evidence to support a charge of voluntary or involuntary manslaughter and as a result the trial judge correctly refused to charge the jury with the lesser included offenses of voluntary or involuntary manslaughter. (App. pp. 250 – 256).

Trial counsel was ineffective in failing to highlight the testimony of Teresa Bishop, Deputy Henderson and Deputy McJunkin in regard to Petitioner’s statements that this was a drive by shooting. Trial counsel asked no questions of Deputy Henderson. During the PCR hearing trial counsel was asked about Investigator Lindsey’s report documenting the fact that Petitioner told Investigator Lindsey that a car came by and shot the victim. (App. p. 343, line 22 – p. 344, lines 1-2; p. 365). Trial counsel admitted that Petitioner’s statement constituted evidence of a drive by

shooting. (App. p. 344, lines 3-9). At trial, however, trial counsel failed to cross examine Investigator Lindsey about Petitioner's statement that a car came by and shot the victim. (App. pp. 194-212).

At trial only one witness, Joshua Bailey, an employee of the bar, testified that after hearing the final shot, he saw a dark car with rims driving by. (App. p. 92, lines 9-12). Joshua Bailey's statement taken on the night of the shooting describes the car as "dark possibly b[l]ack with chrome wheels maybe a Honda Civic or something." (App. p. 374). Trial counsel failed to cross examine Bailey about the more detailed description provided in his statement. (App. pp. 92-93). Trial counsel admitted failing to cross examine another witness, Curtis Gosnell, about his statement that after the shooting he "saw a black car with chrome wheels driving very slowly from the direction of the gunshot toward the Old Mill." (App. p. 347, line 24 – p. 348, lines 1-18; App. p. 373).

The Spartanburg County Sheriff's Department took statements from five additional witnesses who were not called to testify a trial: 1.) Darl Hammacher; 2. Michael Byars; 3.) Anthony Miles; 4.) Jeffrey Benfield; and 5). Jolan Baulig. (App. pp. 367-372). Darl Hammacher, who was helping at the bar that night, stated that the Petitioner and the deceased, Easler, left in one direction and Thongpane and her brother, Vichith, left in a car going the other way. (App. p. 367). Hammacher stated, "They said they saw two cars. One was at the edge of the fence with it's [sic] lights on and left after the gunshots. The other car was coming down toward the Hot Spot." (App. p. 367). Trial counsel admitted that Hammacher was not called to testify. (App. p. 344, line 16 – p. 345, line 1).

Michael Byars, who was also working at the bar on the night in question, stated that Petitioner was with two other Asian males, an Asian female and a white male. (App. p. 368).

According to Byars, "They left in a small dark colored car with rims." (App. p. 368). Byars then stated:

A couple of minutes later we heard shots outside and looked and saw the small dark car riding by heading toward Arcadia. We came outside. Then we saw them heading back toward Fair Forest. They had stopped and I saw several of them running around the outside of the car. They shot around (1) once. The first time it was 3-4 times. The guy we threw out was wearing a blue shirt baggy. I saw him about this time out on the main Rd, about 40-50 feet from my parking lot toward Fair Forest. A few seconds later, they came back down Hayne St. Toward Arcadia.

(App. p. 368). Trial counsel admitted that despite Byars' statement that the dark car was present when the shots were fired, he was not called as a witness. (App. p-. 345, lines 2-17).

Anthony Miles, a patron of the bar, stated, "As we came to pull in I heard several gun shots. There was an Asian or Hispanic man and a taller white guy standing together. There was a dark colored car coming down the road. We had to wait for that car to clear us before we turned in. I was opening my door and I heard a few more shots. There was a car, I am not sure if was the same one or not pulled up beside them and stopped in the road. The car was coming from the same direction as we were." (App. p. 369). Trial counsel admitted that this statement indicated that the shots came from a car. (App. p. 345, line 18 – p. 346, lines 1-3). Miles was not called as a witness.

