STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

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ANTONIO R. TRIMMIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000369

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# PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

I. Did trial counsel's failure to investigate, marshal, and present evidence of Petitioner's alibi – the fact that he was on house arrest at the time of the robbery – result in ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

II. Did trial counsel's failure to investigate, marshal, and present evidence to impeach the testifying co-defendants result in ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

## STATEMENT

During its September 2008 term, a Greenville County grand jury indicted Petitioner for armed robbery and possession of a weapon during the commission of a violent crime in a single indictment (2008-GS-23-2523). App. 327-328. The state, represented by Katryna Salisbury, called the case to trial before the Honorable John C. Few and a jury on October 5, 2009. App. 1. Amanda Lackland represented Petitioner. App. 1. The jury convicted Petitioner as charged. App. 184, lines 14-20. Judge Few sentenced Petitioner to twenty-two years' imprisonment for armed robbery and to five years' imprisonment for the weapon. He ordered the sentences to be served concurrently. App. 188, lines 16-20; App. 329-330.

Petitioner filed a notice of appeal. M. Celia Robinson represented Petitioner and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) raising the issue of the trial judge's refusal to order sequestration of the witnesses, the only issue preserved for review. App. 190-205. On February 8, 2012, the Court of Appeals dismissed Petitioner's appeal and relieved counsel. App. 210-211.

Petitioner filed an application for post-conviction relief (PCR) on March 7, 2013. App. 212-218. The Honorable Letitia H. Verdin presided over an evidentiary hearing in the matter on October 22, 2014. App. 224. Karen Ratigan represented the state, and Richard Warder represented Petitioner. App. 224. At the conclusion of the hearing, Petitioner, through counsel, moved to amend the record. App. 270-285. The state responded on November 21, 2014. App. 286-289. Petitioner filed an amended motion to amend the record. App. 290-318. By an order filed Feburary 2, 2015, Judge Verdin granted the motion to amend the record, but denied Petitioner relief from his convictions and sentences. App. 319-326.

Petitioner filed a notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

I. Trial counsel failed to investigate, marshal, and present evidence of Petitioner's alibi – the fact that he was on house arrest at the time of the robbery – rendering ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

**Relevant facts**

*Trial facts*

Shortly after 9:00 p.m. on January 3, 2008, Dr. Leonard Pugh was driving home from supper at his daughter's home in Mauldin. App. 55, lines 7-17. He noticed a car following him as he turned into his neighborhood, but he "did not think twice about it." App. 56, line 10 – Tr. 57, line 5. After turning into his driveway, Dr. Pugh was walking from his car to his door. He noticed a "slow-moving car," which he found "peculiar." App. 57, lines 6-15. Dr. Pugh then saw someone emerge from the bushes with a handgun. App. 57, lines 16-19. The man demanded money, which Dr. Pugh readily provided. App. 59, line 21 – App. 60, line 4. After getting the money, the man ran away. App. 60, lines 8-9. Dr. Pugh did not see the man get into a car. App. 65, lines 1-5.

Dr. Pugh described the person as a black man in a hooded sweatshirt. He was unable to see the man's face due to the sweatshirt, the streetlights illuminating the man from behind, and Dr. Pugh's decision to look at the ground for most of the encounter. Dr. Pugh testified the man did not appear any taller or larger than he, but his voice sounded like a young person's. App. 59, lines 14-15; App. 60, line 24 – App. 61, line 7; App. 61, lines 17-25; App. 62, lines 13-17. Dr. Pugh was six feet tall. App. 62, lines 5-6. The responding officer, Justin Landford, interviewed Dr. Pugh within thirty minutes of the robbery. App. 70, lines 5-12. According to Landford, Dr. Pugh described the robber as 5'7", weighing 165 pounds, and in his early twenties. App. 69, line

13 – App. 70, line 1. Dr. Pugh also told Lanford, the man had a small black handgun. App. 70, lines 2-4.

