STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Sumter County

George C. James, Jr., Circuit Court Judge

RECEIVED
JUN 16 2017
S.C. SUPREME COURT

JAMES KEION SPANN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002135

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did trial counsel render ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to present an alibi defense through an available and willing alibi witness?

II. Did trial counsel render ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to call an available and willing witness to impeach the state's only eyewitness where no physical evidence connected Petitioner to the crime?

STATEMENT

On July 11, 2009, a Lee County grand jury indicted Petitioner for murder, burglary in the first degree, and possession of a firearm during a crime of violence (2009-GS-31-0073). App. 379-380. On March 30-31, 2010, the state, represented by John Gentry, called the case for trial before the Honorable R. Ferrell Cothran, Jr., and a jury. App. 1. Deborah Butcher represented Petitioner. App. 1.

The trial

There was no question that Lindsey Lovely was shot five times on April 7, 2009. App. 59, ll. 16-24. There was no question Lindsey died as a result of the gunshot wounds. App. 59, ll. 16-24; App. 62, ll. 1-7. The only question was who pulled the trigger. App. 166, l. 7.

Mary Ann Lovely

Mary Ann Lovely, Lindsey's mother, was the state's main witness. App. 64, ll. 7-8. On the night of April 6, 2009, Mary Ann had a hard time sleeping because she "was feeling funny all day" and night. App. 65, ll. 1-3. She stayed up late talking to Meloniece and Elizabeth due to her inability to sleep. App. 65, ll. 2-19. As Mary Ann was on her way to bed, she heard a knock. App. 65, ll. 22-24. Ignoring it, she continued to her bedroom. App. 65, l. 24. Then, she heard the knock again. App. 65, ll. 24-25.

At trial, Mary Ann claimed that she and Elizabeth went to the door in response to the knocking. App. 66, ll. 1-2. Mary Ann "peeped through the hole … and saw Duc at the door." App. 66, ll. 3-4. Mary Ann claimed "Duc" was Petitioner. App. 66, ll. 5-10. Upon seeing the person at her door, she ran to Lindsey's bedroom. App. 69, ll. 20-24. Unable to recall Duc's name – even his nickname, she told Lindsey "the boy is at my door," and when Lindsey wanted

more information, she told him it was "the boy, Duc." App. 70, ll. 5-6.[1] At this point, Mary Ann added that the person at her door had a gun. App. 70, ll. 6-7.

Mary Ann claimed that when she was looking through the peephole, she observed the person lean back and look both ways. App. 70, ll. 8-11. This enabled her to see the gun. App. 70, l. 11. Additionally, she claimed "[h]e was clicking the gun." App. 70, l. 11. On cross-examination, Mary Ann admitted she did not see a gun. App. 79, ll. 16-17. She stated only that she "heard the gun." App. 79, ll. 16-17.

After alerting Lindsey, Mary Ann ran to her other son, who was disabled. App. 70, ll. 15-17. She put her disabled son under a bed. App. 70, ll. 20-21. She then heard gunfire. App. 70, ll. 23-24. During her testimony, she appeared to backtrack to some degree. After explaining that she placed her disabled son under a bed and heard gunfire, she then said that when she was in the kitchen the door "flew open" and Duc entered. App. 70, l. 23 – App. 71, l. 3. When the gunfire stopped, she ran out of her room and saw Lindsey on the floor – he had two bullets in his chest and blood was gushing out of his side. App. 71, ll. 5-19.

Mary Ann called 911 for help.[2] App. 72, ll. 11-16. After Mary Ann told the 911 operator there had been a shooting, the operator asked her to identify the shooter. App. 81, ll. 1-3. Mary Ann responded that she did not know. App. 81, ll. 1-3. During the trial, Mary Ann tried to explain away her conversation with 911 – she interpreted the 911 operator's question as requiring an answer that supplied the individual's "real name." App. 81, ll. 1-14; App. 82, ll. 11-25. Mary Ann could offer no explanation of why she referred to the perpetrator in the plural,

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[1] In her written statement to police, Mary Ann claimed only that she told Lindsay that "the boy" was at the door. App. 80, ll. 9-20. She never identified him as "Duc" to Lindsay, according to her written statement. App. 80, ll. 9-20.

