STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Paul M. Burch, Circuit Court Judge

NOAH C. MUMFORD,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT

APPELLATE CASE NO. 2015-000544

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether trial counsel was ineffective when he impeached his own witness with prior, irrelevant drug use and a thirty-five year old homicide conviction that the solicitor conceded was inadmissible?[1]

2.

Whether trial counsel was ineffective because his lack of any independent investigation resulted in his failure to call a witness whose testimony at the PCR hearing supported petitioner's trial testimony that he acted in self-defense?

3.

Whether trial counsel's admitted failure to request any specific instructions on self-defense constitutes ineffective assistance of counsel?

4.

Whether trial counsel was ineffective because he failed to request the lesser included offense of first degree assault and battery?

[1] Petitioner was granted a new trial by the PCR court and the State filed a petition for certiorari. Petitioner filed a cross-appeal, from which this petition now follows. If the Court denies the State's petition for certiorari, the issues raised in this petition would be moot.

STATEMENT

On February 7, 2011, a Chesterfield County grand jury indicted respondent-petitioner Noah Mumford ("Mumford") for attempted murder. Supp. App. 5. On October 24, 2011, Mumford was tried before the Honorable Thomas A. Russo and a jury. App. 1. Kernard E. Redmond and Chris Jones represented the State. App. 1. Larry W. Knox represented Mumford. App. 1. The jury acquitted Mumford of attempted murder. App. 366, l. 15 – 367, l. 4. The jury convicted Mumford of the lesser included offense of assault and battery of a high and aggravated nature. App. 366, l. 15 – 367, l. 4. Judge Russo sentenced Mumford to ten years' imprisonment. App. 379, ll. 20 – 25. Mumford withdrew his appeal. App. 382.

On February 28, 2013, Mumford filed a PCR application. App. 384. On May 13, 2013, Mumford filed an amended application. App. 391. On July 31, 2014, a hearing was held before the Honorable Paul M. Burch. App. 402. Jack Swerling represented Mumford. App. 402. Joshua Thomas represented the State. App. 402. On November 21, 2014, Judge Burch granted Mumford a new trial. App. 543. In his Order granting post-conviction relief, Judge Burch denied multiple grounds raised by Mumford. App. 543-79. Both the State and Mumford filed motions pursuant to Rule 59(e) and Judge Burch denied both parties' motions. App. 580-87. Both parties filed notices of appeal and this petition follows.

ARGUMENT

Introduction

In a self-defense case and with his client facing twenty years in prison, trial counsel conducted no independent investigation. Eight people were at the scene when Noah Mumford ("Mumford") shot Paul Funderburk, Jr. ("Funderburk") in self-defense. Aside from his own client, trial counsel talked to only two of them—and one of these was only on the day of trial. Incredibly, trial counsel impeached his own witness with a homicide conviction which the solicitor had conceded was inadmissible immediately before the witness took the stand. At PCR, trial counsel claimed he did this on purpose to "clear the air."

One of the witnesses he failed to interview would have corroborated Mumford's testimony that he fired in self-defense. Trial counsel admitted there were specific self-defense charges he could have requested but offered no explanation for not making the request. The PCR judge ultimately granted Mumford a new trial because trial counsel failed to object when a police officer testified essentially as an expert witness on Mumford's military training and how to kill someone by shooting them in the femoral artery. Mumford likely would have been acquitted but for trial counsel's ineffective assistance.

1.

Trial counsel was ineffective when he impeached his own witness with prior, irrelevant drug use and a thirty-five year old homicide conviction that the solicitor conceded was inadmissible.

Factual Background[2]

Mumford was honorably discharged after serving seven years in the military, including a tour in Iraq. App. 258, l. 23 – 259, l. 25. He was a high school graduate and worked for the Chesterfield/Marlboro County E.O.C. weatherizing homes and making them more energy efficient. App. 257, l. 18 – 258, l. 22. Mumford also owned a garage where he worked on cars. App. 260, ll. 3 – 16. Mumford had no criminal record. App. 370, ll. 8 - 16.