Dashaun James, Marteze Hardy, and Keith Williams were charged with armed robbery, which requires a minimum sentence of ten years, and conspiracy for their roles in the robbery of Dr. Pugh. App. 84, lines 13-17; App. 89, lines 9-19; App. 102, lines 18-24; App. 109, lines 10-16; App. 121, line 19 – App. 122, line 4; App. 125, lines 19-25. In exchange for their testimony against Petitioner, each of them pled guilty to lesser charges. Although he had not been sentenced at the time of Petitioner's trial, Dashaun pled guilty to strong arm robbery, which has no mandatory minimum sentence. App. 85, lines 8-23; App. 89, line 20 – App. 90, line 10. Marteze and Keith entered guilty pleas to accessory after the fact of a felony, which has no mandatory minimum sentence. App. 104, lines 4-18; App. 109, line 19 – App. 110, line 2; App. 121, lines 5-21; App. 126, lines 1-10. A disturbing schools charge also was dismissed against Keith as part of the deal. App. 126, lines 11-13. The three cooperating co-defendants claimed they were with Petitioner on the evening of January 3, 2008 and that Petitioner robbed Dr. Pugh using a gun. App. 80, line 10 – App. 81, line 12; App. 99, lines 8-10; App. 100, lines 1-22; App. 101, lines 2-8; App. 117, line 3 – App. 118, line 12; App. 120, lines 14-18. Trial counsel sought to discredit them by pointing to inconsistencies in their stories and by noting their plea deals. App. 88, lines 2-4 (Dashaun was the only one of the three to say he did not see a gun); App. 89, lines 9-19 (plea deal); App. 89, line 20 – App. 90, line 10 (plea deal); App. 106, lines 6-9 (Marteze told police that he got off from work at 11:30 p.m. and the robbery occurred after that time); App. 106, lines 10-13 (Marteze told police the gun was a silver revolver with a brown grip); App. 107, line 12 – App. 108, line 5 (Marteze was inconsistent regarding whether Petitioner was running or walking); App. 109, lines 1-9 (Marteze did not tell police initially that

Keith was present); App. 109, lines 10-16 (plea deal); App. 109, line 19 – App. 110, line 2 (plea deal); App. 124, lines 12-23 (Keith did not tell police that Petitioner had a gun); App. 124, line 25 – App. 125, line 18 (Keith did not tell police that he received money after the robbery); App. 125, lines 19-25 (plea deal); App. 126, lines 1-13 (plea deal).

*PCR hearing*

According to trial counsel, her strategy was to discredit the cooperating co-defendants by showing they were testifying in exchange for plea bargains. App. 229, line 25 – App. 230, line 5; App. 236, lines 11-18. She noted there was no other evidence against Petitioner. App. 229, line 25 – App. 230, line 2. Trial counsel claimed she did not "specifically recall" if she learned that Petitioner was on house arrest at the time of the armed robbery. She admitted that if Petitioner "told [her] that," then she was aware of it. App. 232, lines 1-4. However, she did not investigate Petitioner's house arrest or whether such evidence could be used to establish an alibi defense. App. 232, lines 5-7. Further, trial counsel admitted Petitioner having an alibi because he was on house arrest would have been significant. App. 232, lines 8-10. She "believe[d]" she would have looked into it if Petitioner told her he was on house arrest at the time of the offense and she did not "believe" her file had a note about house arrest or any kind of follow up. App. 236, line 24 – App. 237, line 2.

According to Petitioner, he discussed his alibi defense with trial counsel and explained he was on house arrest at the time of the robbery. Prior to trial, he believed the defense presented would be alibi. App. 239, line 21 – App. 240, line 2; App. 257, lines 6-17. Petitioner noted that his mother would have testified that he was on house arrest at the time. App. 245, lines 12-15; App. 256, lines 2-12. He explained that he completed house arrest four days after the robbery without a single violation. App. 245, lines 15-25. Petitioner explained that trial counsel failed to

interview his alibi witnesses, who would have confirmed that he was "at home" when the robbery occurred, and failed to conduct an investigation into his house arrest, which would have confirmed he was "at home" when the robbery occurred. App. 248, lines 7-9; App. 248, line 21 – App. 249, line 6; App. 255, lines 13-15.

Petitioner's mother, Tasha Trimmier, was very sick during the early part of 2008. App. 261, line 20 – App. 262, line 2. In fact, she was so sick she was confined to her bed. App. 262, lines 15-21. As a result, she relied heavily upon Petitioner, who lived with her, to assist her with even simple tasks. App. 261, line 25 – App. 262, line 2; App. 262, line 22 – App. 263, line 10. Further, Ms. Trimmier was aware that Petitioner was on house arrest at the time. As a result, he was at home when he was not at school or work. App. 261, lines 12-19. Although she did not remember the night of January 3, 2008 specifically, she would have testified at the trial about her illness and the fact that Petitioner was always there when she called out to him during the night. App. 262, line 22 – App. 263, line 10. Further, she would have testified that Petitioner was on house arrest and never violated it. App. 263, lines 11-15. In fact, Ms. Trimmier had informed trial counsel of these facts prior to trial. App. 263, lines 11-15.

