

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Perry H. Gravely, Circuit Court Judge S.C. SUPREME COURT

RECEIVED

MAR 30 2017

CARRIE CALLAHAM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001744

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX.....i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT
 Trial counsel’s failure to object to hearsay violate Petitioner’s right
 to the effective assistance of counsel pursuant to the Sixth and
 Fourteenth Amendments where the state’s key witness testified to
 hearsay, which established a necessary element of burglary, one of
 the charged offenses.....3

CONCLUSION.....15

ISSUE PRESENTED

Did trial counsel's failure to object to hearsay violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments where the state's key witness testified to hearsay, which established a necessary element of burglary, one of the charged offenses?

STATEMENT

On May 7, 2012, a Lexington County grand jury indicted Petitioner for burglary in the first degree (2012-GS-32-1216) and armed robbery (2012-GS-32-1218). App. 557-558; App. 560-561. The state, represented by Will Whetstone and Lawrence Wedekind, called the case to trial before the Honorable George C. James, Jr. App. 1. Robert Madsen and Bennett Casto represented Petitioner. App. 1. At the conclusion of the trial, the jury found Petitioner guilty as charged. App. 418, ll. 16-25. Judge James sentenced Petitioner fifteen years' imprisonment on each charge to be served concurrently. App. 432, ll. 8-10; App. 559; App. 562.

Petitioner filed a notice of appeal, which was perfected by Kathrine H. Hudgins. App. 435-449. Jennifer Roberts represented the state during the direct appeal. App. 450-472. On January 29, 2014, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Callaham, 2014-UP-035 (S.C. Ct. App. filed Jan. 29, 2014). Remittitur was issued on February 24, 2014. App. 476.

On March 27, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 477-483. Through appointed counsel, Petitioner filed an amended PCR application. Supp. App. 1-3. On April 19, 2016, the matter proceeded to an evidentiary hearing before the Honorable Perry H. Gravely. App. 490. Johanna C. Valenzuela represented the state, and Anna R. Good represented Petitioner. App. 490. In a written order filed August 12, 2016, Judge Gravely denied Petitioner relief from her convictions and sentences. App. 549-556.

On August 23, 2016, Petitioner filed and served a notice of appeal. Petitioner now files this petition for writ of certiorari.

ARGUMENT

Trial counsel's failure to object to hearsay violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments where the state's key witness testified to hearsay, which established a necessary element of burglary, one of the charged offenses.

RELEVANT FACTS

Trial

On June 16, 2012, Abdul Bargas lived in a trailer in a trailer park in West Columbia. App. 104, l. 17 – App. 105, l. 13. His wife, Mirna Herrera and their two children also lived there. App. 105, ll. 14-23. Additionally, his brother-in-law, Rigaberto Herrera, resided with them. App. 105, ll. 14-17. He described the events of June 16, 2010 as follows:

I found myself sleeping along with my family. That night we were in the living room watching TV. At that time my brother-in-law was outside talking on the phone. AT that time a neighbor arrived at his house, and at that point two black mean came up to the window of his car and started knocking on it, and he got on his phone and the black men started running, and then they got - - they hid behind my trailer and waited for my brother-in-law to get out.

But the neighbor was watching everything. And then when my brother-in-law got out, the two black men came up, held a pistol to his head, and said to let him in, let them in. He didn't want to open cause he said there was family there, but they forced him to and he opened the door.

And when he opened the door, we were there sleeping. And at that moment we woke up, and when we woke up they were asking for money. They kept asking for money, and one of them grabbed my little boy by his foot, and with his other hand he pointed the pistol at his head, and my wife begged them to let him go, let him go, and they said no, they wanted money.

App. 106, l. 4 – App. 107, l. 1. He then described his wife and brother-in-law giving the men money. App. 107, ll. 6-11.

Thereafter, he stated “the neighbor had realized that they went inside and he had already called the police.” App. 107, ll. 12-13.

Bargas’s wife, Mirna, testified in a much more limited fashion. She corroborated Bargas’s testimony that in June 2010, she lived in a trailer in a trailer park in West Columbia with her husband, her two children, and her brother, Rigaberto. App. 117, ll. 6-17.¹ Mirna, her two children, and her husband fell asleep in the living room while watching television around 11:30 p.m. App. 117, ll. 18-23. When she awoke, she saw “two black men with white t-shirts and one of them had a white handkerchief on his head.” App. 117, l. 24 – App. 118, l. 2. The two men had a pistol against her brother’s head. App. 118, ll. 3-5. The men instructed Rigaberto to calm down because nothing was going to happen. App. 118, ll. 5-6. The men demanded money. App. 118, l. 6. One of the men grabbed Mirna’s son, “threw him down,” and then “grabbed him by the leg” so that he was hanging. App. 118, ll. 9-11. The men agreed to return the boy if she provided money. App. 118, ll. 12-14.