On December 23, 2010, Mumford got a phone call from Amos Nivens and Todd Harrell ("Harrell") asking if he wanted to race motorcycles. App. 261, ll. 2 – 11. Mumford and Harrell sometimes bet on their motorcycle races. App. 264, ll. 5 – 12. Even though their prior bets were usually for a hundred dollars, Harrell told Mumford to "bring the house payment" because Harrell and several others wanted to make a big bet. App. 264, l. 1 – 265, l. 5. Mumford took $5,000 in cash to Harrell's house. App. 263, ll. 11 – 23. Steven Teal ("Teal") and Frank Cranford ("Cranford") went with Mumford. App. 263, ll. 16 – 17.

When Mumford got to Harrell's house, Amos Nivens, Corey Williams ("Williams"), Antonio Sellers ("Sellers") and Funderburk were present with Harrell. App. 60, l. 23 – 61, l. 3. The group who were already at Harrell's were "pretty good friends." App. 61, ll. 4 – 6. Funderburk and Harrell worked together. App. 107, ll. 3 – 4. Funderburk was the only one drinking. App. 119, l. 18 – 120, l. 9. He was drinking a twenty-four ounce bottle of Heineken.

[2] Mumford incorporates by reference the factual background in this issue into his other three issues.

App. 72, l. 9 – 73, l. 11. App. 76, ll. 15 – 17. Funderburk claimed the large bottle of Heineken was the only beer he drank that evening. App. 72, l. 25 – 73, l. 3.

Trash talking was a normal part of their motorcycle races. App. 108, ll. 4 – 11 (Harrell). App. 140, ll. 24 – 25 (Sellers). App. 233, ll. 5 – 17 (Cranford). App. 76, ll. 1 – 4 (Funderburk). App. 267, l. 23 – 268, l. 2 (Mumford). Mumford and Funderburk started talking trash to each other, but Funderburk took it personally. App. 140, l. 10 – 141, l. 21. Funderburk took a step toward Mumford. App. 141, ll. 14 – 16. Sellers tried to defuse the situation and stepped between Mumford and Funderburk. App. 141, ll. 14 – 16. Sellers told them they needed to concentrate on the race. App. 141, ll. 17 – 21. Funderburk told Mumford, "When I finish this beer we're going to see." App. 141, ll. 17 – 21.

Teal saw Funderburk "turn [his] beer up." App. 215, ll. 17 – 21. Teal said, "I knew what time it was when [he] turned it up." App. 215, ll. 17 – 21. Funderburk then attacked Mumford with the beer bottle. App. 215, ll. 17 – 21.

Everyone agreed that Funderburk was the aggressor and attacked Mumford. App. 215, ll. 17 – 21 (Teal). App. 236, ll. 10 – 22 (Cranford). App. 271, ll. 1 – 13 (Mumford). App. 110, ll. 9 – 12 (Harrell). App. 141, ll. 17 – 21 (Sellers). Even Funderburk admitted he was the aggressor:

> **Q. Prior to you swinging at Mr. Mumford did he hit you or touch you or anything?**
>
> **A. No, he did not.**
>
> Q. He did not. He was just talk trash—trash talking?
>
> A. Yes, sir.
>
> **Q. So you were the aggressor by swinging that 24 ounce Heineken beer bottle at Mr. Mumford?**

