

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Edward W. Miller, Circuit Court Judge

CHRISTOPHER ROBERT MURRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002279

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

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

ATTORNEY FOR PETITIONER

ORIGINAL

RECEIVED

APR 07 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Pickens County
Edward W. Miller, Circuit Court Judge

RECEIVED

APR 07 2017

S.C. SUPREME COURT

CHRISTOPHER ROBERT MURRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002279

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Appellate Defender

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

ATTORNEY FOR PETITIONER

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT

Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly impeach Faye Brissey, a critical witness against Petitioner, with her prior inconsistent statement where Brissey testified that she remained in the car the entire time and did not see what happened between Petitioner and the decedent, but asserted in her statement that she witnessed Petitioner and the decedent fighting through a window immediately before she heard gunshots, which supported Petitioner’s defense of self-defense.7

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL12

ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly impeach Faye Brissey, a critical witness against Petitioner, with her prior inconsistent statement where Brissey testified that she remained in the car the entire time and did not see what happened between Petitioner and the decedent, but asserted in her statement that she witnessed Petitioner and the decedent fighting through a window immediately before she heard gunshots, which supported Petitioner's defense of self-defense?

STATEMENT OF THE CASE

Petitioner and his girlfriend Faye Brissey went to James Gibson's mobile home around 11:00 pm on January 18, 2010. While Faye waited in the car, Petitioner walked to Gibson's front door and knocked. Gibson opened the front door and immediately struck Petitioner in the mouth. Gibson then grabbed Petitioner and pulled him into the house. App. 149, ll. 1-18. The two wrestled in the living room. During the struggle, the gun Petitioner had concealed on his waist became loose and fell on the floor. Petitioner grabbed the gun and it fired twice accidentally. One of these shots struck the ceiling and the other struck the floor underneath the couch in the living room. App. 149, ll. 15-22. While the men were still wrestling, Gibson got on top of Petitioner. Petitioner then shot Gibson in the chest in an effort to protect himself. App. 144, ll. 9-12.

Petitioner and Faye were both arrested a few days after the shooting. Petitioner cooperated with law enforcement and told the police that he shot Gibson in self-defense after Gibson attacked him in the doorway and the two started fighting. App. 341, l. 24 – 342, l. 2. Faye also gave a statement to the police. She told detectives that she saw Petitioner and Gibson fighting through the window immediately before the shooting. App. 290, ll. 10-18.

A Pickens County Grand Jury ultimately indicted Petitioner on January 18, 2011 for the offense of murder. App. 591-592. His case was called to trial on April 18, 2011 before the Honorable G. Edward Welmaker, and a jury. App. 1. Assistant Solicitors Doug Richardson and Baker Cleveland represented the state, and Gary Mallard represented Petitioner. App. 1.

During trial, Faye changed her story and claimed that after Gibson opened the front door, Petitioner walked inside and she immediately heard three gunshots. She claimed the gunshots were "back to back." App. 274, l. 8 – 275, l. 10. Faye never saw the men fighting. She claimed she waited in the car the entire time and "couldn't really see what they were doing." App. 290, ll. 10-18.

Despite the obvious inconsistencies between Faye's statement to law enforcement, where she said she saw Petitioner and Gibson fighting through the window, and her trial testimony, where she claimed she never saw the men fighting but only heard gunshots, Petitioner's counsel inexplicably failed to impeach her with her prior statement. While counsel elicited some testimony about her prior statement when he recalled her during the defense case in chief, he failed to thoroughly and effectively impeach her. The following exchange took place between trial counsel and Faye:

Q: In your statement, you indicated that Christopher Murray [Petitioner] knocked on the door, James [Gibson] answered, they started fighting. How did you know they were fighting?

A: Because he told me when he got into the car. When he got out, he came back out and he got into the car and we crossed the bridge and that's when he told me that he shot him and everything.

App. 407, ll. 15-21.

Faye was undisputedly the state's main witness against Petitioner. Yet because of counsel's lousy cross-examination and poor questioning when he recalled her, her credibility was largely unchallenged. The jury never heard the full account of what Faye asserted in her statement, which supported and corroborated Petitioner's defense of self-defense.

Based on the evidence presented, the trial court charged the jury with voluntary manslaughter and self-defense.¹ App. 469, l. 15 – 472, l. 23. On April 20, 2011, the jury found

¹ Only as an afterthought did trial counsel argue self-defense to the jury during his closing argument. He stated, "In conclusion, as you consider and weigh the alternative - - excuse me. You will also be charged on self-defense. Normally, one does have a duty to retreat if you are claiming self-defense. But in this case once he [Petitioner] got there, once he was, like, surprised by the immediate physical attack of James [Gibson], once James was on top of him, I'll submit that he really couldn't get away at that point. That he was really in a struggle to the death, that it was really either his life or James' that would be taken." App. 441, ll. 4-12. Counsel then concluded his argument. His failure to effectively argue self-defense to the jury was not raised at

Petitioner guilty of murder. App. 480, ll. 4-10. He was sentenced by Judge Welmaker to forty years' imprisonment. App. 489, ll. 22-24.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Murray, 404 S.C. 300, 744 S.E.2d 607 (Ct. App. 2013).