Petitioner's records maintained by the Department of Juvenile Justice (DJJ) corroborated Petitioner's PCR testimony that he was on house arrest when the robbery occurred. Specifically, he was placed on house arrest on December 6, 2007 by the Honorable Timothy L. Brown concerning his juvenile adjudications for disorderly conduct and simple possession of marijuana. App. 316. Judge Brown sentenced him to commitment in DJJ suspended to probation and house arrest. App. 316. The records also corroborated Petitioner's PCR testimony that he did not violate house arrest and successfully completed house arrest. In fact, the house arrest order was rescinded on February 2, 2008 and Petitioner's probation ended on May 8, 2008. App. 316.

*Order denying relief*

According to the order denying relief, Judge Verdin addressed Petitioner's claim that trial counsel rendered ineffective assistance by failing to "discover geographic monitoring information from the Home Incarceration Program (HIP) which could have provided him with an alibi for the events in question." App. 322. The order claimed trial counsel "testified that, as a matter of trial strategy, she believed that evidence of HIP monitoring and gang affiliation would be more prejudicial than helpful." App. 323. According to the order, trial counsel "also feared that the use of HIP's GPS monitoring would open the door to evidence of [Petitioner]'s prior criminal record." App. 323.

Ultimately, the PCR judge held Petitioner had failed to prove trial counsel failed to render reasonably effective assistance under prevailing professional norms and had failed to prove he was prejudiced by trial counsel's performance. App. 324. According to the PCR judge, Petitioner "failed to present specific and compelling evidence that trial counsel committed wither [*sic*] errors or omissions in her representation" of Petitioner. App. 324. Thus, the court denied Petitioner relief from his convictions and sentences. App. 324-325.

**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.

Without question, a trial attorney "'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014)(quoting Strickland, 466 U.S. at 691). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Id. This Court has held that if trial counsel articulates a valid reason for employing certain strategy and the strategy used satisfies an objective standard of reasonableness, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker's girlfriend regarding Walker's whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker's girlfriend testified that when she was dating Walker, which included the time of the alleged kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that while the girlfriend's "testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker

spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Thus, "it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147.

This Court has held that if trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). In Stokes, this Court determined trial counsel employed a valid strategy in not calling witnesses that he believed lacked credibility. Id. Similarly, this Court found counsel's trial strategy reasonable in Drayton v. Evatt, 312 S.C. 4, 10-11, 430 S.E.2d 517, 521 (1993) where trial counsel did not present evidence of the defendant's future adaptability because to do so would have allowed the introduction of negative psychiatric and discipline reports.

On the other hand, this Court found counsel's performance deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state's vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony.

In sum, if trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel as long as the strategy used satisfies an objective standard of reasonableness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

The PCR court's determination that trial counsel's failure to investigate and present evidence of Petitioner's alibi – house arrest – at the time of the commission of the robbery was not supported by the facts in the record. According to the PCR judge, "trial counsel testified that, as a matter of strategy, she believed the evidence of HIP monitoring and gang affiliation would be more prejudicial than helpful." App. 323. Although trial counsel testified that she wanted to exclude evidence of gang affiliation, trial counsel never testified she wanted to excluded testimony regarding Petitioner's monitoring while on house arrest. In fact, trial counsel testified that Petitioner having an alibi as a result of house arrest would have been "significant." Further, trial counsel would have been unable to make a reasonable determination on the presentation of evidence related to house arrest because she failed to make a reasonable investigation into the matter.

Trial counsel's failure to present Petitioner's alibi witnesses and evidence that he was on house arrest at the time of the robbery violated Petitioner's right to the effective assistance of counsel. Petitioner informed trial counsel of his being on house arrest at the time of the offense. Additionally, even a cursory investigation into Petitioner's criminal record, which would have been a required component of trial counsel's investigation, would have revealed Petitioner was on house arrest. Had trial counsel investigated Petitioner's criminal record and learned he was on house arrest, she would have learned of the statutory provisions permitting house arrest as a condition of probation, even for juvenile offenders. See S.C. Code Ann. § 24-13-1530(A)(permitting home detention as an alternative to incarceration for low-risk, nonviolent adult and juvenile offenders); S.C. Code Ann. § 63-19-1410(A)(3)(allowing a court to place a child "under supervision in the child's own home" following an adjudication); S.C. Code Ann. § 24-13-1530(A)(permitting home detention as an alternative to incarceration for low-risk,