A. If you say so.

Q. You were the aggressor. So you started all of this?

A. No, sir.

Q. Okay. But you do admit and it is your testimony that first swung at Mr. Mumford with this beer bottle?

A. Yes, sir.

Q. This was your weapon of choice?

A. That was the beer that I was drinking.

Q. Do you consider this a weapon?

A. It could be used as a weapon.

Q. Did you use it as a weapon that night?

A. No, sir, I didn't.

Q. What were you using it for?

A. I used it for a weapon, but does not—used it as a weapon.

Q. You used it for a weapon?

A. Yes, sir.

App. 80, l. 13 – 81, l. 11 (emphasis added). The witnesses at trial disagreed whether Funderburk actually managed to hit Mumford with the bottle. Funderburk and his friends claimed the bottle missed Mumford. App. 84, l. 19 – 85, l. 10 (Funderburk). App. 110, ll. 13 – 14 (Harrell). App. 153, ll. 12 – 19. Teal and Cranford said the bottle hit Mumford. App. 215, ll. 17 – 21 (Teal). App. 236, ll. 19 – 22. Mumford said Funderburk swung the bottle at his head, but missed and hit him somewhere on the body. App. 272, ll. 2 – 5. App. 279, l. 19 – 280, l. 4. Mumford had a metal plate in his head and was afraid of serious injury if he were struck in the head. App. 190, ll. 11 – 17. App. 272, l. 22 – 273, l. 1. App. 279, ll. 19 – 23.

Funderburk, who was 6'2' and over 200 pounds, then grabbed and "got into a tussle" with Mumford.[3] App. 65, l. 3 – 66, l. 6. App. 280, ll. 16 – 18. Funderburk claimed he pushed Mumford down and as he turned around to walk off, Mumford "came from behind me and started shooting." App. 66, ll. 3 – 15. Funderburk's initial description of his injuries did not support the notion that Mumford fired from behind him:

> Entry wound under my right butt cheek. Come out the front of the thigh. **Entry wound in my left kneecap. Goes out the back** and comes out the side of my kneecap. And two in my lower right ankle.

App. 67, ll. 6 – 11 (emphasis added). Funderburk's description of his wounds more closely matched Mumford, Teal, and Cranford's description of the shooting. Mumford said after he fired into the ground, Funderburk first turned, but then "turned around and came back to me." App. 272, l. 2 – 273, l. 17. Cranford said Mumford "shot twice at the ground, and then [Funderburk] come back at him again and that's when he fired again." App. 239, ll. 11 – 17. Teal also said Funderburk turned around, came back, and "went back off on Noah, and Noah stopped him before he got hurt." App. 219, ll. 13 – 24.

Harrell agreed that Mumford's first shot was pointed at the ground, but agreed with his friend Funderburk that Funderburk had pushed away and was "still in the motion of going back" when Mumford shot him. App. 112, ll. 1 – 22. App. 129, ll. 6 – 9. In Sellers' version, the two had separated from their tussle and "just glazed [sic] at each other for a second, and when [Mumford] pulled the gun out [Funderburk] went to turn, and Noah started firing." App. 141, l. 22 – 142, l. 6.

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[3] Funderburk admitted he was "much bigger" than Mumford. App. 81, ll. 16 – 18. Mumford said, "I had no way to repel him. He is 200 something pounds and I'm 170." App. 280, ll. 16 – 18.

Because of the conflict in the testimony about whether Funderburk was facing Mumford when Mumford began firing, the solicitor sought permission to recall Funderburk as a reply witness. App. 296, l. 19 – 305, l. 12. The solicitor admitted he had not presented Funderburk's doctor as a witness during his case, but wanted Funderburk to testify about the wounds he received. App. 296, l. 19 – 297, l. 11. The solicitor argued this testimony was "relevant based on the assertions of the Defense witnesses." App. 297, ll. 4 – 11. The trial judge agreed to allow the reply testimony, stating, "It all boils down to credibility and believability." App. 304, ll. 6 – 7.

During his reply, Funderburk changed his testimony and claimed he was shot, "Back of the knee, come out the side in the back of the knee." App. 306, ll. 9 – 16. This directly contradicted his earlier testimony when Funderburk said "Entry would in my left kneecap. Goes out the back and comes out the side of my kneecap." App. 67, ll. 6 – 11. Trial counsel did not cross-examine Funderburk on the reversal of his testimony. App. 309, l. 9 – 310, l. 5. Trial counsel did not point out the change in his testimony in his closing argument. App. 315, l. 12 – 328, l. 21.

Trial Counsel's Impeachment of His Own Witness, Steven Teal

After the State rested, the Court and the attorneys settled the records of the defense witnesses, Teal, Cranford, and Mumford. App. 204, l. 22 – 205, l. 23. The solicitor twice stated that he had nothing with which to impeach Teal. App. 204, l. 22 – 205, l. 23. The solicitor stated:

> MR. REDMOND: The only one, Mr. Cranford does have a criminal history. **Looks like Mr. Teal, his exceeds the ten year limit.**
>
> THE COURT: All right.