Jeffrey Benfield, another patron, stated, "I was driving to Reds when I heard 4-6 rounds fired from a weapon. As I was pulling into Reds I saw two males one white and one darker skin. As I got out of the car the males were walking in the grass towards the Hot spot. Then a darker colored car pulled up beside the two guys. Then I heard two more rounds fired and caught a glimpse of the mussel [sic] blast from one." (App. p. 371). Trial counsel admitted that this statement possibly indicated that shots came from the dark car. (App. p. 346, lines 10-18). Benfield was not called as a witness.

Jolan Baulig, another patron, stated:

On 9-21-07 @ around 10:00 pm Me, Nathan Benefield and Anthony (LNU) were coming up Hayne St. from the direction of Arcadia going to Red's Grill to shoot pool. When we got close to the parking lot we heard about 5 pops. I made the comment it sounded like firecrackers and we pulled on in near the road and parked at the far right side as face the building. When we were pulling in, this small dark car was behind us. They continued on heading toward Fair Forest. We saw two people walking up the road toward Fair Forest. At least one male. When we parked and got out I could see the small dark car stop at the two people walking. I heard a few shots from that direction and my friends and I took off running toward the grill front door. That's all I heard and saw.

(App. p. 372). Trial counsel admitted that this statement indicated that the shots could have been fired from the dark car. (App. p 346, lines 19-24). None of the five witnesses who provided statements indicating that shots could have been fired from the dark car testified at trial. Trial counsel did not believe that he interviewed any of these witnesses. Trial counsel was ineffective in failing to elicit testimony and introduce evidence to support that the deceased was the victim of a drive by shooting involving a black Honda Civic.

Trial counsel was additionally ineffective in failing to link the black Honda Civic seen at the time of the shooting to Alan Kennedy and Tyler Vichith. Importantly, during the PCR hearing, Amanda Condrey testified that Tyler Vicith and Alan Kennedy were at Red's the night of the shooting in the black Civic. (App. p. 338, lines 12-17). Condrey also testified at the PCR hearing that the night after the shooting she saw Kennedy in the black Honda Civic. (App. p. 336, lines 23-25). She recalled that Alan Kennedy, another person, Siena and Marco, the man who drove the black Honda, were at the house. (App. p. 336, line 25 – p. 337, lines 1-2). Condrey confirmed that she spoke with trial counsel by phone one time prior to trial. (App. p. 337, lines 3-5). Condrey testified that trial counsel was supposed to call her back but never did. She tried to tell trial counsel everything that she knew about the incident. (App. p. 337 lines 7-8). Condrey was not called as a witness at trial.

Simone Moeung, Condrey's former husband, also testified at the PCR hearing. Moeung testified that he and the Petitioner and Shane Easler, the deceased, were best friends. (App. p. 328, lines 22-23). Moeung testified that two or three days after the shooting he saw Kennedy with a Mexican guy in a black Honda Civic. (App. p. 332, lines 6-14). Trial counsel was ineffective in failing to introduce the testimony of Condrey placing Kennedy and Vichith in the black Honda on the night of the shooting and failing to introduce the testimony of Moeung linking Alan Kennedy to the black Honda Civic seen at the time of the shooting

Additionally, trial counsel was ineffective in failing to establish that animosity existed between the deceased and Kennedy and Petitioner and Vichith. During the PCR hearing Moeung testified that his sister, Siena Sams, was dating Easler at the time of the shooting. (App. p. 329, lines 1-11). At the time of the shooting, his sister had a child with Alan Kennedy. (App. p. 330, lines 16-24). At the time of the PCR hearing the sister, Siena Sams, was married to Alan Kennedy. (App. p. 329, lines 16-18). Moeung testified that a week before the shooting Easler and his sister had a physical altercation and Shane "put his hands on [her]." (App. p. 329, lines 20-22). Moeung testified that Kennedy was "upset that Shane had put his hands on her." (App. p. 330, line 25). Moeung testified, "yeah, I believe that Alan [Kennedy] was pretty upset about him [Shane Easler] hitting my sister. (App. p. 332, line 24). Moeung additionally testified that Tyler Vichith did not like Petitioner because Petitioner was dating Vichith's sister, Victoria. (App. p. 331, lines 11-21). Vichith and Kennedy were best of friends. (App. p. 331, lines 22-25).