On August 15, 2013, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this petition. App. 539-545. The state filed a return to this application dated April 8, 2014. App. 546-550. An evidentiary hearing was convened on April 22, 2015 before the Honorable Edward W. Miller. App. 551. Senior Assistant Deputy Attorney General Karen C. Ratigan represented the state, and R. Mills Ariail, Jr. represented Petitioner. App. 551.

Petitioner asserted during the evidentiary hearing that Faye Brissey "sat on the stand and lied" yet trial counsel did nothing to try to impeach her or discredit her. He testified that Faye's statement to police supported his defense of self-defense. In her statement, Faye stated that "the gun went off" while Petitioner and Gibson were fighting. App. 558, l. 19 – 559, l. 12. More specifically, Petitioner said, "In her . . . initial statement, she said we went over there, I got out of the car, knocked on his door, he opened the door, hit me in the month and we started . . . tussling. She said she looked in through the window and seen fists flying and said she put her head in her hands and started crying. That's when she heard the three gunshots." App. 561, ll. 5-13. However, during her testimony Faye claimed Petitioner "immediately fired three quick shots in succession" after he went into the house and that she did not see the men fighting. App. 560, l. 19 – 561, l. 1.

PCR. However, the fact that counsel almost forgot to argue self-defense signaled to the jury that counsel did not believe it was a credible defense and strongly weakened Petitioner's defense.

Gary Mallard represented Petitioner at trial.² When confronted with why he did not draw out the inconsistencies between Faye's statement to the police and her trial testimony, Mallard merely stated, "I'm not sure. I don't recall." He did not provide any sort of strategic reason for failing to properly impeach her. For example, PCR counsel asked Mallard why he did not question Faye about the fact that she claimed during her testimony that Petitioner "put a toboggan over his head and went into the house," but had never made that allegation before and did not state that in her statement to the police. App. 579, ll. 15 – 579, l. 5. Mallard simply stated, "I don't recall." App. 579, l. 5. Despite not recalling why he failed to thoroughly and effectively impeach Faye, he admitted that Faye's testimony was "the crux of this case." App. 577, ll. 9-11.

By order filed October 7, 2015, the PCR court denied Petitioner relief. App. 585-590. The court found Petitioner "failed to allege with any specificity what other questions trial counsel could have asked [Faye] Brissey that would have affected the outcome of his trial." App. 588 (citing Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989)). The court also emphasized that Faye testified that "the things I said in my statement wasn't really true because I was scared." App. 588; See App. 408, ll. 2-3. Therefore, the court found Petitioner failed to meet his burden of proving counsel was ineffective for not thoroughly discrediting and impeaching Faye. App. 588.

Because the outcome of Petitioner's trial would have been different if trial counsel would have properly and effectively impeached Faye, the key witness against Petitioner, with her prior

² Another inmate at the county jail told Petitioner about Mallard shortly after he was arrested. Despite the fact that Mallard had never tried a murder case before, Petitioner "thought [he] would be better off with . . . an outside attorney than a public defender." App. 556, ll. 9-14. Mallard ultimately took Petitioner's case "pro bono" because Petitioner did not have any money. App. 554, l. 13 – 555, l. 19. While no money was exchanged, Mallard made Petitioner do sit ups and pushups during their meetings "in order to make him feel invested." App. 575, l. 15 – 576, l. 4. While Petitioner and Mallard met "a lot" before trial, their meetings mostly entailed Mallard supervising Petitioner doing pushups and sit ups. Petitioner testified, "Mostly it was me doing push-up and sit-ups and just him watching and counting." App. 565, ll. 13-22.

sworn statement in which she admitted she saw Petitioner and Gibson fighting through the window immediately before she heard gunshots, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly impeach Faye Brissey, a critical witness against Petitioner, with her prior inconsistent statement where Brissey testified that she remained in the car the entire time and did not see what happened between Petitioner and the decedent, but asserted in her statement that she witnessed Petitioner and the decedent fighting through a window immediately before she heard gunshots, which supported Petitioner's defense of self-defense.