MR. REDMOND: **We have <u>nothing</u> that we intend to impeach on with Mr. Teal**, but Mr. Cranford, we do have several items.

App. 204, l. 24 – 205, l. 5 (emphasis added). The court took a short recess and Teal was the first witness called by the defense. App. 206, ll. 2 – 22.

After a few background questions, trial counsel began questioning Teal about the very conviction the solicitor had just admitted he could not use for impeachment:

Q. And before we get into the questions there are some questions that I'm going to ask you about your background. You have a criminal record, don't you?

A. Yes, sir, I do.

Q. Tell the jury about your criminal record?

A. Well, I have a homicide and D.U.I.

Q. And when was that?

A. I'm 53.

Q. Fifty-three. And did you have to serve any time for that?

A. Yes, sir, I did?

Q. And how much time did you serve for that?

A. I made a four year sentence.

Q. How many?

A. I got a four year sentence. I maxed out.

Q. You maxed out. Did that happen here in South Carolina?

A. Yes, sir, it did.

Q. So you paid your debt to the State of South Carolina?

A. Yes, sir, I have.

Q. And that happened a long time ago?

A. Yes, sir.

Q. And did you have any other criminal record?

A. No, sir.

App. 209, l. 10 – 210, l. 10. Trial counsel inexplicably brought up Teal's thirty-five year old conviction again after Teal testified about the shooting:

Q. Now, you're friends? You're good friends with Noah?

A. Yes, I am.

Q. You work with Noah?

A. Yes, sir.

Q. And you were once convicted for vehicle homicide?

A. Correct.

App. 219, l. 25 – 220, l. 5.

Trial counsel did not stop with impeaching Teal with an inadmissible conviction. He also impeached Teal with prior, irrelevant drug and alcohol use:

Q. Okay. Do you drink?

A. Yes.

Q. What do you drink?

A. Bud Light.

Q. Beg your pardon?

A. Bud Light.

Q. White Lightening?

A. Bud Light.

Q. Bud Light. I thought you said White Lightening. Bud Light. Do you drink every day?

A. No, sir.

Q. How often do you drink?

A. Mostly on the weekends.

Q. Mostly on the weekends. **Do you use illegal drugs?**

A. Yes.

Q. **Have you ever used illegal drugs?**

A. Yes.

Q. How long ago did you last use illegal drugs?

A. I been clean for five years.

Q. Twenty-five years?

A. Five.

App. 210, l. 11 – 211, l. 6 (emphasis added). Teal then responded negatively to trial counsel's questions about whether he drank or used illegal drugs the night of the shooting. App. 211, ll. 7 – 11.

Trial Counsel's Attempts to Explain His Impeachment of Teal

At the PCR hearing, trial counsel gave at least two versions of why he impeached his own witness at trial. Trial counsel first tried to put the blame on Teal:

> Q. Why would you ask Mr. Teal if he had a conviction thirty-five years ago if he's your witness, and a key witness in a self-defense case?
>
> A. When I interviewed Mr. Teal, that subject was brought up about the vehicular homicide, and I asked him if it was more than ten years ago, and he said no, it was not more than ten years.
>
> I did not find out it was more than ten years ago until the day of the trial.
>
> Q. Well, you didn't explore that?

A. No, I did not.

App. 410, ll. 12 – 22. Trial counsel then admitted he had not interviewed Teal until the day of trial. App. 411, ll. 2 – 17.

Trial counsel admitted that Teal was an important witness because he was going to testify that Funderburk continued to act as the aggressor. App. 408, l. 22 – 409, l. 4. Trial counsel admitted the conviction was inadmissible. App. 410, l. 23 – 411, l. 1. He admitted that convictions go directly to a witness's credibility. App. 415, ll. 2 – 4. He also admitted that when he is cross-examining an adverse witness, he uses their prior convictions to impeach their credibility. App. 419, l. 24 – 420, l. 15.