Amanda Condrey testified that she witnessed Shane Easler shove Siena Sams into a wall. (App. p. 335, lines 20-25). Condrey testified that after she separated the two, Sams told Easler, "You're dead." (App. p. 336, lines 1-2). Trial counsel was ineffective failing to introduce evidence of animosity between Kennedy and the deceased and animosity between Vichith and Petitioner.

During the PCR hearing trial counsel admitted reviewing, prior to trial, a letter from April Martin. (App. p. 350, line 21 – p. 351, lines 1-4). On the day of the shooting Martin and her boyfriend, Tyler Crowe, had made plans with Petitioner and the deceased to go to a friend's birthday party. (App. p. 375). Martin called Petitioner that night to let him know they were running late. (App. p. 375). When petitioner answered the phone he told her somebody shot Shane. (App. p. 375). Martin then called Victoria Thongpane who told her to meet them at the Hot Spot. (App. p. 375). Martin met Thongpane and her brother, Tyler Vichith, at the Hot Spot. (App. p. 375) Martin left the Hot Spot and went to a friend's house. (App. p. 376). When she arrived at the friend's house, Thongpane, her brother and a "white guy named Taylor" were already there. (App. p. 376). Martin wrote that Taylor was "flipping out scared." Martin stated that Vichith got scared when the police called Victoria's phone. (App. p. 376). The next day Vichith begged Martin not tell the detective that he and Taylor and Allen Kennedy were "there." (App. p. 376). Martin also stated that Victoria had heard that her brother was bragging about drugging Petitioner and framing him. (App. pp. 376-377).

PCR counsel asked trial counsel, "From – from that, from having April's information and other information, did you see enough to pursue the drive by shooting possibility?" (App. p. 351, lines 14-15). Trial counsel answered, "I think the analysis would go under third party guilty." (App. p. 351, line 16). Trial counsel appears to believe that the testimony would have been inadmissible as third party guilt. (App. p. 351, lines 17-23). When asked about third party guilt on cross trial counsel testified "So I had to pick my poison and, say, 'Okay, I think there's a very good relationship between these two. That's why he wouldn't kill him¹,' or go for the third party guilty,

¹ Trial counsel appears to assert a defense strategy of no intent to kill. The absence of intent, however, does not form the basis of a lesser included offense to murder and the elements of an accident defense are not present in this

which I thought the evidence just wasn't there. I didn't even think I would be able to argue it to be honest with you." (App. p. 357, lines 6-9). Trial counsel erred in thinking the third party guilt evidence was inadmissible. Trial counsel failed to recognize the strong evidence supporting a defense theory that the deceased was the victim of a drive by shooting by someone other than Petitioner.

In regard to trial counsel's failure to cross examine witnesses the PCR judge wrote in the order of dismissal:

The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing witnesses' answers at trial would have been different. The statements about there being a drive-by shooting were presented to the jury and testimony that a small dark car was driving near the scene at the time of the shooting was presented. As counsel discussed, there was no additional evidence he thought he could present to support an argument of third-party guilt. Accordingly, the Applicant has not shown that a different approach would have been beneficial to the defense. Therefore, this claim is dismissed.

(App. p. 386).

The PCR judge's finding is not supported by the record. During the PCR hearing Petitioner established that trial counsel failed to cross examine Teresa Bishop, Deputy Henderson, Deputy McJunkin and Investigator Lindsey in regard to Petitioner's statements, made on the night of the shooting, that the deceased was the victim of a drive by shooting. Trial counsel admitted failing to cross examine witness, Curtis Gosnell, about his statement that after the shooting he "saw a black car with chrome wheels driving very slowly from the direction of the gunshot toward the Old Mill." (App. p. 347, line 24 – p. 348, lines 1-18; App. p. 373). While one witness, Joshua Bailey, testified at trial that after the shooting he saw a dark car with rims driving by (App. p. 92, lines 9-12), trial counsel failed to cross examine Bailey about the more detailed description provided in the statement

case. If this was a valid defense, trial counsel should have called Moeung and Martin to establish that Petitioner and the deceased were close friends.

taken on the night of the shooting describing the car as “dark possibly b[l]ack with chrome wheels maybe a Honda Civic or something.” (App. p. 374).

