STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

L. Casey Manning, Circuit Court Judge

FRED R. RUTLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000381

BRIEF OF PETITIONER

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ISSUES PRESENTED

I. Did trial counsel render ineffective assistance by failing to cross examine a key prosecution witness regarding prior inconsistent statements she made concerning whether the deceased was armed with a gun at the time of the shooting?

II. Did trial counsel provide ineffective assistance by failing to request the trial judge instruct the jury as to defense of others to preserve this issue for appeal where the evidence supported the instruction and the prosecution consented to its issuance?

STATEMENT OF THE CASE

On November 30, 1992, a Lexington County grand jury indicted Petitioner for murder (1992-GS-32-3398). App. 847-848. On February 25, 1993, Petitioner was indicted for possession of a firearm during the commission of a violent crime (1993-GS-32-586). App. 850-851. Then, on May 20, 1993, Petitioner was indicted for pointing a firearm (1993-GS-32-1514). App. 853-854. On May 26-29, 1993, Petitioner was tried before the Honorable Frank Eppes and a jury. Dayton Riddle and Knox McMahon prosecuted Petitioner. H. Jackson Gregory[1] represented Petitioner. App. 1.[2] Robin Hunt, who was a witness for the state at Petitioner's trial, had worked as trial counsel's legal secretary. Hunt introduced Petitioner to Gregory for legal representation in the murder case. Trial counsel agreed to represent Petitioner for $1,000. App. 711, lines 6-22; App. 785, lines 23-25. However, trial counsel received only $1 for his representation. App. 749, lines 12-25; App. 836.

Petitioner was found guilty as charged. App. 574, lines 13-24. Judge Eppes sentenced Petitioner to life imprisonment for the murder conviction, five years' imprisonment for possession of a firearm during the commission of a violent crime, and ten years' imprisonment for pointing a firearm. App. 575, lines 4-10. On June 7, 1993, Petitioner's trial counsel filed a motion for new trial. App. 595-599. It appears that motion was denied by Judge Eppes on June 10, 1993. On June 21, 1993, Petitioner's trial counsel filed a motion for new trial based on after-discovered evidence.

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[1] H. Jackson Gregory was disbarred by this Court on May 30, 2000. In re H. Jackson Gregory, 340 S.C. 413, 532 S.E.2d 605 (2000); App. 747, line 22 – App. 748, line 6.

[2] Undersigned counsel has been unable to locate a copy of the trial transcript despite diligent efforts. However, undersigned counsel located a copy of the record on appeal, which has been included in the appendix.

App. 600-602. According to the order denying post-conviction relief, this motion was subsequently denied. App. 832.

Petitioner filed a timely notice of appeal. Robert Dudek represented Petitioner on appeal. This Court affirmed his convictions and sentences in an unpublished per curiam opinion. State v. Rutland, Op. No. 95-MO-263 (S.C. Sup. Ct. filed Aug. 25, 1995). App. 603. Subsequently, Petitioner filed a petition for rehearing. App. 604-608. This Court denied rehearing on October 9, 1995. App. 609.

Thereafter, Petitioner filed a pro se motion for new trial based on after discovered evidence. App. 610-619. Through trial counsel, Petitioner filed a memorandum of law in support of his motion. App. 620-645. The state, represented by the solicitor's office, responded to the motion with the filing of an affidavit. App. 646-647. After trial counsel was disbarred, the Honorable William P. Keesley appointed David Farrell to represent Petitioner concerning his motion for new trial. App. 705, lines 6-10. Petitioner then supplemented his motion with affidavits. App. 648-663. On July 27, 2001, the state, represented by the Attorney General's Office, formally responded to the motion. App. 663-685. According to the order denying post-conviction relief, Petitioner voluntarily withdrew his pending new trial motion with the intent of filing a post-conviction relief application. The state agreed to waive any defense based upon the statute of limitations. App. 832.

On May 29, 2003, Petitioner filed an application for post-conviction relief (2003-CP-32-1983). App. 686-694. The matter proceeded to an evidentiary hearing on April 19, 2006 before the Honorable L. Casey Manning. Jennifer N. Williams represented Petitioner, and Sabrina C. Todd represented the state. App. 701. On August 30, 2007, Judge Manning denied Petitioner relief.

App. 831-844. On September 21, 2007, Petitioner filed a motion to alter or amend. App. 845. Six years later, on August 13, 2013, Judge Manning denied Petitioner's motion. App. 846.

Petitioner filed a notice of appeal. On August 18, 2014, Petitioner filed a petition for writ of certiorari raising three issues. On April 8, 2015, all five justices of this Court granted the writ as to Questions I and III in the petition and ordered briefing.[3] Petitioner now files this brief in accordance with this Court's order.

[3] Petitioner has re-numbered Question III from the petition for writ of certiorari as Question II in this brief.

STATEMENT OF FACTS

Sally and Jimmy Peele (hereinafter, the deceased) were married, but estranged. App. 212, lines 12-16; App. 290, lines 17-18. Sally and Petitioner worked together and struck up a friendship. App. 202, line 5; Tr. 203, lines 12-13; App. 347, lines 1-5; App. 376, lines 9-10. Petitioner learned from Sally that the deceased was physically abusing her, including one incident in which he had beaten her with a pipe. App. 201, line 22 – App. 202, line 1; App. 202, line 3; App. 299, lines 9-12. Quite naturally, Sally was afraid of the deceased. App. 202, line 2. On September 3, 1992, Sally called Petitioner because the deceased "was getting violent." App. 202, lines 5-6; App. 306, lines 16-17; App. 380, lines 1-5. On the morning of September 4, 1992, Sally, Petitioner, and Robin Hunt went to a pawn shop and purchased two firearms – a .25 caliber semi-automatic pistol and a Mossberg twelve gauge shotgun – and ammunition. App. 197, lines 7-19; App. 197, line 21 – App. 198, line 3; App. 202, lines 13-17; App. 266, line 24 – App. 267, line 10; App. 313, lines 23-25; App. 315, lines 14-16; App. 382, line 24 – App. 384, line 14. The shotgun was owned by the deceased and Sally. The deceased had pawned the shotgun several months prior to his death. App. 270, lines 22-25; App. 313, lines 3-22. After learning Sally's daughter was not in school, they called the sheriff's department. App. 202, lines 19-21.

The three then went to the deceased's home to get Sally's car. App. 198, lines 19-22; App. 199, lines 9-16; App. 384, line 21 – App. 385, line 3. Unexpectedly, the deceased was at home, smoking marijuana[4] with a neighbor. Sally, armed with a pistol, entered alone. Shortly, Sally and the deceased exited through the back door yelling at each other. Petitioner exited the van with a shotgun. Petitioner said he was there to help Sally. When the deceased approached Petitioner, Petitioner shot the gun once into the air. App. 211, lines 10-11; App. 248, line 1 – App. 253, line 23; App. 316, line 5 – App. 321, line 21; App. 386, line 3 – App. 392, line 6. Despite the gunfire, the deceased repeatedly asked Sally to return to the home to talk. App. 210, line 21 – App. 211, line

[4] The toxicology report showed the deceased had ingested marijuana and valiums. App. 275, line 23 – App. 276, line 4.

9; App. 322, line 20 – App. 323, line 6; App. 392, line 24 – App. 399, line 6. Sally attempted to talk to the deceased, but he began to act violently again; therefore, Sally and Petitioner got into the van with Hunt and left. App. 211, lines 15-16; App. 254, lines 6-9; App. 323, lines 7-14; App. 394, lines 2-3.

Later that day, Sally and Petitioner went to the Bow Wow Boutique, a pet grooming shop, to buy a car so they "could get away." App. 199, lines 19-20; App. 202, lines 21-24; App. 324, line 21 – App. 325, line 4; App. 396, lines 5-12.[5] Petitioner entered the Boutique with the pistol in his back pocket. App. 202, line 24 – App. 203, line 1; App. 397, lines 20-23. Petitioner armed himself because of the incident involving the deceased earlier that morning: "I just had a man promise to take me out; blow my shit away, fuck up my world, just moments before." App. 397, lines 22-24. The deceased unexpectedly arrived at the Boutique. The deceased pointed his gun at Sally. Petitioner repeatedly attempted to calm the deceased, but he was undeterred. Petitioner pulled the pistol from his pocket and warned the deceased not to do anything. Petitioner was forced to shoot the deceased. When the deceased turned from Sally and began his approach to Petitioner, he was forced to shoot him again. App. 399, line 12 – App. 408, line 20; App. 791, line 4 – App. 792, line 1.

Petitioner did not attempt to flee. Instead, Petitioner attempted to render aid to the deceased. App. 134, lines 16-17; App. 342, line 22 – App. 343, line 8; App. 401, lines 10-19. Further, when the police arrived, Petitioner admitted he had shot the deceased and asked the police to help the deceased. App. 91, lines 4-13; App. 177, lines 15-18; App. 345, lines 2-3; App. 410, line 20 – App. 411, line 6. When Petitioner was questioned by the police, he cooperated fully and admitted his role. App. 179, lines 24-25; App. 180, lines 13-14; App. 413, lines 16-25; App. 418, line 16 – App. 420, lines 12. Petitioner's statement to law enforcement was consistent with his trial testimony - when the deceased reached toward his back, Petitioner pointed his gun at the deceased, who pulled a

[5] The shooting occurred at approximately 1:30 p.m. on September 4, 1992. App. 176, lines 2-8.

gun from his back. Petitioner shot the deceased once, but when the deceased continued to approach him with the gun, Petitioner was forced to fire three more rounds. App. 203, lines 2-11.

There was never any question that Petitioner shot the deceased. The only question for the jury was whether Petitioner acted in self-defense or the defense of others.

ARGUMENT

I. Trial counsel rendered ineffective assistance by failing to cross examine a key prosecution witness regarding prior inconsistent statements she made concerning whether the deceased was armed with a gun at the time of the shooting.

Relevant facts

Evidence produced at trial

Kimberly Kestner worked at the Bow Wow Boutique, which was owned by Robin Hunt. App. 117, lines 16-18; App. 118, lines 6-7; App. 118, lines 17-21. Kimberly was working on September 4, 1992, when Sally and Petitioner arrived at the Boutique to buy her car. App. 119, lines 9-12; App. 124, lines 21-25; App. 144, lines 3-7.

According to Kimberly, the deceased arrived not long after Sally and Petitioner's arrival. App. 128, lines 12-17. When Sally saw the deceased, she said, "Oh my God." App. 141, lines 5-7; App. 145, lines 15-18. Upon hearing Sally utter those words, Kimberly ducked behind the dog she was grooming. App. 146, lines 4-6. The prosecution asked Kimberly: "Did you see at that point in time anything in [the deceased's] hand?" App. 130, line 10. Kimberly responded she did not because his hands were below the lattice work. App. 130, line 11. When the deceased got closer to Kimberly, she observed he had a pack of cigarettes in his hands, which he placed on the counter. App. 131, lines 6-15. The prosecutor pressed forward: "Did you ever see anything else in Mr. Peele's hand - - besides those cigarettes?" Kimberly responded, "No." App. 131, line 25 – App. 132, line 3. The prosecutor again asked Kimberly: "Now again, prior to that time, up until this time you'd never seen Jimmy with any weapon?" Kimberly responded, "No." App. 134, lines 22-24. For a third time the prosecutor asked Kimberly if she saw the deceased with a gun, and Kimberly responded yet again in the negative. App. 137, lines 24-25.

Kimberly claimed she saw Appellant put a pack of cigarettes in his mouth and reach behind his back as the deceased walked through the door. App. 132, line 13 – App. 133, line 13. When Kimberly glanced at the deceased, "he appeared to be doin' the same thing." App. 133, line 23 – App. 134, line 1. Petitioner and the deceased were between ten and fifteen feet apart. App. 137, lines 5-10. Then, Kimberly heard two shots. App. 134, lines 6-9. After moving from where she had taken cover, Kimberly saw Petitioner and Sally approach the deceased and begin CPR. App. 134, lines 13-17; App. 149, lines 21-23. Kimberly called 911 from her apartment attached to the Boutique. App. 135, lines 10-14.

When the 911 operator asked Kimberly to ask Petitioner to put his weapon down, Kimberly saw Petitioner for the first time with a gun. Petitioner placed the gun on the floor. App. 136, lines 3-11. Kimberly saw another gun on the floor about eight to ten feet behind the deceased to his left. App. 136, lines 19-21; App. 150, lines 7-12; App. 150, line 25 – App. 151, line 1. The officer in charge of processing the scene found the loaded weapon about four or five feet from the deceased. In fact, it was a Cobray M-11 nine millimeter manufactured by S.W.D. App. 155, line 14 - App. 156, line 10. Sally testified that she moved the gun out of the way so that she could roll the deceased on his back to administer CPR. App. 342, lines 8-21.

Trial counsel cross-examined Kimberly, but *never* mentioned she had made prior inconsistent statements regarding the incident, *particularly whether the deceased had a gun.* App. 138, lines 4-7. Thus, the evidence before the jury from the only neutral witness was that the deceased was unarmed at the time of the shooting.

During his closing argument, the prosecutor relied upon Kimberly's testimony to argue to the jury the deceased never pulled his gun. App. 548, lines 19-23. The prosecutor emphasized that

Kimberly was an "independent witness" and she never saw the deceased with a weapon. App. 549, lines 20-21.

In fact, the prosecutor argued to the jury that Petitioner planted the nine millimeter at the scene during his closing argument: "They got lucky with this one. They got lucky with this because I tell you what, if Jimmy Peele came in there with malice in his heart, [thirty-two] bullets, malice in his heart, [thirty-two] bullets in his magazine, he wouldn't shot (unintelligible) and this never fired." App. 543, line 23 – App. 544, line 2. Later, the prosecutor argued that "based on where that weapon was found that Jimmy Peele, Jimmy Peele never ever pulled that weapon. Kim didn't see it. Jimmy Peel[e] was right-handed. Now they're getting in here now and Sally said well I shoved it." App. 548, lines 19-23. He argued that because the deceased was right-handed, the gun would have been in a different place if the deceased had pulled it out prior to his death. App. 548, line 24 – App. 549, line 2. He asked the jury to conclude that Petitioner and Sally saw the gun when Salley pushed the deceased on his back to perform CPR: "Remember she said I had to kinda sling him on his back, had to kinda push him over on his back, about C.P.R. That's when they saw that weapon 'cause you don't go into a rage killin' somebody carryin' a pack of cigarettes in a place." App. 549, lines 2-8. The prosecutor elaborated that when Kimberly left to make the phone call for help, Petitioner and Sally were alone and had the weapon. App. 549, lines 14-20. The prosecutor's argument that Petitioner planted the gun at the scene was his final argument to the jury.

The questions posed by the jury during deliberations illustrated the jury's struggle to arrive at a unanimous verdict. One of the initial questions asked by the jury concerned fingerprints on the nine millimeter found at the scene. App. 569. Clearly, the jury was interested in who had possessed the nine millimeter, which was found just feet from the deceased's body. Additionally, the jury requested to be instructed as to the elements of murder, manslaughter, mutual combat, and self-

defense. The judge provided the instruction yet again. The foreperson even requested a written copy of the instruction, but the trial judge refused. App. 566, line 15 – App. 568, line 24; App. 571. However, the judge permitted the court reporter to play the tape back of him instructing the jury on murder, manslaughter, mutual combat, and self-defense at least twice. App. 570, lines 4-9; App. 571, lines 21-25; App. 572.

After deliberating for several hours, the jury reached a verdict on at least one indictment, but was unable to reach a verdict on others. App. 572, line 24 – App. 573, line 1. The judge then engaged in the following conversation with the jury:

> THE COURT: Ms. Frances, as a reasonable person do you think we could find any [twelve] people - - hate to declare a mistrial because it's not only an expense to the defendant, it's an expense to the defendant. [*sic*] I don't see that we could find [twelve] more intelligent people than you all to decide this fairly. I know they're controversial and if you have a well-founded opinion you shouldn't change it but with a spirit of give and take, do you think as a reasonable person you may be able to reach a verdict on the other cases?
>
> THE FORELADY: I don't know.
>
> THE COURT: How about it? DO you think so? I just - - as I say, of course ya'll [*sic*] came back and we told you we can't comment on any facts. We could tell you any law that we charged you but and don't want to keep you away from your home and families but we could stay and try to reach a unanimous decision without givin' up any well-founded conscientious opinions but with a spirit of give and take[.] Let's have a round of talk and let everybody say what they want to say and see if you can come to an agreement. If you can't, tell us and we'll take what you have done and ---
>
> THE FORELADY: Ok.
>
> THE COURT: Ok. I'll ask you try it before we order any supper, and I'll ask you to try.

App. 573, lines 1 - 24. Ten minutes later, the jury had a verdict. App. 574, lines 9-12.

Evidence produced during the PCR hearing

At the PCR hearing, trial counsel recalled that Kimberly had been interviewed by a reporter for a newspaper and had given a statement to law enforcement. According to the newspaper article, Kimberly observed the deceased enter the Boutique armed with a nine millimeter gun and present it "in the effort to threaten the lives of the folks that were in the boutique." App. 718, lines 3-9; App. 720, lines 20-24. Consistent with her statements to the reporter, Kimberly told law enforcement the deceased was armed at the time he entered the Boutique. App. 718, lines 9-12; App. 721, lines 4-25; App. 821("Jimmy Peele came in. He reached behind him and pulled a gun). According to the incident report, Kimberly stated the deceased pulled a weapon out prior to the shooting. App. 721, lines 14-25. Trial counsel was very well aware of Kimberly's statement to police and the incident report prior to trial. App. 720, line 25 – App. 721, line 25. Although trial counsel was unable to locate the newspaper article prior to trial, he was aware of its existence and the statements made by Kimberly to the reporter. App. 722, line 25 – App. 723, line 9.

Trial counsel found Kimberly's trial testimony "surprising" because it was "180 degrees" different from her pretrial statements. App. 722, lines 1-10. Candidly, trial counsel admitted he failed to confront Kimberly with her prior inconsistent statements during his cross-examination of her due to his "oversight." App. 722, lines 11-21; App. 723, lines 10-16; App. 752, lines 2-10. One primary issue at trial was whether the deceased was armed – particularly, in light of the prosecutor's closing argument that Petitioner had planted the gun found at the scene. App. 736, line 11 – App. 737, line 10. Although Sally and Petitioner testified the deceased was armed, both were interested parties in the case, but Kimberly was a disinterested party who was presented as an objective witness. App. 764, line 7 – App. 765, line 3.

The prosecutor, Dayton Riddle, stated that he was aware Kimberly's testimony was inconsistent with her statement to police, and he expected trial counsel to cross-examine her on the inconsistencies because the statement had been provided to the defense during discovery; however, Riddle did not elicit any testimony from Kimberly about the inconsistent statements. App. 796, line 21 – App. 797, line 9. Riddle admitted Kimberly's testimony was important because she was an independent witness and any discrepancies between her statement to police and her trial testimony would have affected her credibility and "would be important to bring out." App. 804, line 20 – App. 805, line 6.

In her closing argument to the PCR judge, the state conceded "there may be some showing here [of] deficient performance." The state only argued a lack of prejudice. App. 812, line 25 – App. 813, line 2.

Order denying relief

The PCR court found trial counsel's failure to impeach Kimberly with her prior statements that she saw the deceased draw a weapon constituted deficient performance. App. 839. However, the PCR court held Petitioner failed to show prejudice because Kimberly did not testify at the PCR hearing. App. 839. According to the PCR court, Kimberly "might have denied the statements attributed to her, requiring they be proved through extrinsic evidence which [Petitioner] also did not provide at his PCR hearing, or she might have provided some satisfactory explanation for the difference between her pretrial statements and her trial testimony." App. 839. The PCR court stated it was left "to speculate as to the impact the proposed impeachment of [Kimberly] would have had at [Petitioner]'s trial." App. 839. Thus, the PCR Court denied Petitioner relief.

Discussion

"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." Strickland v. Washington, 466 U.S. 668, 686 (1984). 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. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

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.

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.

In this case, the PCR judge found trial counsel was deficient in failing to cross-examine Kimberly with her prior statements. The state filed no motion to alter or amend challenging this decision and the state conceded deficient performance at the PCR hearing. Thus, the only issue before this Court is whether trial counsel's failure to impeach Kimberly with her prior inconsistent statements prejudiced Petitioner. Trial counsel provided ineffective assistance by failing to cross-examine Kimberly on three prior statements made by her in which she stated the deceased had a weapon at the Boutique when she had testified at trial that she saw no weapon in the deceased's possession. The PCR court erred in holding that Petitioner was required to present the testimony

of Kimberly at the PCR hearing in order to show prejudice. The issue is not what would Kimberly have said – some hypothetical trial. The issue is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. That is, whether trial counsel's failure undermines confidence in the outcome of the trial. Without question, Kimberly's testimony was critical to the prosecution. She was one of only three people who witnessed the shooting. Petitioner and Sally were interested parties, but Kimberly had no interest in the outcome of the trial. She was an independent witness, as the prosecutor stated in his closing argument. In fact, the prosecutor relied upon Kimberly's testimony that the deceased had no weapon to suggest to the jury that the gun had been planted. App. 549, lines 14-23.

The PCR court's determination that Petitioner did not prove Kimberly's prior inconsistent statements through extrinsic evidence is not supported by the record. Petitioner presented multiple items of extrinsic evidence to prove Kimberly saw the deceased with a gun prior to the shooting. First and foremost, Kimberly's statement to law enforcement was Petitioner's first exhibit during the PCR hearing. App. 821. Further, Petitioner presented an affidavit of Wesley Bruce Vowell, which was Petitioner's second exhibit during the PCR hearing. According to the affidavit, Vowell heard Kimberly say that she saw the deceased with a gun. App. 825-826. Further, Belinda Joyce Smith submitted an affidavit attesting to Kimberly telling her that the deceased had a gun in his hand prior to the shooting. This occurred while the two were "acting out" what occurred during the shooting. Kimberly told Smith that she saw the deceased pull a nine millimeter pistol "and aim it at Sally Peele." Further, she heard Petitioner warn the deceased not to shoot. Kimberly saw the deceased point his gun at Petitioner, which was when Petitioner shot. App. 827-828. Cindy Lou Wise attested that Kimberly told her the deceased walked into the Boutique and pulled a gun,

pointing it at everyone. Further, Kimberly said the deceased fired in self-defense. App. 829-830. The PCR court's conclusion that Petitioner failed to prove Kimberly's prior inconsistent statements that the deceased had a gun through extrinsic evidence lacks evidentiary support.

Whether the deceased had a gun was the heart of the case because Petitioner had admitted to shooting the deceased. The only issue for the jury was whether Petitioner acted in self-defense or in defense of others. The jury struggled with this issue as evidence by the question: "Whose fingerprints were on the 9mm gun?" App. 569. Further, the jury repeatedly requested to be instructed on murder, manslaughter, and self-defense. App. 566, line 15 – App. 568, line 21; App. 571; App. 571, lines 21-24; App. 572. Even after multiple instructions, the jury was unable to reach a verdict. App. 572, line 21 – App. 573, line 1. Only after the judge instructed the jury "to have a round of talk and let everybody say what they want to say and see if you can come to an agreement" did the jury reach a verdict fifteen minutes later. App. 573, line 2 – App. 574, line 10.

Trial counsel's deficient performance in failing to impeach Kimberly – the only independent witness – with multiple prior inconsistent statements concerning the critical issue in the case of whether the deceased was armed at the time of the shooting. This evidence was critical to Petitioner's claim of self-defense and defense of others.

II. Trial counsel provided ineffective assistance by failing to request the trial judge instruct the jury as to defense of others to preserve this issue for appeal where the evidence supported the instruction and the prosecution consented to its issuance.

Relevant facts

Evidence produced at trial

During the trial, the prosecutor moved to exclude evidence of prior difficulties between Sally and the deceased despite having introduced some evidence of those prior difficulties during the prosecution's case-in-chief. The prosecutor argued the evidence was not relevant to self-defense. App. 285, line 15 –App. 286, line 17. Petitioner argued the evidence was relevant to the deceased's propensity for violence. App. 284, line 23 – App. 285, line 13. The judge remarked:

> Anybody has a right to come to the defense of a member of their family. They have a right to come to their defense. They stand in the same shoes they stand in, but I don't think there are any shoes to stand in at this particular time accordin' to the facts this far that this jury's heard.

App. 286, lines 18-23. Thus, the judge granted the state's motion to exclude the evidence. App. 287, lines 8-10. During this discussion, however, the solicitor stated he had no problem with charging the jury on defense of others: "I don't have any problem with that charge whatsoever." App. 288, lines 9-13. During the charge conference, trial counsel inquired about a litany of instructions, including defense of others. The judge did not indicate he was not charging defense of others and the prosecution did not object to the charge. App. 501, lines 1-5. Trial counsel even argued defense of others to the jury. App. 514, line 25; App. 522, lines 16-25.

Sally testified that the deceased entered the Boutique and pulled a gun on her. App. 330, lines 20-24; App. 350, lines 2-5. She identified the nine millimeter found at the scene as the gun used by the deceased. App. 331, lines 2-10. Sally heard Petitioner say "Please don't." She then

saw Petitioner with his gun pointed toward the floor. App. 339, lines 4-17. Only when the deceased saw Petitioner's gun did he take aim at Petitioner and remove his sights from Sally. App. 340, line 21 – App. 342, line 7. Then, Sally started to move between the two men. App. 340, lines 8-10. She then heard shots. App. 340, lines 11-12. Sally believed the deceased had shot because she saw him "pullin' the trigger." App. 341, lines 13-18.

Although the trial judge charged the jury concerning self-defense, the judge did not instruct the jury concerning defense of others. App. 556, line 19 – App. 559, line 16. During deliberations, the jury requested to be re-instructed on murder, manslaughter, mutual combat, and self-defense. The judge instructed the jury concerning those four again. App. 566, line 15 – App. 568, line 21; App. 571. At that point, trial counsel requested a charge of defense of others, but the judge refused to do so. App. 570, lines 21-25.[6] The jury was unable to reach a verdict after deliberating several hours. App. 572, line 21 – App. 573, line 1.

Direct appeal

This issue was raised by Petitioner in his direct appeal. This Court held the issue was not preserved for review because "no request or contemporaneous objection to charge as given" was made. App. 603. Although Petitioner argued the issue was preserved in his petition for rehearing, this Court denied the petition; thus, this Court's decision that the issue was not preserved for appellate review was the final word. App. 604-609.

Evidence produced at the PCR hearing

Trial counsel recalled discussing the defense of others jury instruction with the trial judge and arguing defense of others in his closing argument. App. 741, lines 3-9. According to trial counsel, defense of others was crucial to Petitioner's case. Trial counsel recalled the jury having

several questions concerning the elements of murder, manslaughter, and self-defense. App. 742, lines 3-25. However, the jury was not allowed to consider defense of others because the judge did not instruct the jury on the defense, and trial counsel failed to preserve the matter for review. App. 742, lines 1-13. Trial counsel "dropped the ball." App. 743, line 13. In her closing argument, the Assistant Attorney General conceded "there may be some showing here [of] deficient performance." The state only argued a lack of prejudice. App. 812, line 25 – App. 813, line 2.

Order denying relief

The PCR court determined "a defense of others charge was not appropriate" because Sally "was not in imminent danger at the time [Petitioner] fired the gun at her husband, Jimmy Peele." App. 842. Further, the PCR court found "Sally was not without fault in bringing on the difficult as she had pointed a pistol at [the deceased] earlier in the day." App. 842-843. Nevertheless, the PCR court recognized that the prosecution did not object to the judge charging the jury concerning the defense of others, but was not persuaded trial counsel erred in failing to request the charge. App. 842.

Discussion

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984). Without question, trial counsel failed to request a charge on defense of others as this Court has held there was no preservation of such an error. State v. Rutland, Op. No. 95-MO-263 (S.C. Sup. Ct. filed Aug. 25, 1995). This failure was deficient performance prejudicing Petitioner. The PCR court erred in concluding Petitioner was not entitled to a defense of others charge because Sally was not in imminent danger when Petitioner

[6] Petitioner had submitted written requests to charge, including the defense of others. App. 584.

shot the deceased where the evidence demonstrated the deceased held the gun to Sally only seconds before setting his sights on Petitioner.

This Court has held that in order for the trial judge to give a defense of others instruction, there must be "some evidence adduced at trial that the defendant was indeed lawfully defending others." Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). "Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense." State v. Starnes, 340 S.C. 312, 322-323, 531 S.E.2d 907, 913 (2000). This Court noted that a defendant is entitled to a defense of others instruction if the person whom he is seeking to protect would likewise have the right to act in self-defense. State v. Long, 325 S.C. 359, 480 S.E.2d 62 (1997).

This Court's opinion in State v. Sales, 285 S.C. 113, 328 S.E.2d 619 (1985) is instructive due to the similar nature of the facts. Sales' sister and her boyfriend were fighting in their shared home over the boyfriend's use of grocery money to buy liquor. The boyfriend hit the sister in the face with an iron poker. Sales' nieces ran to his home and begged him to help sister. Sales found sister at her home holding her face. When sister and boyfriend began to struggle over a heavy object, Sales separated the two. The boyfriend then swung the heavy object at Sales. A fight between Sales and the boyfriend ensued. The boyfriend died. This Court held the trial judge properly instructed the jury on the defense of others, but found error in the trial court's failure to instruct the jury that Sales had no duty to retreat because sister had no duty to retreat from her home and Sales assumed the rights and limitations of the person he acted to protect. Id. at 114-15, 328 S.E.2d at 619-620.

The evidence here clearly entitled Petitioner to a jury instruction on the defense of others. The deceased held a gun to Sally only moments before turning to Petitioner who shot him instantaneously. The suggestion that Sally was not in imminent danger is preposterous. Clearly, Sally was in danger while the deceased held a gun to her, but she remained in danger of the deceased even when the deceased turned his gun on Petitioner. Sally, and Kimberly, would have been justified in using deadly force to repel the deceased. Additionally, evidence of the deceased's violent behavior against Sally that was known by Petitioner was relevant to whether he was in reasonable apprehension of great bodily harm from the deceased, an essential element of his self-defense claim, but also part of the evidence to support his claim of defense of others. See State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005), aff'd on other grounds by State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008).

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the lower court and grant Petitioner relief from his convictions and sentences based upon ineffective assistance of trial counsel.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 22nd day of July, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

L. Casey Manning, Circuit Court Judge

FRED R. RUTLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Fred R. Rutland #197903, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 22nd day of July, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of July, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022