nonviolent adult and juvenile offenders); S.C. Code Ann. § 63-19-1410(A)(3)(allowing a court to place a child "under supervision in the child's own home" following an adjudication); S.C. Code Ann. § 24-21-430(10)(explaining that as a condition of probation, an individual may be required to submit to house arrest "which is confinement in a residence for a period of twenty-four hours a day, with only those exceptions as the court may expressly grant in its discretion"); S.C. Code Ann. § 24-21-430(11)(noting an individual on house arrest may have to "submit to intensive surveillance which may include surveillance by electronic means").

Trial counsel's failure to present the alibi witnesses and defense denied Petitioner his right to the effective assistance of counsel. Petitioner's alibi would have refuted completely the testimony of the state's cooperating witnesses, which was the only evidence against him. To the extent that Petitioner's prior record would have been revealed to the jury through the presentation of the evidence of his house arrest, the jury would have learned merely that he had been adjudicated delinquent for simple possession of marijuana and disorderly conduct. App. 316. Those adjudications were for minor offenses and would not have permitted the jury to speculate that Petitioner's prior criminal conduct created the likelihood that he had committed the current offense or that he was a gang member. Revealing the prior criminal record would have been a small price to pay for the opportunity to present evidence that Petitioner could *not* have committed the crime because he was someplace else. The only evidence against Petitioner was that of the state's cooperating witnesses, who were obviously motivated to be less than honest with the jury in light of their cooperation agreements. Thus, the ability of Petitioner to present an alibi defense would have been critical evidence for the jury, and there is a reasonable probability the outcome of the trial would have been different.

II. Trial counsel failed to investigate, marshal, and present evidence to impeach the testifying co-defendants rendering ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

**Relevant facts**

*Trial facts*

The *only* evidence presented against Petitioner was that of his co-defendants, Dashaun James, Marteze Hardy, and Keith Williams. Each testified against him pursuant to plea agreements with the state in which they were allowed to enter guilty pleas to reduced charges, which eliminated the possibility of mandatory minimum sentences. Trial counsel used those plea agreements in her cross-examinations. App. 84, lines 13-17; App. 85, lines 8-23; App. 89, line 9 – App. 90, line 10; App. 102, lines 18-24; App. 104, lines 4-18; App. 109, lines 10-16; App. 109, line 19 – App. 110, line 2; App. 121, line 5 – App. 122, line 4; App. 125, lines 19-25; App. 126, lines 1-13.

*PCR hearing*

According to Keith Williams' rap sheet, he was charged with interference with officers on April 13, 2008 and had not been disposed of at the time of Petitioner's trial in October 2009. App. 276; App. 296. Additionally, Marteze Hardy had been charged with criminal conspiracy for an offense occurring on February 17, 2008, and with armed robbery and criminal conspiracy for an offense occurring on February 21, 2009. Those charges were outstanding at the time of Petitioner's trial. App. 278; App. 288.

As discussed supra, trial counsel testified that her strategy was to show the bias of the witnesses who testified against Petitioner as that was the only evidence against him. App. 229, line 24 – App. 230, line 5; App. 236, lines 11-18. Petitioner testified that trial counsel failed to

investigate and discovery that Marteze and Keith had other pending charges at the time of the trial. App. 249, lines 14-19. Petitioner wanted trial counsel to use those pending charges to contradict the witnesses and expose their biases. App. 249, lines 19-25; App. 250, lines 1-3.

*Order denying relief*

The PCR order addressed Petitioner's claim that trial counsel failed to conduct an adequate investigation prior to trial, including his specific allegation that trial counsel "did not sufficient investigate the background of the state's witnesses for the purposes of preparing an adequate cross examination." App. 322. The PCR order noted Petitioner alleged trial counsel was ineffective for failing to discover and use "evidence of pending charges against the state's witnesses," which would have been useful impeachment evidence. App. 322-323. Regarding this claim, the PCR judge found Petitioner had not met his burden of proving trial counsel was ineffective for failing to conduct a sufficient investigation. App. 324. Thus, the Court denied Petitioner relief on this ground. App. 324-325.

**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, 466 U.S. at 686. "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. Concerning prejudice, "[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.