Petitioner's defense at trial was self-defense. In his statement to law enforcement upon his arrest, Petitioner told the police that he shot Gibson during a struggle after Gibson attacked him at the front door. Faye Brissey, who was arrested the same day as Petitioner, also told the police that she saw Petitioner and Gibson fighting through the window immediately before she heard gunshots. Her statement corroborated what Petitioner told the police and supported his defense of self-defense. Trial counsel inexplicably failed to impeach Faye with her prior statement when she later testified at trial that she remained in the car the entire time and only heard gunshots. Counsel offered no strategic reason whatsoever during the evidentiary hearing when confronted with why he failed to discredit Faye at trial. Instead, he merely claimed that he did not recall. Counsel's deficient performance was highly prejudicial to Petitioner particularly where Faye was the prosecution's key witness.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper

measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

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). In Thomas, after Thomas was found guilty of first degree burglary and first degree criminal sexual conduct, he challenged his convictions during post-conviction relief alleging his counsel was ineffective for failing to impeach the complainant with statements she made to emergency medical personnel immediately after the attack that she did not know her assailant. Id. 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 complainant, the only witness to the crime, this Court found counsel’s deficient performance prejudiced Thomas. Id.

In Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016), this Court held Rutland was prejudiced by trial counsel’s deficient performance when he failed to cross-examine the prosecution’s key witness regarding her prior inconsistent statements. Id. at 577-578, 785 S.E.2d at 353-354. Rutland, who was indicted for murder, admitted to shooting the decedent but maintained

his actions were in self-defense. Id. Counsel failed to impeach the only disinterested witness with her prior sworn statements that the decedent was armed at the time of the shooting, which supported Rutland's account of events. Id. at 574, 785 S.E.2d at 351. This Court held there was a reasonable probability that the outcome of Rutland's trial would have been different if counsel had discredited this key witness with her inconsistent statement during cross-examination. Id. at 577-578, 785 S.E.2d at 353-354. Consequently, the Court reversed Rutland's conviction and sentence. Id. at 579, 785 S.E.2d at 354.

Here, trial counsel's deficient performance and the resulting prejudice to Petitioner are obvious. Consequently, the PCR court erred by failing to grant Petitioner relief. This was trial counsel's first murder case and, his failure to adequately and effectively impeach Faye Brissey can only be explained by his inexperience. See App. 556, ll. 3-6. Counsel admitted at the evidentiary hearing that Faye's testimony was the "crux of this case," yet he could recall no reason whatsoever as to why he did not discredit her with her prior inconsistent statement. App. 577, ll. 9-11; App. 578, ll. 15 - 579, l. 12.

Counsel was aware of Faye's statement to the police in which she asserted that she saw Petitioner and Gibson fighting through the window immediately before she heard gunshots. This statement supports Petitioner's defense of self-defense and corroborated the statements he gave to the police shortly after his arrest. Despite the obvious inconsistencies between her statement to the police and her testimony before the jury where she claimed she never got out of the car and merely heard gunshots, counsel did not thoroughly and effectively impeach Faye during his cross-examination or when he recalled her as a witness during the defense case in chief. His failure to do so constituted deficient performance.

Any question as to whether Petitioner was prejudiced by trial counsel's deficient performance may be answered by looking to the solicitor's reliance on Faye's testimony during his closing argument. See Rutland, 415 S.C. at 578, 785 S.E.2d at 354. For example, the solicitor asserted, "They [the gunshots] weren't bam, we have a struggle, bam, and then bam, it wasn't like that. It was bam, bam, bam. Bam, bam, Bam, that's exactly what Faye said happened. And remember what else she said, no longer than ten seconds after they had got there did she hear those shots." App. 451, l. 23 – 452, l. 4.


Faye was the only witness present at Gibson's house when the shooting occurred. Her testimony was crucial to the state's case against Petitioner. Had trial counsel properly impeached her, the outcome of Petitioner's trial would have been different. See Johnson, 325 S.C. at 186, 480 S.E.2d at 735.

Consequently, Petitioner respectfully requests this Court reverse the ruling of the PCR and remand for a new trial.

CONCLUSION

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

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Pickens County

Edward W. Miller, Circuit Court Judge

CHRISTOPHER ROBERT MURRAY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

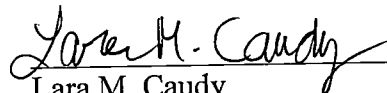
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher Murray states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing that was held on April 22, 2015. In her opinion, seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Christopher Murray.

Respectfully Submitted,

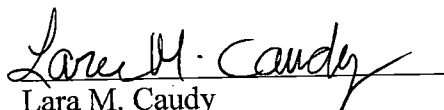

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of April, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



Lara M. Caudy
Appellate Defender

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

ATTORNEY FOR PETITIONER

This 7th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Edward W. Miller, Circuit Court Judge

CHRISTOPHER ROBERT MURRAY,

PETITIONER

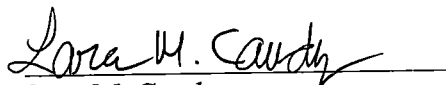
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case have been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served upon Christopher Murray, #345729, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 7th day of April, 2017.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of April, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.