Mirna gave them men a pink wallet containing about \$300 in twenty dollar bills. App. 118, ll. 15-19. Mirna then pulled her son back to her. App. 188, ll. 23. Rigaberto gave the men his wallet as well. App. 118, ll. 24-25. He also gave the men a gold chain he was wearing. App. 119, ll. 2-4. Then, the men left. App. 119, ll. 4-6. Mirna and the others “went outside to see what was going on, to see could [they] see who it was.” App. 119, ll. 7-11. Neighbors were outside as well. App. 119, l. 13.

A neighbor, Marcelo Prado, arrived home between the hours of midnight and 1 a.m. on June 16, 2010, after getting some food with a friend, who also lived in the trailer park. App. 263,

¹ The record refers to Rigaberto as Mirna’s brother and brother-in-law. For ease of reference, Petitioner refers to Rigaberto as Mirna’s brother.

ll. 13. He saw a blue S.U.V. with its motor running and a woman inside. App. 263, ll. 8-19. After he and his friend, Ramon, ate their meals in Prado's home, Ramon left.² App. 264, ll. 1-12. When Ramon arrived at his home, he called Prado to say "they were robbing at Number 6," which was the home of Mirna and Bargas. App. 264, l. 2-16; App. 265, ll. 1-5; App. 265, ll. 20-21. Ramon also told Prado the robbery involved "a black guy who was outside." App. 264, ll. 21-22. Prado then called for help. App. 265, ll. 6-11.

Robert McIntyre and other members of the West Columbia Police Department responded to the call. App. 128, l. 2 – App. 129, l. 3. The officers were looking for a blue Chevy Tahoe. App. 129, ll. 6-8. About a block away from the trailer park, McIntyre spotted a dark blue Tahoe. App. 129, ll. 9-13. McIntyre stopped the SUV and walked to the driver's side window. App. 132, l. 22 – App. 133, l. 1. Two other officers approached the front passenger seat. App. 133, ll. 2-10. The officers found a black female, Petitioner, in the driver's seat. App. 133, ll. 11-25. A black male was in the front passenger seat, and another black male was in the back seat behind the driver. App. 133, ll. 7-10.

Per the officers' request, the man in the front passenger seat got out of the car and "a gold bracelet of some sort" fell from his lap. App. 137, ll. 11-18. While picking up the bracelet from the floorboard, the officer saw "a butt of a pistol." App. 137, ll. 21-22. Thereafter, the officers searched the car, finding a second gun in the backseat. App. 137, l. 23 – App. 138, l. 2. The officers also found a pink wallet and a blue wallet. App. 139, ll. 20-24.

Upon Petitioner's arrest, she gave a statement to law enforcement. Petitioner's statement revealed she had met one of the men, whom she knew only as "Black," a couple of days prior to her arrest. App. 308, ll. 24-25. She explained that the Black and his friend asked her to drive

² Ramon was in Mexico at the time of Petitioner's trial.

them to West Columbia so they could “deal with something.” App. 309, ll. 1-2. She was aware that both men had guns. App. 309, l. 3. In fact, both men had threatened to harm her if she said anything against them. App. 309, ll. 11-12. The two men got out of the car and walked away. App. 309, ll. 12-13. When the men returned, they instructed her to drive. App. 309, ll. 13-14. As the police approached, the men threatened to harm her and her children if she said anything. App. 309, ll. 15-16. In her statement, Petitioner begged the police to keep her cooperation a secret: “Please don’t let Mr. Black read this. He knows where my kids are.” App. 324, ll. 11-14.

At the close of the state’s case, trial counsel moved for a directed verdict. Defense counsel argued the state had failed to present evidence of how the men entered the home. App. 338, l. 23 – App. 339, l. 4. The testimony established only that when Bargas and Mirna awoke, the two men were in the home. App. 339, ll. 4-6. The state had not presented evidence to establish the illegal entry aspect of burglary in the first degree because the state had not presented evidence that the men had entered without consent. App. 339, ll. 7-12.