[2] A recording of the 911 call was admitted as an exhibit at Petitioner's trial. The exhibit is on file with this Court for review in conjunction with this petition for writ of certiorari.

"they" when speaking with the 911 operator, but at trial, she insisted there was only one person involved. App. 84, ll. 4-16.

Laying the foundation for impeachment pursuant to Rule 613, SCRE

During cross-examination, the following exchange occurred wherein trial counsel questioned Mary Ann regarding prior inconsistent statements, including a prior inconsistent statement to Michael Spann:

> Q Did you tell anybody after this incident that you did not see [Petitioner]?
>
> A I has [sic] not talked to anyone else after this incident about this situation, not any of my family.
>
> Q Do you know a gentleman by the name of Michael Spann?
>
> A Who?
>
> Q Michael Spann?
>
> A Michael Spann? I don't recall.
>
> Q Is your testimony here today that you never told a Michael Spann that you never saw James Spann - -
>
> Mr. Gentry: Objection, the testimony is that she doesn't know Michael Spann.
>
> The Court: She can answer that question.
>
> A I don't know who he is. I don't. Not by – not by you telling me his name. They could have call [sic] him something else, I don't know.

App. 84, l. 23 – App. 85, l. 13. This line of questioning continued:

> Q Ms. Lovely, are you here telling me that your son was shot and you've never spoken to anyone about this incident?
>
> A My family. I don't remember telling anybody on the outside anything.
>
> Q Okay. Would the name Lenny refresh your memory?
>
> A Oh, I know this guy name Lenny.

Q Do you know that's Michael Spann's street name?

A No.

Q … So you do know a Lenny?

A Yes, I know a guy named Lenny.

Q Okay. This was a friend of your son's?

A No. He was a friend of my niece, but I have not talked to him about the situation. No, I have not.

App. 86, ll. 3-19.

Tameka Wilson

The only other substantive witness to testify on behalf of the state was Tameka Wilson. Wilson and Lindsey were in his room around midnight on April 7, 2009. App. 91, ll. 17-25. She recalled Mary Ann "coming to the door stating that she heard a gun being cocked at the door." App. 91, l. 25 – App. 92, l. 1. Wilson and Lindsey ran toward the door through a hallway. App. 92, ll. 2-3. The door was "kicked in," and shots were fired. App. 92, ll. 3-4. Wilson was behind Lindsey when he was shot. App. 92, ll. 20-23; App. 93, ll. 19-20.

Wilson heard the person who kicked in the door say, "where they at?" App. 94, ll. 1-4. She was not sure who the person was because she "never saw anybody." App. 94, ll. 5-12. She told police that she *thought* the person could have been Petitioner based on the voice and their prior relationship. App. 94, ll. 13-20. Wilson explained that she and Petitioner had ended their romantic relationship, so she told the police that the person who entered the home may have been Petitioner. App. 94, ll. 20-24. In short, she believed she heard Petitioner's voice, but she was uncertain. App. 95, ll. 3-17. Wilson spoke to the 911 operator as well. App. 99, ll. 15-24. Although she mentioned Petitioner's name four times during the conversation, she stated she believed she heard Petitioner's voice. App. 100, ll. 11-21.

The state presented no other evidence connecting Petitioner to the shooting. App. 148, l. 25 – App. 149, l. 3.

No defense case

During the state's case-in-chief, the solicitor announced that one of the defense's witnesses was "in Kirkland R&E," and that Kirkland was "in quarantine." App. 105, ll. 18-21. As a result, the state was not going to have the witness transported to court. App. 105, ll. 21-22. Trial counsel said she had no problem with the witness not being transported and she did not anticipate calling the witness any way. App. 105, ll. 24-25; App. 106, ll. 4-6.