After complaining that, "To this day, I have not been paid for my representation of [Mumford]," trial counsel continued to blame Teal and claimed that Teal was possibly "mistaken" about the age of his conviction.[4] App. 412, l. 14 – 413, l. 16. Trial counsel then claimed he had a strategic purpose in impeaching Teal—that he was "trying to show the jury that this man had nothing to hide." App. 414, ll. 4 – 23. PCR counsel then asked why trial counsel impeached Teal with prior drug use:

> Q. Well, let me ask you this now. In addition to asking about his criminal record, you also asked him if ever used illegal drugs.
>
> Now, why would you ask him that?
>
> **A. . .**
>
> Q. Why would you ask your own witness if he was a drug user?
>
> A. Because I was trying to **clear the air** about my witness.
>
> Q. What do you mean, clear the air?

[4] Teal unequivocally denied ever being mistaken about the age of his own conviction or telling trial counsel the conviction was less than ten years old. App. 517, ll. 7 – 16.

A. . .

App. 416, ll. 12 – 22 (emphasis added). Trial counsel's silence in response to these questions speaks volumes. Trial counsel later claimed he thought "it was feasible" to bring up the drug use and he might do that with any of his witnesses "Depending on the circumstances." App. 420, l. 16 – 421, l. 2. Desperately trying to get to the end of this part of PCR counsel's withering examination, trial counsel claimed impeaching Teal "was the strategy that I used" and twice reiterated that asking about the conviction and the drug use was the "right thing." App. 421, ll. 3 – 14.

The PCR Court's Ruling

The PCR Court held that trial counsel's testimony that Teal gave him incorrect information about his conviction was credible and that Teal's testimony that he was not mistaken about the age of his own conviction was not credible. App. 563-64. The court found that with the mistaken information from Teal, "trial counsel wisely asked Teal about his prior conviction to preempt the State from effectively impeaching him with the conviction." App. 564. The court made a similar finding regarding impeaching Teal with prior drug use. App. 564. The court also found no prejudice. App. 564.

In his Rule 59(e) motion, Mumford specifically pointed out that the PCR court's ruling was erroneous because the solicitor admitted that Teal's conviction was not admissible. App. 585. The PCR court had earlier noted the importance of this fact in the Order: "It should be pointed out here that at the trial, Mr. Teal's record was discussed outside of the jury's presence and the Solicitor acknowledges that Mr. Teal's convictions were not admissible because they were beyond the ten (10) year limit." App. 559. Despite Mumford's Rule 59(e) motion and its own finding, the PCR court denied the motion to alter or amend without explanation. App. 587.

Discussion

No evidence supports the PCR court's holding that trial counsel's impeachment of his own witness with an inadmissible conviction was not deficient performance. Trial counsel's post hoc explanations are rendered irrelevant because the solicitor admitted that he could not use Teal's conviction for impeachment. App. 204, l. 22 – 205, l. 23. The solicitor was correct because the conviction was more than ten years old and did not involve a crime of dishonesty. Rule 609(a)(1) and (b), SCRE. See State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); Shane v. Rhines, 672 P.2d 895, 898 (Alaska 1983) (holding DUI is not a crime of dishonesty under Rule 609(a)). Because the convictions were inadmissible and the solicitor conceded the point, trial counsel's alleged strategy of "clearing the air" was unreasonable because the jury would never have heard of Teal's convictions. Trial counsel's conduct constitutes deficient performance under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 686 (1984).

The impeachment of Teal prejudiced Mumford. More than a reasonable probability exists that, but for trial counsel's impeachment of Teal, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). 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). This case was a credibility contest not only between Mumford and Funderburk, but between their two witnesses. The trial judge acknowledged as much when he agreed to allow Funderburk's reply testimony, stating, "It all boils down to credibility and believability." App. 304, ll. 6 – 7. Neither of Funderburk's witnesses had any criminal convictions that were discussed in front of the jury. Trial counsel began an attempt to impeach Harrell by asking him if he had ever been arrested, but abandoned it after a bench conference. App. 137, l. 13 – 138, l. 7. Sellers had no convictions. Mumford's witness, Cranford,

had drug and robbery convictions.[5] App. 242, l. 5 – 244, l. 4. In this close case, had Mumford been able to present one of his witnesses to the jury as not having a criminal record, it would have made a difference. With both of Mumford's witnesses having convictions, it made Mumford seem like he ran with a tough crowd, especially compared to Funderburk. Improper admission of prior convictions for impeachment is prejudicial and reversible error. See State v. Morris, 289 S.C. 294, 345 S.E.2d 477 (1986) (reversing because of admission of bookmaking conviction).