The prosecutor argued there was “circumstantial evidence” that Rigaberto “had been outside talking on the phone” and then “all of a sudden,” Bargas and Mirna awoke to find Rigaberto “standing in the doorway with two black males with guns to his head, that would be indicative of circumstances of him being forced into the residence.” App. 343, l. 23 – App. 344, l. 4. The prosecutor pointed to the un-objected-to testimony that Rigaberto was outside and “resisted coming in. He was ordered to open the door by them, and he resisted.” App. 344, ll. 5-8. According to the prosecutor, Bargas said that Rigaberto “had told him” that “he had resisted coming in because it was family. I think that was a quote from the record.” App. 344, ll. 9-13.

Continuing with his claims of what Bargas said Rigaberto said: "He said they then hit him in the head and he came inside and relented and went inside." App. 344, ll. 14-15.

The prosecutor also relied on Prado's testimony to argue against the directed verdict motion. According to the prosecutor, Prado's testimony established there was a "confrontation outside with the gun drawn to force [Rigaberto] in to get into that house to commit the robbery" because Prado's friend, Ramon, would have been unable to see a robbery taking place inside the residence. App. 344, l. 21 – App. 345, l. 6. Per the prosecutor, "with the testimony of Mr. Prado, it certainly meets the necessities to take the charge to the jury as far as the breaking and entering of the threshold." App. 345, ll. 7-10.

The judge ruled summarily on the motion, finding "circumstantially there [was] enough evidence there in the manner in which [the prosecutor] just explained." App. 351, ll. 4-8. Thus, the judge denied the motion for directed verdict. App. 352, ll. 1-2.

PCR hearing

Trial counsel recalled Abdul Bargas testifying on behalf of the state. Trial counsel also admitted that Bargas testified "about what neighbors saw happen," which was not within Bargas' personal knowledge. App. 517, ll. 11-19. Trial counsel did not object to the testimony despite Bargas testifying as to hearsay matters "several times." App. 517, l. 23 – App. 518, l. 3. Bargas told the jury he was sleeping, but described events that allegedly occurred outside his home and when he was sleeping; therefore, unquestionably, he testified to hearsay, and trial counsel admitted as much during the PCR hearing. App. 534, ll. 4-14. This hearsay testimony included how the alleged perpetrators entered the home and an allegation that one of the perpetrators hit someone over the head with a pistol. App. 534, ll. 15-18. Bargas also testified to hearsay, as trial counsel admitted, to what the neighbor realized and calling the police. App. 534, l. 19 –

App. 535, l. 4. Essentially, trial counsel admitted that “everything on Page 106 and about the neighbor called the police was all hearsay because [Bargas] was asleep up until that point.” App. 535, ll. 5-10. Despite Bargas offering obviously objectionable testimony – hearsay – trial counsel did not object. App. 535, ll. 11-13.

To explain his failure to object, trial counsel discussed his “strategy ... when it comes to what [he] consider[s] before making an objection in front of a jury.” App. 527, ll. 3-7. Specifically, he explained he “definitely” does not “want to overly object.” App. 527, ll. 8-9. In his opinion, “from a strategy standpoint,” objecting or “overly” objecting, “kind of tends to negatively impact” the lawyer “even more so, the client.” App. 527, ll. 9-12. He acknowledged there were times when a lawyer “absolutely” must object, but stated a lawyer “kind of weigh(s) each time with regard to whether it’s really hurting” “that kind of thing.” App. 527, ll. 12-16.

Upon review of the particular portion of the transcript during which Bargas testified to hearsay and trial counsel did not object, trial counsel was asked to explain what he kept in mind when he decided whether to make an objection. He responded:

You know, basically the person, I believe testifying in this is talking about what happened when they entered his trailer. The attention is just front and center on him. The neighbor doesn’t seem to really make a statement. But says the neighbor was watching everything at one point. But, you know, at that point the neighbor had realized they went inside and he’d already called the police.

But, you know, these are facts scattered in this narrative of what happened to the victim once these folks were inside his house. And it’s just going step-by-step. They grabbed the kids and pointed guns and all of that stuff. So I just don’t think it would have been worth it to object at that place.

App. 529, ll. 3-20. According to trial counsel he “strategically chose when ... [he] would need to object and whether it was going to negatively affect [his] case.” App. 530, ll. 20-25.