At the conclusion of the state's case, trial counsel announced that she did not intend to put up any evidence. App. 154, ll. 14-16.

The verdict &sentencing

Ultimately, the jury found Petitioner guilty as charged. App. 189, ll. 3-10. Judge Cothran sentenced Petitioner to his "natural life" for murder and burglary, and to five years' imprisonment for the weapon. App. 196, ll. 2-8; App. 381-383. The judge ordered all sentences to be served concurrently. App. 196, ll. 2-9; App. 381-383.

Motion for new trial

On April 9, 2010, Petitioner filed a motion for new trial based upon jurors failing to disclose information during *voir dire*. Supp. App. 1-6. On May 13, 2010, Judge Cothran presided over a hearing on the motion. Supp. App. 7. Gentry represented the state, and Butcher represented Petitioner. Supp. App. 7. At the conclusion of the hearing, the judge denied the

motion for new trial. Supp. App. 64, l. 25. Subsequently, the judge issued a written order denying the motion. Supp. 67.[3]

The appeal

Petitioner filed a notice of appeal that was perfected by LaNelle Cantey Durant. App. 198-209. On appeal, Petitioner challenged testimony from an officer that suggested Petitioner was guilty based on statements made by Petitioner during a telephone call. App. 198-209. By an opinion filed on March 28, 2012, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. App. 231. State v. Spann, 2012-UP-207 (S.C. Ct. App. filed March 28, 2012). Remittitur was issued on April 13, 2012. App. 232.

Post-conviction relief proceedings

On December 31, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 233-245. Subsequently, Petitioner, with the assistance of counsel, filed an amended PCR application. App. 253-255. The matter proceeded to an evidentiary hearing on April 16, 2015, before the Honorable George C. James, Jr. App. 256.[4] Bertila Boyd-Bostic represented Petitioner, and Daniel F. Gourley represented the state. App. 256. The parties re-convened on April 26, 2016. App. 332. Julie A. Coleman represented the state at the second hearing. App. 332. By an order filed September 30, 2016, then-Judge James denied Petitioner relief. App. 362-378.

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[3] When Petitioner's current counsel sought a copy of the order from the Lee County Clerk of Court, the Clerk provided counsel with an unsigned order that had not been clocked. Upon further inquiry, the Clerk stated the Office had no signed copy of the order or a clocked version of the order. Petitioner provided the unsigned order with no file stamp in the Supplemental Appendix because it is what the Clerk provided. See Supp. 67.

[4] The exhibits introduced during the PCR hearing were left out of the appendix initially. This was an oversight. The exhibits from the PCR hearing are included in the Supplemental Appendix. Supp. App. 68-74.

On October 15, 2016, Petitioner served a notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I. Trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to present an alibi defense through an available and willing alibi witness.

Relevant Facts

PCR hearing

Trial counsel's private investigator, John Davis, Jr., interviewed Clayton Plowden prior to Petitioner's trial. App. 264, l. 23-24. Plowden provided a written statement to Davis explaining that on the night of Lovely's death, Plowden was in Sumter *with* Petitioner. App. 265, ll. 1-5.

Trial counsel corroborated Davis's testimony. She agreed that Petitioner told her he had an alibi and that Davis interviewed his alibi witness. App. 274, l. 21 – App. 275, l. 1. Although trial counsel could not recall the individuals with whom she spoke, she claimed she also talked to individuals concerning the alibi. App. 275, ll. 1-3. Nevertheless, she was quick to add: "It wasn't a solid alibi." App. 275, l. 3. With no explanation, she provided that it was her opinion that the alibi witness could not testify that Petitioner was somewhere else "at the time of the alleged murder." App. 275, ll. 8-11.

