

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Frank Eppes, Trial Judge  
The Honorable L. Casey Manning, Post-Conviction Relief Judge

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Appellate Case No. 2014-000381

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**RECEIVED**

APR 14 2016

**SC SUPREME COURT**

FRED R. RUTLAND, ..... Petitioner,

v.

THE STATE, ..... Respondent.

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**PETITION FOR REHEARING**

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**I.**

On March 30, 2016, this Court reversed the post-conviction relief (PCR) judge's denial of Respondent's application for post-conviction relief. Rutland v. State, Op. No. 27614 (filed March 30, 2016). The Court found the PCR judge properly determined trial counsel's performance in failing to utilize prior statements for impeachment was deficient, but concluded the PCR judge's finding that Petitioner failed to meet his burden to show prejudice was not supported by any evidence of probative value. Respondent submits that this Court has misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing and affirm the PCR judge's denial of relief.

## ARGUMENT

### **Adherence to the Applicable Standard of Review**

The Court found that counsel's deficient performance prejudiced Applicant based, in part, on the existence of impeachment evidence, the arguments of the solicitor at trial, and the length of deliberations by the jury. Respondent submits that this Court has misapprehended the applicable standard of review. The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

There is ample probative evidence in the record to support the PCR judge's finding that Applicant could not show prejudice. Specifically, the newspaper article presented to this Court was never introduced into evidence; and many of the affidavits would not have been admissible at trial. There was substantial evidence against Petitioner. There was testimony that the victim was lured to the Boutique as part of a prearranged plan. App. p. 482-8.<sup>1</sup> Applicant made a statement to law enforcement that he and Ms. Peele – the victim's wife – had discussed killing the victim about a month before the murder. App. p. 213-14. Finally, there was Petitioner's own testimony, indicating he armed himself as soon as he saw the victim. Ap. p. 464, ln. 22 - p. 465, l. 2; see Todd v. State, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003) ("In order to establish self-defense . . . the defendant must be without fault in bringing on the difficulty"). Accordingly, the "any evidence" standard is satisfied.

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<sup>1</sup> Respondent concedes – as this Court pointed out in its opinion, that this statement was ultimately recanted several years later. However, as Ms. Hunt testified at the evidentiary hearing, and both the statement and the recantation were properly before the PCR judge, App. p. 775, there is nothing in the record to suggest anything other than that the PCR judge attributed the appropriate weight to both, particularly in light of the rule that recantation testimony is highly suspect and unreliable. See, e.g., State v. Parker, 249 S.C. 139, 142, 153 S.E.2d 183, 184 (1967) (explaining that to hold an affidavit of recantation requires the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of cases).

Understandably, it is tempting for appellate courts to try and look at transcripts and fact patterns with a fresh perspective. Indeed, Respondent submits this Court's factual findings and conclusions are persuasive. Such a temptation, however, is a trap; one which would require this Court to abandon its role as a reviewing court, bound by the standard of review and the necessary deference toward the fact finder. The PCR judge's ruling should be affirmed.

### **Deference to the PCR Judge's Findings of Fact and Conclusions of Law**

Concerning the ruling that the PCR judge was incorrect in finding petitioner failed to produce extrinsic evidence of Kestner's statements at the PCR hearing,<sup>2</sup> Respondent respectfully submits the Court has misapprehended the PCR judge's order and failed to grant proper deference to its findings of fact and conclusions of law. Reviewing courts give "great deference to the post-conviction relief court's findings of fact and conclusions of law." Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

There is no dispute that Petitioner presented Kestner's prior inconsistent statements at the evidentiary hearing. Instead, the issue here involves the evidentiary value of those statements, and the weight attributed to them by the PCR judge. Impeachment does not occur in a vacuum, and the PCR judge properly found that Applicant could not meet his burden of showing prejudice after failing to present any evidence which could provide the context necessary to make a substantive determination as to how it would have played out at trial – in this case, how Kestner would have responded or reacted to her prior statement.

Such a finding is both intuitive and consistent with applicable law. See, e.g., Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by

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<sup>2</sup> Respondent would note that the newspaper article relied on by this Court in its opinion was not introduced as evidence during the evidentiary hearing.

mere speculation as to the result); Glover v. State, 318 S.C. 496, 458S.E.2d 538 (1995). Moreover, the facts of this case bear out the PCR judge's reasoning. Without Kestner present to explain her prior statement, a finding of prejudice requires at least *some* degree of speculation on the fact finder's part. This Court, in its opinion, takes a relatively large leap in finding that Kestner's credibility would have suffered from her inconsistent statement, and that it would have suffered to the extent that the outcome of the proceeding would have been different. What remains for future litigants is this Court's conclusory holding that if trial counsel had "discredited Kestner's testimony by raising her prior inconsistent statements, then her credibility at trial would have suffered."

Respondent submits some sort of justification for such a leap is necessary, mainly because it is not entirely clear – from the facts of the case or from this Court's opinion – that Kestner's prior statements would have actually affected her credibility at trial, or even how much of an impact they would have had. Her testimony at trial was already equivocal, and arguably inconsequential, in that she had an obstructed view of the overall incident and could not say whether the victim was armed or not. App. p. 131-34; see also Brief of Respondent at 11.<sup>3</sup> Had she been confronted with her prior statements at trial **or the PCR hearing**, her explanation could have been explosive, but it also could have been mundane: perhaps after witnessing a traumatic event from a poor vantage point, Mrs. Kestner allowed her mind to fill in the blanks and assumed the victim was also armed, only to later acknowledge while under oath that she had never actually seen a weapon in his hands. In any event, before this ruling, the burden in a PCR proceeding was on the applicant to present evidence in support of one theory or another. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (185) (In a post-conviction relief

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<sup>3</sup> In fact, Petitioner's testimony minimized Kestner's ability to see what was going on during the murder. App. p. 403, l. 12-14; see also Brief of Respondent at 12.

proceeding, the applicant bears the burden of proving the allegations in their application). Whatever else this Court's opinion means, it now requires circuit court judges across the state to assist PCR applicants in meeting their burdens with speculation in some instances – while still prohibiting it in others. C.f. Moorehead, supra. This decision fails to clarify the boundaries. Respondent submits that the result is a body of law that is less stable, less predictable, and less fair to all parties.

### CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court grant this petition for rehearing, find the PCR judge correctly denied Respondent's PCR application, and affirm the order of dismissal.

Respectfully submitted,

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April 13, 2016

STATE OF SOUTH CAROLINA  
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**CERTIFICATE OF SERVICE**

I, Patrick Schmeckpeper, certify that I have today served the within **Petition for Rehearing** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Susan B. Hackett, Esquire**  
**South Carolina Commission on Indigent Defense**  
**Division of Appellate Defense**  
**Post Office Box 11589**  
**Columbia, South Carolina 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 14<sup>th</sup> day of April, 2016.



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