During the PCR hearing, appellate counsel testified that had the issue regarding “all the hearsay from the neighbors” been properly preserved for appeal, she “probably” would not have

raised the issue. App. 542, ll. 15-21. According to appellate counsel, she would not have found the issue meritorious “because ... her defense was mere presence and duress.” App. 542, ll. 21-23. Appellate counsel speculated “the fact that the neighbors saw two males six trailers down from where she was seen committing a robbery certainly may even actually help with that defense of mere presence and duress.” App. 542, l. 23 – App. 534, l. 2.

Order denying relief

Regarding Petitioner’s allegation that trial counsel should have objected to portions of the testimony from Abdul Bargas as inadmissible hearsay, the PCR judge summarily concluded that Petitioner failed to satisfy her burden of proving trial counsel was deficient or that she suffered any prejudice from trial counsel’s failure. App. 554. To this point, the PCR judge relied on two points. The first was that trial counsel failed to object for strategic reasons – “he does not like to overly object in front of a jury.” App. 554. The second was that “based on the statements being made as events occurred or shortly thereafter, the objection[s] may have been overruled based on the excited utterance exception.” App. 554. On this point, the PCR judge noted appellate counsel’s testimony that she would not have appealed the hearsay issue had an objection been lodged. App. 554.

DISCUSSION

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 695 (1984). “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.” Id. at 686. 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. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel’s performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. Id. at 695.

“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.

Specifically, on the prejudice prong, the question to ask is “whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt.” Id. (emphasis added). The United States Supreme Court specifically ruled that “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. Moreover, the Court held that: “The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Id. at 696. 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.

Deficient performance

The first question to answer is whether the testimony to which trial counsel failed to object was objectionable. More specifically, was the testimony hearsay. It appears all agreed the testimony was objectionable hearsay. However, there was a dispute as to whether an exception would apply. In fact, the PCR judge speculated that any hearsay objection “may have been overruled based on the excited utterance exception.” App. 554. Thus, an analysis of the hearsay exception, excited utterance, is necessary.

Hearsay – Excited utterance exception

“Hearsay is not admissible.” Rule 802, SCRE. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. The Rules of Evidence provide an exception for the admissibility of excited utterances as well. An excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. “The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant’s process of reflective thought and, consequently, reduces the likelihood of fabrication.” State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006)(citing State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)).

This Court has identified three elements a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as an excited utterance: “(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.” State v. Washington, 379 S.C. 120, 124, 665

S.E.2d 602, 604 (2008)). “[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule.” State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006)(citing State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998)).

In State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), “the trial court allowed the police officer who first took the victim’s statement and a nurse who examined the victim in the emergency room to testify about the victim’s statements to them describing the assault.” The Court of Appeals held that “the testimony was hearsay and amounted to impermissible bolstering of the victim’s trial testimony.” Id. The Court also noted that the statements did not amount to an excited utterance because there was “a great deal of time for reflection” before the victim made the statements to the police officer and nurse. Id. at 500, 492 S.E.2d at 413. In State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), the Court of Appeals held the admission of the victim’s statements to her stepmother regarding details of the assault under the excited utterance exception to the hearsay rule was reversible error where a considerable time period had passed between the assault and the statement giving the victim time to reflect. The Court further held the stepmother’s testimony was cumulative because it mirrored that of the victim and improperly bolstered the victim’s story in the minds of the jury. Id. at 156, 515, S.E.2d at 772.

In State v. Davis, 371 S.C. 170, 178-81, 638 S.E.2d 57, 61-63 (2006), this Court found that the trial court committed reversible error in admitting the co-defendant’s statements, as an excited utterance, that his brother had shot the victim because the victim had taken a swing at his brother. In addition to a lack of evidence that the co-defendant was under the stress or excitement of the shooting when he made the statement, the Davis Court found that the record

did not support the conclusion that Hill witnessed the shooting. 371 S.C. at 180, 638 S.E.2d at 63. Thus, the Court ruled: "Because there is no evidence Hill actually saw Paul get shot, Hill's statement is not admissible under the excited utterance exception to the hearsay rule." Id.

Without question, Bargas testified to hearsay regarding what occurred outside of his home and what occurred prior to his waking. There was simply no way for Bargas to have knowledge of those events without someone telling him. The testimony was offered for the truth of the matter asserted as it served to establish an element of the offense of burglary – the illegal entry. Bargas testified exhaustively as to what a neighbor and/or Rigaberto told him occurred. Additionally, the hearsay statements did not fall within an exception. Specifically, the statements did not fall within the excited utterance exception as theorized by the PCR judge. There was no evidence regarding when the declarant made the statements to Bargas; therefore, the temporal aspect of an excited utterance is missing here. Further, there was no evidence presented by the state that the declarant was in an excited state when the declarant made the statements to Bargas. Thus, the fundamental characteristic of an excited utterance, which qualifies it as an exception to hearsay, was missing.