Nevertheless, trial counsel wrote to the solicitor advising him that three individuals, including Plowden, would testify that Petitioner was with them on Bowman Road in Sumter at the time of the murder. App. 275, l. 12 – App. 276, l. 1. To explain the inconsistency between the letter and her PCR testimony, trial counsel offered that she "probably had not investigated more" at the time of the writing of the letter. App. 276, ll. 14-17. When explaining this, she seemed to backtrack:

> As soon as I get alibi witness, I will talk to them. And it's in the alibi. There are times when I haven't investigated as well. I mean I try to, because I certainly want to make sure [I] do before I give it to the solicitor in case there's something against me or my client.

App. 276, ll. 17-22. When asked to clarify if she had investigated at the time she wrote the letter, she stated she could not remember. App. 276, ll. 23-25. However, she was adamant that if she had a good alibi witness, she would have wanted the witness to testify. App. 277, ll. 2-4. In fact, trial counsel asserted that if she felt like she had a good alibi witness, she would have requested a continuance when the state told her one of the witnesses she had listed and requested be transported from the prison was not transported because the prison was in quarantine. App. 278, l. 1 – App. 279, l. 17.

When pressed, trial counsel stated that "part of the problem" in the case was that she "could not verify the alibi witnesses" would state that Petitioner was with them at the time of the incident. App. 279, ll. 18-19. In light of her obvious request that the alibi witness be transported for testimony at the trial, trial counsel offered her assumption that she thought he was a good witness when she made the arrangements, but she "may have learned that [she] didn't feel that he was." App. 284, l. 5 – App. 285, l. 4.

Clayton Plowden recalled that at the time of Petitioner's trial, he was incarcerated at Kirkland Correctional Institution. App. 336, ll. 1-4. He recalled speaking to Davis, but explained he never met with trial counsel regarding Petitioner's case. App. 336, ll. 10-15. Plowden provided Davis with a written statement. App. 336, ll. 20-24. His statement was dated March 29, 2010, just *one* day prior to Petitioner's trial. App. 337, ll. 3-12.

Order denying relief

In the order denying relief on this claim, the PCR judge explained that he found the credibility of Clayton Plowden "suspect." App. 369. The judge then noted that Plowden was

incarcerated at the time of Petitioner's trial for forgery, a crime of dishonesty. App. 369. Additionally, Plowden stated he and Petitioner "were smoking marijuana and drinking gin from 10:00 p.m. through 1:00 a.m.," and these facts "would certainly not have put [Petitioner] in a good light." App. 369.

Next, the PCR judge concluded that "[t]rial counsel's explanation for not calling [Plowden] to testify at trial, *while not specifically articulated*, was that she simply did not feel he was a good alibi witness." App. 370 (emphasis added). "All in all," the PCR judge held, "trial counsel's decision not to call him to testify at trial was a valid strategy and the strategy was sufficiently articulated by trial counsel." App. 370.

Discussion

Criminal defendants are entitled to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution. "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.

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).[5]

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 (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.

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 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 held Walker was entitled to relief based upon his counsel's failure to interview his alibi witness. Id.

[5] See also Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001)(holding trial counsel's failure to object to prejudicial hearsay because he did not want to confuse or upset the jury was not valid strategy); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992)(finding a failure to object to the trial judge's comments encouraging the jury to deliberate early was not a reasonable strategic decision).

Trial counsel failed to call Plowden as an alibi witness at Petitioner's trial, despite his willingness and ability to testify that Petitioner was in Sumter County when the shooting occurred in Lee County. Trial counsel's explanation for her failure to present an alibi defense was she did not believe the witness provided a solid alibi. She offered no evidence to support this belief, and the record evidence belied her testimony. She put the state on notice of her intent to present an alibi defense, specifically through Plowden as a witness. She requested that Plowden be transported to the trial. On the day *immediately* preceding Petitioner's trial, Plowden provided trial counsel with a written statement confirming Petitioner's alibi – he was in Sumter when Lovely was shot in lee County. Trial counsel's alleged strategic reason for not calling Plowden as an alibi witness was not supported by the facts in the record, and any strategy alleged to have been employed by trial counsel was unreasonable in light of the facts and circumstances.

Trial counsel's failure to present the alibi defense prejudiced Petitioner as it denied Petitioner an opportunity to defend against the state's extremely weak case. The prosecution's only evidence against Petitioner was the testimony of Mary Ann Lovely, the deceased's mother. Although trial counsel questioned Mary Ann regarding perceived inconsistencies in her testimony with prior statements she had given, trial counsel failed to provide Petitioner with an affirmative defense – alibi. Had trial counsel provided the jury with the defense of alibi, there is a reasonable probability that the outcome would have been different in light of the prosecution's reliance upon scant evidence of guilt.

II. <u>Trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to call an available and willing witness to impeach the state's only eyewitness where no physical evidence connected Petitioner to the crime.</u>

Relevant Facts

PCR hearing

Prior to Petitioner's trial, defense counsel's investigator, Davis, interviewed Michael Spann, who was incarcerated at Trenton Correctional Institution at the time. App. 265, ll. 6-15. He knew Petitioner and the deceased from having lived in the area. App. 265, l. 18 – App. 266, l. 1. In light of his friendship with the deceased and the deceased's family, Michael Spann spent a considerable amount of time with the family around the time of the funeral. App. 266, ll. 23-25. When Michael asked Mary Ann if she saw Petitioner shoot her son, she confided that she did not because she was in her room asleep. App. 267, ll. 1-4. Davis made sure trial counsel was aware of his investigation, including his interview with Michael Spann. App. 269, ll. 14-22.

Trial counsel testified she did not recall speaking to Michael Spann. App. 280, ll. 3-5. She did have notes, however, indicating Michael Spann had heard statements of a witness that the witness did not see anything. App. 280, ll. 6-13.

Michael Spann, whose nickname was "Blity," was friends with Lindsey and his family. App. 346, ll. 16-23; App. 352, ll. 8-18. He explained that he was friendly with Lindsey's cousin, Amy Peoples, who was Mary Ann Lovely's niece. App. 347, ll. 4-5. After Lindsey's death, he spent time with Lindsey's family. App. 347, ll. 6-9. He recalled the family talking "about the case a lot." App. 347, l. 10.

Michael spoke to trial counsel and her investigator. App. 347, ll. 15-22; App. 349, ll. 16-18. He even provided a written statement to them. App. 347, ll. 23-25. Michael told trial counsel he was willing to testify at Petitioner's trial on Petitioner's behalf. App. 349, ll. 19-23. He told them that Mary Ann told him "that on the night that what happened to her son, she just said, she was so scared, the only thing they heard was, they thought they heard somebody around the house." App. 348, ll. 5-9. Mary Ann told him "she heard a loud noise." App. 348, l. 9. She "was too scared to come out of her room." App. 348, ll. 9-10. From her bedroom, "she heard gunshots." App. 348, ll. 10-11. She then "waited almost about 5 minutes before she left her room." App. 348, ll. 11-12. Upon walking out of her room, "she saw her son laying on the floor, dead. Or she assumed he was dead." App. 348, ll. 12-14.

Mary Ann never told him she saw Petitioner at her home. App. 348, ll. 15-20. "She said she never saw anybody." App. 348, l. 20. "She said she never saw anybody. She heard a noise. She heard a loud banging, and she heard gunshots. And she waited almost 5 minutes before she moved. Said when they left out and came around there, he was laying on the floor." App. 348, l. 22 – App. 349, l. 2. See also, App. 353, ll. 11-24.

Michael and Mary Ann had this conversation within a week or two of Lindsey's death. App. 349, ll. 3-9.

Order denying relief

The PCR judge explained that the purpose of Michael Spann's testimony at Petitioner's trial "would have been to complete the impeachment of Mary Ann Lovely with a prior inconsistent statement." App. 370. Thereafter, the PCR judge summarized the trial evidence presented by the state, including the testimony of Tameka Wilson and Mary Ann Lovely. App.

370. As the judge ably concluded, Mary Ann was "the sole eyewitness" against Petitioner. App. 371. Therefore, her "credibility was obviously an important issue." App. 371.

During the cross-examination of Mary Ann, trial counsel asked Mary Ann if she knew Michael Spann. App. 372. She responded that she did not know anyone by that name, but admitted she knew someone "identified as 'Lenny.'" App. 372. The PCR court explained that Michael Spann testified at the PCR hearing that "his street name was 'Blity' (pronounced 'blitty')." App. 372. The judge concluded "that the similar sounding enunciations" of the nicknames were "indicative of the same person, i.e., Michael Spann." App. 372. Trial counsel asked Mary Ann if she ever told the person she knew as "Lenny" that she heard a noise at the front door, heard the gunshots, but did not leave her bedroom until *after* the shooting. App. 372. Mary Ann denied any such conversation with Lenny or anyone else. App. 372.

As the PCR judge explained the exchange between Mary Ann and trial counsel "was a partial use of Rule 613, SCRE." App. 372. After recounting the requirements of the rule, the PCR judge explained "trial counsel's cross-examination laid a foundation for the admission of a prior inconsistent statement." App. 372. As such, "[t]he witness to be called to complete the impeachment was Michael Spann." App. 372. "Michael Spann's testimony, if deemed credible by the jury, could have placed Ms. Lovely's credibility in doubt." App. 373.

Further, Michael Spann told trial counsel and her investigator what Mary Ann said to him. App. 373. "Trial counsel could have called Michael Spann as a witness to complete the impeachment as permitted by Rule 613, but trial counsel did not do so." App. 373. Further, the PCR court noted that "[t]rial counsel articulated no reason whatsoever for not calling him to testify." App. 373. Instead, trial counsel "incorrectly lumped him into the category of 'alibi

witnesses' and explained that she did not think any of the alibi witnesses would be helpful." App. 373.

The PCR judge rejected the notion that trial counsel's failure to call Michael Spann as a witness was a valid trial strategy because counsel failed to articulate any strategy for her failure to do so. App. 373. As the judge held, "the presumption of adequate representation disappears when trial counsel articulates no strategy," and the PCR court may not "base a finding of the exercise of valid strategy on evidence that is not in the record." App. 373. Therefore, the PCR judge concluded trial counsel provided deficient performance. App. 373.

Turning to the prejudice prong, the PCR judge concluded "[t]he question of prejudice in this case is close." App. 374. Nevertheless, the judge held there was not a reasonable probability that the outcome of the trial would have been different if Michael Spann had been called to testify. App. 374. According to the judge, "[h]is credibility would have been too suspect; he was an admitted former gang member, had a criminal record, was incarcerated at the time of trial, and [was] also related in some way to [Petitioner]." App. 374. The court also noted that Michael Spann had known the deceased and Petitioner for many years. App. 374. The judge concluded "Michael Spann's testimony would have been too tainted for a jury to have found him credible and there is therefore not a reasonable probability that the jury would have found [Petitioner] not guilty." App. 375.

Discussion

In PCR actions, the burden is on Petitioner to prove his allegations by a preponderance of the evidence. Rule 71.1(e), SCACR. In order to prove ineffective assistance of counsel, Petitioner must show that counsel rendered deficient performance resulting in prejudice to him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

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); see also Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (3d Cir. 1996); Rutland v. State, 415 S.C. 570, 578-579, 785 S.E.2d 350, 354 (2016). After Thomas was found guilty of first degree burglary and first degree criminal sexual conduct, he challenged his convictions in PCR alleging his counsel was ineffective by failing to impeach the alleged victim with statements she made to emergency medical personnel immediately after the attack that she did not know her assailant. Thomas, 308 S.C. at 124, 417 S.E.2d at 532. This Court found counsel's performance "deficient in failing to call the medical personnel who would have cast doubt on the sole witness' identification of the petitioner." Id. Based on the critical role of the witness – the only witness to the crime – this Court found counsel's deficient performance prejudiced Thomas. Id.

Driscoll was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach an alleged eyewitness who claimed he saw Driscoll stab the guard and that Driscoll confessed to the murder. Driscoll's attorney knew the witness had told police that he only spoke to Driscoll after the stabbing and that Driscoll had not claimed responsibility. Driscoll, 71 F.3d at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration in finding the failure to impeach prejudicial. The court found the failure "was a breach with so much potential to infect other evidence, that without it, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt." Id.; See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998)(holding that defendant was prejudiced by trial counsel's failure to impeach a witness with a prior denial that a crime occurred); Delarosa v.

State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009)(remanding case for prejudice inquiry because of trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

In Black v. State, 151 S.W.3d 49, 56 (Mo. 2004), trial counsel failed to impeach several witnesses regarding prior inconsistent statements that "related directly to the central issue of whether Mr. Black acted with deliberation or in a fit of rage or out of self-defense." The court found counsel's failure prejudiced Black because it went to the key issue of deliberation where the record showed the jury was focused on that issue based on its note requesting further information on "cool reflection." Id.

The Missouri Supreme Court rejected the state's argument that Black "was required to have called each of the witnesses in question at his post-conviction motion hearing so that he could show what they would have stated had his counsel attempted to impeach them with their prior inconsistent statements." Id. at 57. The court held "a movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice." Id. The court found counsel's failure prejudiced Black because it went to the key issue of deliberation where the record showed the jury was focused on that issue based on its note requesting further information on "cool reflection." Id.

In a federal habeas case, the Third Circuit Court of Appeals granted relief to Berryman where defense counsel failed to impeach the state's sole eyewitness with her prior inconsistent statements. Berryman v. Morton, 100 F.3d 1089, 1097 (3d Cir. 1996). "Berryman's conviction rested solely on the victim's uncorroborated out-of-court identification, and her in-court identification two years later." Id. Berryman was accused along with two others. Berryman was

tried with one of his co-defendants, but the third man was tried separately. The first trials of all three ended in mistrials forcing re-trials. Thus, there were a total of four trials concerning the same set of facts and circumstances. Id. at 1092.

The descriptions of the three men given by the victim in the third man's second trial "differed radically from the actual height of each man, and differed from the identification testimony" she gave at the first trial of the third man. Id. at 1098. Despite these inconsistencies, Berryman's counsel never attempted to impeach her with her prior testimony. Id. Trial counsel explained his failure as "minor" because there were "a lot of major and substantial discrepancies in her story." Id. The Third Circuit concluded the explanation "simply does not wash" because the victim's identification was critical as it was the only evidence against Berryman. Id. at 1098-1099.

Concerning prejudice, the Third Circuit noted the jury never learned of the victim's previous descriptions of her assailants as vastly different from her testimony, meaning the jury was unable to properly evaluate the strength of her identification. The court noted the victim related the actions of her assailants according to their heights in respect to each other. However, she lacked the ability "to consistently describe the actions of Berryman who was nearly half a foot taller than one defendant, and nearly half a foot shorter than the other" and this was information the jury needed to weigh the accuracy of her identification. Based on the central role the identification played and how it was tied to height, the court concluded the prejudice was "obvious." Id. at 1102.

The Arkansas Supreme Court held Peebles' trial counsel was ineffective for failing to present the jury with inconsistent statements made by the alleged child-victim in a criminal sexual conduct case. Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998). The alleged child-

victim had accused Peebles of committing sexual acts against him; however, during a pretrial hearing, the child-victim denied repeatedly that Peebles had done anything to him. Id. at 535. The court explained that "defense counsel made no attempt to offer [child victim]'s inconsistent statements into evidence though this information would have been invaluable to the jury." Id. at 536-537. The court concluded that "[b]ecause the jury was not informed that the three-year old boy, who was the critical witness against Peebles, had recanted his story at a pretrial hearing, we conclude that Peebles did not receive a fair trial." Id. at 536.