The Sixth Amendment to the United States Constitution guarantees an accused the right to be confronted with the witnesses against him. "The Confrontation Clause requires a witness to testify under oath and submit to cross-examination so that the jury can observe the witness's demeanor and assess his credibility." State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff'd as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007). This guarantee ensures a defendant has the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 316 (1974); State v. Mizzell, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994); State v. Whatley, 407 S.C. 460, 467, 756 S.E.2d 393, 393 (Ct. App. 2014). Additionally, Rule 608(c) of the South Carolina Rules of Evidence states that "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." To establish a violation of the Confrontation Clause, Petitioner must show that he was prohibited from asking questions designed to show bias on the part of a witness. See Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). In addition, the error must not have been harmless beyond a reasonable doubt. State v. Mitchell, 286 S.C. 572, 574, 336 S.E.2d 150, 151 (1985), State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002).

The ability of trial counsel to use the pending charges as impeachment evidence cannot be questioned. Further, trial counsel's only strategy was to discredit the cooperating witnesses; therefore, using the other pending charges would have coalesced with her stated strategy. The plain language of Rule 608(c), SCRE makes clear that evidence of bias, prejudice, or motive may be shown to impeach a witness. See also State v. Jones, 343 S.C. 562, 569, 541 S.E.2d 813, 817-818 (2001)(holding that a defendant was entitled to cross examine an alleged accomplice about past dealings between the accomplice and the prosecuting office to expose the

accomplice's bias and prejudice); State v. McEachern, 399 S.C. 125, 140-141, 731 S.E.2d 604, 612 (Ct. App. 2012)(noting that proof of bias is almost always relevant because the jury must weigh the credibility of the witnesses).

In State v. Graceley, 399 S.C. 363, 373-374, 731 S.E.2d 880, 885-886 (2012), the South Carolina Supreme Court held the trial court erred in improperly limiting the scope of defense counsel's cross-examination of state's witnesses concerning the witnesses facing mandatory minimum sentences that were significantly longer than the sentences received in exchange for their cooperation. The prosecution made plea deals with multiple cooperating witnesses against Gracely. Those deals permitted the witnesses to avoid several mandatory minimum terms of imprisonment. Id. at 374, 731 S.E.2d at 885-886. The trial court permitted defense counsel to question the witnesses regarding the maximum sentences permissible for the charged offenses, but limited counsel's questioning regarding mandatory minimums. Id. at 374, 731 S.E.2d at 886. This limitation prevented counsel "from demonstrating the possible bias arising from the plea deals through an examination reaching the requisite degree of granularity." Id. The Supreme Court made clear "[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." Id. at 374-375, 731 S.E.2d at 886 (emphasis in the original).

During Graham's murder trial, the presiding judge prohibited Graham from asking a witness called by Graham's co-defendant about an eight-year sentence he received for accessory after the fact of the murder for which Graham was on trial. State v. Graham, 314 S.C. 383, 385-386, 444 S.E.2d 525, 527 (1994). With little elaboration, the South Carolina Supreme Court held this limitation violated Graham's Sixth Amendment rights. Id.

In State v. Sims, 348 S.C. 16, 25-26, 558 S.E.2d 518, 523 (2002), the South Carolina Supreme Court held the trial judge erred when he limited the defendant's questioning of a state witness about pending charges. The Court was persuaded that the number of the charges pending "and the severity of the potential sentences" was probative as to the witness' bias. Id. at 25, 558 S.E.2d at 523 (explaining the witness was charged with burglary in the first degree, among other crimes, which exposed the witness to a possible life sentence). According to the Court, "[t]here was the substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case." Id.

In State v. Mizzell, 349 S.C. 326, 330, 563 S.E.2d 315, 317 (2002), the South Carolina Supreme Court held the trial court erred in refusing to permit the defendant to question the witness on the potential sentences he faced where the witness was charged with the same crimes as the defendant. The Court was not persuaded by the state's argument that the testimony was not probative because the witness had neither agreed to a plea bargain nor pled guilty and held this fact should not prevent the admission of such evidence. Id. at 332-333, 563 S.E.2d at 318. The Court held "[t]he lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency." Id. at 333, 563 S.E.2d at 318.

Courts use the Van Arsdall factors to determine whether an improper limitation on cross-examination was ultimately harmless. Examination of these factors assists with determining whether trial counsel's improper limitation on cross examination as a result of her deficient performance in failing to investigate the co-defendant's prior records was prejudicial to Petitioner. According to the Supreme Court, whether an improper limitation on cross-examination was harmless beyond a reasonable doubt "depends upon a host of factors" including "the importance of

the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence of absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684.

The state's entire case rested upon the testimony of the cooperating witnesses – Deshaun, Marteze, and Keith. There was no other evidence against Petitioner because Dr. Pugh could not identify his assailant and there was no physical evidence in the case. Thus, the importance of Marteze's and Keith's testimony could not be any higher. They *were* the state's case.

Second, impeaching Marteze and Keith with other pending charges would not have been cumulative to trial counsel impeaching them with their plea bargains. Concerning Keith, trial counsel noted that his charge for disturbing schools was being dismissed as a result of his plea bargain, but she neglected to question him about his pending charge for interference with police officers for which he faced an additional three years' imprisonment. See S.C. Code Ann. § 16-5-50. Not only was Keith motivated to cooperate and testify favorably for the state due to the charges revealed at the trial, but he was further motivated by the pending charge related to interfering with the police. Additionally, Marteze faced two counts of criminal conspiracy and another charge of armed robbery. He faced five years' imprisonment on each count of conspiracy. See S.C. Code Ann. § 16-17-410. Most importantly, he faced a mandatory minimum of ten years' imprisonment for armed robbery and a maximum of thirty years. See S.C. Code Ann. § 16-11-330. Marteze's bias to protect himself could not have been greater in light of the additional pending charges and would not have been cumulative to the charges actually used on cross-examination.

Third, although Keith's and Marteze's stories were consistent generally, there were some material points on which the two testified differently and in which their testimony differed from the

other evidence offered at trial.[1] Marteze told the police that the armed robbery occurred after 11:30 p.m., which differed sharply from Dr. Pugh's testimony. Cf. App. 55, lines 16-17 with App. 106, lines 1-9. Initially, Marteze told police that the only people involved were he, Deshaun, and Petitioner. App. 109, lines 1-9. Keith was the only one to testify that Petitioner told the others that he was going to rob someone. App. 116, lines 2-13. Despite testifying that he saw Petitioner with a gun, he never told the police about a gun. App. 124, lines 12-24. He also never told the police that he received proceeds from the robbery. App. 124, line 25 – App. 125, line 18.

Fourth, the record does not disclose that trial counsel otherwise limited her cross-examination of Keith and Marteze or that the trial judge limited her cross-examination. Thus, the fourth factor weighs against Petitioner; however, the other four factors weigh heavily in Petitioner's favor and are dispositive of this issue.

Fifth, the overall strength of the prosecution's case was markedly weak. The prosecution's case rested entirely upon the testimony of the cooperating witnesses. The prosecution could offer no other evidence to the jurors as the prosecutor admitted in her closing argument. App. 152, lines 13-20. In order to convict Petitioner, the jurors had to believe those witnesses. App. 159, line 25 – App. 160, line 13. The prosecutor's case was weak as it depended solely on the credibility of teenagers who were facing significant prison time for their admitted roles in the

[1] The general consistencies among the state's witnesses are unsurprising in light of the trial judge's refusal to sequester the witnesses pursuant to trial counsel's request. App. 33, lines 22-24; App. 35, line 23 – App. 36, line 16. The solicitor capitalized on the general consistencies among the only witnesses to incriminate Petitioner in her closing when she argued the jury should believe them because "the part of the story that remains consistent is the actual crime." App. 160, line 1-22. She also argued the witnesses were "consistent and firm about two things," which were "[o]ne, that [Petitioner] had a gun and committed the robbery and then split up the proceeds" and "two, they were to come here and tell the truth to you yesterday That was their part of the bargain. They get to pay [*sic*] to a lesser charge if they tell the truth. They were consistent and very certain about both of those two facts. Those are the most critical facts." App. 165, lines 4-16.

armed robbery. Had trial counsel impeached Keith and Marteze with the additional pending charges to expose the full force of their motivations to testify against Petitioner, the state's case would have fallen apart. Thus, Petitioner suffered prejudice as a result of trial counsel's failure to investigate, marshal, and present evidence of the pending charges against the state's cooperating witnesses, on whom the entire case depended.

## CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of October, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

Letitia H. Verdin, Circuit Court Judge

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ANTONIO R. TRIMMIER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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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 Karen Ratigan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Antonio Rashid Trimmier #337233, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 27th day of October, 2015.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of October, 2015.

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