Trial counsel's failure to object to the hearsay testimony was deficient performance. The testimony was objectionable as hearsay and did not fall within any exception. By failing to object, trial counsel's performance fell below prevailing professional norms of criminal defense attorneys. Hearsay is a basic concept among the evidentiary rules. While it may be difficult to analyze at times, the hearsay testimony presented here, coupled with the lack of evidence that an exception applied, was obvious and required an objection.

After determining the crucial evidence offered by the state was hearsay and no exception applied, the next question is whether trial counsel offered a valid strategic reason for failing to object.

Reasonable trial strategy

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 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, 275-276, 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.

Recently, this Court held a lawyer's failure to object because of his concern that the jury might think he was trying to hide something was not valid. Stone v. State, Op. No. 27701 (S.C. Sup. Ct. filed Mar. 29, 2017)(Shearouse Adv. Sh. No. 13 at 17). This Court explained that "[i]f trial counsel was truly concerned about the effect his objections would have on the jury, he should have sought a determination as to admissibility outside the jury's presence." Id.

According to this Court, the lawyer failure to articulate any valid strategic reason for not objecting to objectionable evidence, and therefore, the lawyer provided deficient performance. Id. Likewise, in Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001), this Court held a lawyer's "failure to object because he did not want to confuse or upset the jury" was not a valid strategy where the lawyer failed to object to hearsay that corroborated the testimony of alleged victim. See also Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002)(holding trial counsel provided ineffective assistance for not objecting to the solicitor's improper closing argument and finding his stated reason of not wanting the trial judge to scold him in front of the jury was not a valid strategic reason).

Trial counsel's only reason for failing to object to the testimony was he desire to not "overly object." According to trial counsel, "from a strategy standpoint," objecting or "overly" objecting, "kind of tends to negatively impact" the lawyer "even more so, the client." After explaining his view of Bargas' testimony, trial counsel testified he "just" did not "think it would have been worth it to object at that place." Trial counsel's stated reason for failing to object to admitted objectionable testimony was his desire not to overly object in front of the jury. As this Court has held, this is not a reasonable strategic reason for failing to object where the evidence presented is objectionable.


Having determined trial counsel's performance was deficient and that no reasonable trial strategy supported the implementation of the deficient performance, the next question presented is whether Petitioner suffered prejudice as a result of trial counsel's failure to object to the hearsay testimony.

Prejudice

The state's case against Petitioner was weak – the state relied upon accomplice liability to hold Petitioner responsible for the conduct of two men who had threatened her and forced her to drive them to the trailer park. She was not with the men when the crimes took place, and she was unable to see the men engaging in the crimes from her location. Bargas' testimony established an element of the offense of burglary as the state relied upon it to defeat defense counsel's motion for a directed verdict. As defense counsel noted during his argument on the motion, Bargas and Mirna were asleep when the men entered the home. How the men arrived in the home was unknown to them. However, defense counsel permitted Bargas to testify to hearsay regarding how the men entered the home – by forcing Rigaberto to allow them to enter. This established the illegal entry element of the burglary offense. Had this evidence not been presented, the trial court would have been forced to direct a verdict of acquittal on this charge. One can hardly imagine any more prejudice resulting from deficient performance than the establishment of a necessary element of a charged offense permitting the defeat of a motion for directed verdict.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. If this Court prefers to grant the petition and dispense with further briefing, Petitioner respectfully requests this Court reverse the PCR court's ruling, reverse Petitioner's convictions based on a finding of ineffective assistance of counsel, and remand for a new trial.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Perry H. Gravely, Circuit Court Judge

CARRIE CALLAHAM,

PETITIONER

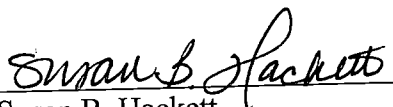
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STATE OF SOUTH CAROLINA,

RESPONDENT

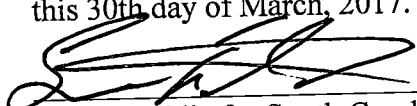
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari, a copy of the Appendix, and a copy of the Supplemental Appendix have been served on Carrie Callaham, #328469, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 30th day of March, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of March, 2017.



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