The PCR court found that Mumford did not suffer any prejudice because the solicitor did not use Teal's conviction or drug use in cross-examination or closing argument. App. 564. The solicitor had no need to further cross-examine Teal on his conviction or drug use because trial counsel had already done a more thorough job than the solicitor would have been permitted to do. While the solicitor did not explicitly mention Teal's conviction in his closing, he did speak at length about Cranford's convictions. App. 342, ll. 1 – 13. The solicitor linked criminal convictions to credibility and asked the jury to listen for the trial judge's charge on credibility of witnesses. App. 342, ll. 1 – 13. The trial judge charged the jury that a past criminal record "may only be considered by you if at all in determining the witness' believability." App. 351, ll. 9 – 16. Therefore, the jury had Teal's conviction, the solicitor's argument that convictions impugn credibility, and the trial judge's charge that they could consider convictions when determining credibility. The PCR court's rationale that Mumford suffered no prejudice fails. This Court should grant certiorari on this issue and reverse.

2.

[5] Further revealing that "clearing the air" was a post hoc attempt to manufacture a strategy for impeaching Teal, trial counsel did not ask Cranford about his prior convictions during direct-examination. The first thing the solicitor asked Cranford on cross-examination was if his testimony was the truth and then impeached him with his prior convictions. App. 242, l. 4 – 243, l. 21. If trial counsel truly meant to "clear the air" with Teal, then his failure to take the sting out of Cranford's prior convictions on direct-examination is inexplicable.

Trial counsel was ineffective because his lack of any independent investigation resulted in his failure to call a witness whose testimony at the PCR hearing supported petitioner's trial testimony that he acted in self-defense.

The PCR court found that trial counsel stated "that he probably did not leave the office on one occasion to investigate the case on his own." App. 560. The PCR court stated that "trial counsel candidly admitted he did not perform many of the tasks Applicant alleges should have been performed. . . ." App. 572. He did not interview Harrell, Sellers, Amos Nivens, or any of the police officers. App. 560. Most importantly, he did not interview Corey Williams ("Williams"). App. 560. App. 424, ll. 10 – 12. App. 521, ll. 10 – 13. This failure deprived Mumford of his Sixth Amendment right to effective assistance of counsel.

Williams, who was already present at the scene of the shooting **with Funderburk** when Mumford arrived, said at the PCR hearing that "[o]f course" he would have testified for Mumford had trial counsel interviewed him or asked him to come to the trial. App. 521, ll. 5 – 16. Williams' testimony would have been incredibly important because he confirmed that Mumford shot at the ground. App. 521, ll. 17 – 19. He confirmed that Funderburk hit Mumford with the beer bottle. App. 521, ll. 24 – 25. Funderburk tried to hit and kick Mumford. App. 522, ll. 7 – 10. Most importantly, Williams testified that Funderburk was facing Mumford. App. 522, ll. 13 – 14.

The PCR court drew the erroneous conclusion that Williams' testimony was "cumulative" and "harmful" to Mumford. App. 568-69. This conclusion is without evidentiary support. Williams was an eyewitness to the shooting. His testimony could not have been cumulative because it was different from Funderburk's witnesses who claimed the bottle did not hit Mumford and that Funderburk had turned away after the tussle. The importance of this point

is clear because of the solicitor's insistence on calling Funderburk in reply to testify about entry and exit wounds.

The failure to interview and find favorable witnesses is deficient performance. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003); Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). In Walker, trial counsel was held ineffective for failing to interview a favorable alibi witness. Id. In Martinez v. State, 304 S.C. 39, 41, 403 S.E.2d 113, 113-14 (1991), this court held trial counsel ineffective for failing to subpoena a witness who could have testified favorably for the defense. In Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998), trial counsel was held ineffective for failing to call a triage nurse in a rape case.

This case most resembles Walker. In a case about self-defense, the failure to call a favorable eyewitness whose testimony would help establish that the defendant was still in reasonable belief of danger is akin to the alibi witness in an identity case like in Walker. The prejudice from failing to call Williams is enormous. Williams would seem less biased than Mumford's two witnesses because he did not arrive at the scene with Mumford. Had trial counsel called Williams as a witness, Mumford likely would have been acquitted. Strickland v. Washington, 466 U.S. 668, 686 (1984); Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

3.

Trial counsel's admitted failure to request any specific instructions on self-defense constitutes ineffective assistance of counsel.

Trial counsel admitted he failed to request jury charges tailored to the facts of this self-defense case. App. 454, l. 25 – 457, l. 25. This failure deprived Mumford of his Sixth Amendment right to effective assistance of counsel. At PCR, Mumford presented three charges

that trial counsel should have submitted. App. 457, ll. 16 – 25. App. 7 – 9. The PCR court apparently assumed trial counsel performed deficiently, but held Mumford suffered no prejudice because the charge on self-defense was substantially correct. App. 565.

The PCR court's holding that Mumford was not prejudiced by the failure to request specific self-defense instructions is a legal error. A trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As this Court recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller at 443, 377 S.E.2d at 330.

In Fuller, the defendant was black. Id. at 441, 377 S.E.2d at 329. He solicited a white prostitute. Id. The prostitute took him to her trailer for sex, but the trailer was occupied and the defendant left. Id. The defendant later returned to the prostitute's trailer and a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. At this point, two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot which temporarily allowed him to drive away, but the street was a dead end. Id. at 442, 377 S.E.2d at 330. The two assailants tried to block the defendant's car from leaving and the defendant ultimately crashed and pinned his car against a steel rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing them both. Id. No gun was found on the assailants. Id.

Relying on State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984), the trial judge in Fuller only instructed the jury on the boiler-plate elements of self-defense. Id. This Court held it was error to only give the general charge from Davis when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that a defendant has the right to act on appearances from State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). Id. at 443-44, 377 S.E.2d at 330-31. Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Id. Finally, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury" from State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920). Id. For each of these charges, the Fuller court explained the specific facts necessitating the additional, illuminating instruction. Accordingly, the reasoning used by the PCR court in this case has been expressly rejected by this Court.

First, trial counsel should have requested a charge that a person can be acting lawfully even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999). This charge was vitally important because the solicitor cross-examined Mumford on the fact that he had a concealed weapon without a permit. App. 283, l. 23 – 286, l. 12. After confirming that Mumford did not have a permit to carry a concealed weapon, the solicitor asked whether he was "carrying a concealed weapon anyway," to which Mumford replied, "Yes." Twice during closing argument, the solicitor told the jury that Mumford was unlawfully in possession of a concealed weapon. App. 331, l. 21 – 332, l. 1. App. 336, ll. 14 – 24. The Burriss charge was

necessary to rebut the inference that Mumford could not have been acting in self-defense because he unlawfully possessed a gun.

Second, Mumford was prejudiced because trial counsel failed to ask for a jury charge that the relative sizes and weights of the defendant and the aggressor can be considered when determining whether a defendant had the right to act in self-defense. State v. Hendrix, 270 S.C. 653, 660-61, 244 S.E.2d 503, 507 (1973). Hendrix makes it clear that when the State alleges excessive force, such a charge is an important consideration in a self-defense case. Id. The State's entire theory was that Mumford used excessive force. The first words the jury heard from the solicitor in his opening statement were, "Noah Mumford brought a gun to a fist fight." App. 53, ll. 18 – 19. A large size disparity existed between Funderburk and Mumford. Funderburk was "much bigger" than Mumford. App. 81, ll. 16 – 18. Mumford said, "I had no way to repel him. He is 200 something pounds and I'm 170." App. 280, ll. 16 – 18. The lack of this charge undoubtedly prejudiced Mumford.