Trial counsel failed to appreciate the significance of Petitioner’s statements in regard to the drive by shooting and other witnesses’ description of the dark Honda Civic because, according to trial counsel’s testimony at the PCR hearing, “I don’t really think there was a drive-by shooting defense in this.” (App. p. 341, lines 22-23). Trial counsel’s statement ignores the numerous statements given by Petitioner on the night of the shooting as well as statements by Gosnell and Bailey about the dark Honda civic with chrome wheels being seen at the time of the shooting. Trial counsel’s failure to cross examine was particularly prejudicial in light of Petitioner’s testimony at trial that he did not remember what happened on the night of the shooting.

In regard to third party guilt the PCR judge wrote in the order of dismissal:

This Court also finds that Counsel was not ineffective for failing to further interview witnesses, investigate or pursue a defense of third-party guilt because as Counsel testified, the evidence was insufficient to present a legal defense of third-party guilt. As clarified in Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). “a defendant [can] introduce evidence of third- party guilt regardless of the strength of the State’s case if the evidence offered by the accused as to the commission of the crime by another person is limited to such facts as are inconsistent with his own guilty and the raise a reasonable inference or presumption as to his own innocence. Miller v. State, 379 S.C. 108, 114, n.2 (2008). The Applicant presented no evidence that would cause this court to find that a legal defense of third-party guilt could have been utilized at trial. As discussed, there were merely rumors and possible inferences with the allegations of “bad blood” and sightings of a small black car near the scene. Therefore, this claim is denied and dismissed.

The PCR judge erred and adjudged the evidence far too narrowly. Petitioner presented admissible evidence of third party guilt during the PCR hearing. First, the “bad blood” between Alan Kennedy and the deceased was more than a rumor, inference or allegation. Simone Moeung testified at the PCR hearing that Alan Kennedy “was pretty upset” about the deceased hitting

Moeung's sister, Siena Sams, who was the mother of Kennedy's child. (App. p. 332, line 24). Moeung's former wife, Amanda Condrey, testified at the PCR hearing that after the deceased shoved Siena Sams into a wall Sams told the deceased, "You're dead." (App. p. 336, lines 1-2). A week after Sams made the statement, the deceased, her former boyfriend, was dead. Sams later married Kennedy. Moeung additionally testified that Tyler Vichith, Kennedy's best friend, did not like Petitioner because Petitioner was dating Vichith's sister, Victoria. (App. p. 331, lines 11-21). Trial counsel was ineffective in failing to call Moeung and Condrey to establish animosity between the deceased and Alan Kennedy and between petitioner and Tyler Vichith.

Second, during the PCR hearing Petitioner introduced evidence which was more than a sighting of a small black car near the scene. In addition to witnesses Bailey and Gosnell who trial counsel failed to cross examine in regard to the black Honda Civic with chrome rims present at the time of the shooting, as discussed above, there were five additional witnesses who gave statements to the police indicating that shots could have been fired from a dark car seen at the time of the shooting. Trial counsel was ineffective in failing to call those five witnesses to corroborate that the black Honda Civic was involved in the shooting.

Third, Petitioner introduced evidence at the PCR hearing connecting Kennedy and Vichith to the black Honda Civic seen at the time of the shooting. Condrey testified that Tyler Vicith and Alan Kennedy were at Red's the night of the shooting in the black Civic. (App. p. 338, lines 12-17). Condrey testified that the night after the shooting she saw Kennedy in the black Honda Civic. (App. p. 336, lines 23-25). Moeung testified that two or three days after the shooting he saw Kennedy with a Mexican guy in a black Honda Civic. (App. p. 332, lines 6-14).