This Court's decision in Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) sheds light on what Petitioner was required to show in order to establish prejudice under Strickland. Pauling challenged his convictions for first degree burglary and first degree criminal sexual conduct. Id. at 607, 503 S.E.2d at 469. One of his allegations was that trial counsel failed to prepare a triage nurse as a defense witness. Id. at 607-608, 503 S.E.2d at 469. At trial, counsel questioned a doctor about notes prepared by the triage nurse. Importantly, the notes indicated the alleged victim told the triage nurse that there was no actual penetration. However, trial counsel's attempt to question the doctor about the notes drew a hearsay objection, which was sustained. Id. at 608, 503 S.E.2d at 470. At his PCR hearing, Pauling introduced the triage nurse's notes indicating the alleged victim said the assailant did not penetrate her vagina. Id. at 609, 503 S.E.2d at 470.

This Court rejected the state's argument that Pauling was required to call the triage nurse to testify at his PCR hearing in order to show prejudice. According to this Court, Pauling's presentation of the nurse's notes was sufficient under Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Id. at 610-611, 503 S.E.2d at 471. As explained by this Court, Pauling's

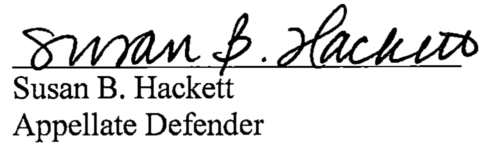
introduction of the notes was evidence as to the nature of the nurse's testimony. Id. at 611, 503 S.E.2d at 471.

Trial counsel rendered deficient performance by failing to call Michael Spann as a witness at trial. As the PCR court found, trial counsel offered no strategic reason for this failure. She was aware of Michael's testimony as evidenced by her cross-examination of Mary Ann Lovely and the testimony presented during the PCR hearing.

Trial counsel's deficient performance prejudiced Petitioner as it would have provided the necessary completion of the impeachment foundation laid by trial counsel during cross-examination of Mary Ann. Michael was the witness to whom Mary Ann admitted she did not see the shooter. Mary Ann was the only witness called by the state who testified unequivocally that Petitioner was the shooter. She *was* the state's case. Failure to impeach her on the critical eyewitness testimony was prejudicial to Petitioner. The solicitor's closing argument centered on Mary Ann's testimony. This is not surprising considering it was the only evidence against Petitioner. When telling the jury about the shooting, the solicitor relied upon Mary Ann's testimony and her identification of Petitioner as the shooter. App. 159, l. 21 – App. 162, l. 1. The solicitor asked the jury what reason Mary Ann had to lie in the case. App. 165, ll. 11-12. He then answered the question: "Not a single one. Not a single one." App. 165, l. 12. Trial counsel's error in failing to call Michael to testify to impeach Mary Ann on the critical evidence in the case was prejudicial to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court and grant him a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of June, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Jr., Circuit Court Judge

JAMES KEION SPANN,

PETITIONER

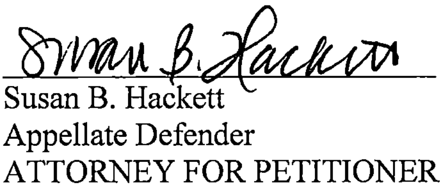
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

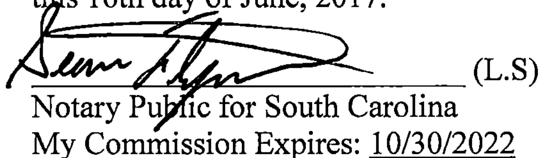
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and copies of the Appendix and Supplemental Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and copies of the Appendix and Supplemental Appendix have been served on James Keion Spann, #286321, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 16th day of June, 2017.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 16th day of June, 2017.


(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022