Finally, Mumford was prejudiced because trial counsel failed to ask for an instruction that a defendant has the right to judge more harshly the conduct of an aggressor who has consumed alcohol. State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000). In Day, this Court held the trial judge's charge was incomplete because it should have included a charge indicating that the "[defendant] had a right to judge the conduct of [the victim] more harshly than otherwise because of [the victim's] drug consumption." Id. It was uncontroverted that Funderburk consumed the contents of a twenty-four ounce bottle of Heineken and then used the bottle as a weapon to attack Mumford. Had trial counsel requested these charges which were supported by the evidence, the outcome of the trial likely would have been different. Strickland

v. Washington, 466 U.S. 668, 686 (1984); Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

4.

Trial counsel was ineffective because he failed to request the lesser included offense of first degree assault and battery.

Trial counsel admitted that he did not ask for the lesser included offense of assault and battery in the first degree. App. 462, l. 1 – 464, l. 24. He admitted that asking for the charge would have been "a smart thing to do." App. 463, ll. 23 – 24. Despite this testimony, the PCR court held trial counsel was not ineffective because of a trial strategy of getting "the jury to acquit on the indicted charge, not convict on a lesser included." App. 565.

This holding is erroneous for two reasons. First, it ignores trial counsel's admission that he should have asked for the charge. App. 463, ll. 23 – 24. Second, it ignores that trial counsel never objected when the trial judge charged the jury **on a lesser included offense at trial**. App. 353, ll. 10 – 18. App. 360, l. 11 – 364, l. 7. The trial court charged the jury on ABHAN. App. 353, ll. 10 – 18. Mumford was convicted of ABHAN. App. 366, l. 21 – 367, l. 2. Trial counsel had **no** strategy in this respect and the PCR court erred in not finding deficient performance. Strickland v. Washington, 466 U.S. 668, 686 (1984).

Mumford was prejudiced by trial counsel's deficient performance. The PCR court erroneously held there was no evidence "from which the jury could have convicted Applicant of the lesser included offense of first degree assault and battery." App. 566. First degree assault and battery is a lesser included offense of attempted murder and ABHAN. S.C. Code Ann. § 16-3-600(C)(3). It requires an injury or a great bodily injury. S.C. Code Ann. § 16-3-600(C).

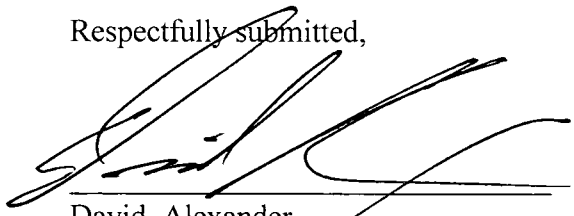
Therefore, the PCR court's conclusion that the shots fired by Mumford were only cognizable under ABHAN is incorrect.

Furthermore, ABHAN is defined as a violent offense and carries a potential twenty-year sentence. S.C. Code Ann. § 16-1-60; S.C. Code Ann. § 16-3-600(B)(2). Conversely, first degree assault and battery carries only a maximum sentence of ten years and is parole-eligible. S.C. Code Ann. § 16-3-600(C). S.C. Code Ann. § 16-1-60. S.C. Code Ann. § 24-21-610 et seq. Had the jury been properly charged, there is a substantial likelihood Mumford would have been convicted of first-degree assault and battery and received a lesser sentence. Trial counsel's deficient performance therefore prejudiced Mumford and he is entitled to a new trial. Strickland v. Washington, 466 U.S. 668, 686 (1984); Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

CONCLUSION

For the foregoing reasons, if this case is not mooted by the denial of the State's petition for certiorari, this Court should grant Mumford's petition with the ultimate relief of a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of October, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Paul M. Burch, Circuit Court Judge

NOAH C. MUMFORD,

RESPONDENT-PETITIONER,

V.

STATE OF SOUTH CAROLINA,

PETITIONER-RESPONDENT

APPELLATE CASE NO. 2015-000544

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the supplemental appendix in this case have been served on Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Noah C. Mumford, #348375, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 29th day of October, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of October, 2015.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.