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Counsel was ineffective in failing to elicit and introduce evidence of third party guilty indicating that the deceased was the victim of a drive by shooting involving a black Honda Civic, that Alan Kennedy and Tyler Vichith were present in the black Honda Civic on the night of the shooting and were connected to that car and that there was animosity between Kennedy and the deceased and Vichith and the Petitioner. Trial counsel erroneously believed the evidence of third party guilt was inadmissible. There is a reasonable probability that if the evidence of third party guilt had been presented to the jury, the result of the trial would have been different.

Trial counsel's erroneous belief that the third party guilt evidence was inadmissible rendered his performance deficient. In Holmes v. S. Carolina, 547 U.S. 319, 328, 126 S. Ct. 1727, 1733, 164 L. Ed. 2d 503 (2006) the United States Supreme Court wrote:

In Grégory, the South Carolina Supreme Court adopted and applied a rule apparently intended to be of this type, given the court's references to the "applicable rule" from Corpus Juris and American Jurisprudence:

“ ‘[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.’ ” 198 S.C., at 104–105, 16 S.E.2d, at 534–535 (quoting 16 C.J., Criminal Law § 1085, p. 560 (1918), and 20 Am.Jur., Evidence § 265, p. 254 (1939); footnotes omitted).

Petitioner offered evidence at the PCR hearing that the deceased died as a result of a drive by shooting committed by Kennedy and Vichith as they drove by in the black Honda Civic with chrome rims. This evidence is inconsistent with Petitioner's guilt and raises a reasonable inference that Petitioner is innocent and was also a victim being framed. Vichith had the opportunity to remove the gun from Petitioner's car and provide the gun to Kennedy in the black Honda. The evidence presented at the PCR hearing supports that shots were fired from the black Honda. In Petitioner's intoxicated state, after taking Xanax and drinking beer, after the shooting Kennedy and or Vichith could have placed the gun in Petitioner's back pocket before fleeing the scene, consistent with April Martin's statement. The evidence of third party guilty was admissible. If the trial judge had excluded the evidence, Petitioner would have prevailed on this issue on direct appeal

Petitioner was prejudiced by trial counsel's deficient performance. While the jury heard testimony about a drive by shooting, the majority of this testimony came from uncorroborated statements made by Petitioner on the night of the shooting. These statements were discredited by the prosecution on cross examination. The jury did not hear the evidence presented at the PCR hearing indicating that shots were fired from the small dark car. The jury did not hear that Kenndey and Vichith were in the small dark car at Red's on the night of the shooting. The jury did not hear

from witnesses, other than Petitioner, that Petitioner and the deceased were best friends. The jury did not hear that Kennedy was upset with the deceased for hitting the mother of his child. The jury did not hear that Vichith did not like Petitioner because Petitioner was dating Vichith's sister.


In Miller v. State, 379 S.C. 108, 665 S.E.2d 596, (2008), the South Carolina Supreme Court found trial counsel ineffective in failing to thoroughly cross examine a witness about third party guilt. Miller was convicted of armed robbery. A car involved in the armed robbery belonged to Stephanie Pauling. Pauling was also charged with armed robberies involving Miller's nephew. Pauling's car was used in the robberies involving the nephew. While counsel questioned Pauling about the other armed robberies and the similar physical characteristics between the Miller and his nephew, trial counsel failed to question the witness about the fact that her car and a similar hand gun were used in all of the robberies.

The jury in the present case was given less information about third party guilt than the jury in the Miller case. Trial counsel was ineffective in failing to elicit and introduce evidence of third party guilt. Petitioner was prejudiced by the deficient performance.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of August, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

R. Keith Kelly, Circuit Court Judge

CHANNACK KEAM,

PETITIONER,

V.

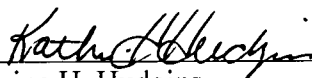
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002696

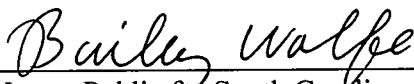
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, and Channack Keam at McCormick Correctional Institution, this 3rd day of August, 2015.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 3rd day
of August, 2015.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .