STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Clarendon County

Clifton Newman, Circuit Court Judge

GEORGE SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000027

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did trial counsel's introduction of evidence of Petitioner's alleged flight following the shooting incident while cross-examining the lead investigator violate Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT

On Saturday, April 65, 2008, shortly after 9:30 p.m., Kelvin Black went to his neighborhood bar, The Bait Shop, after work. App. 23, ll. 13-15; App. 24, ll. 9-25. Kelvin used a pathway commonly used by residents in his apartment complex. App. 26, ll. 2-4. Several hours later, Kelvin left the bar to return to his apartment. App. 26, l. 23 – App. 27, l. 9; App. 61, ll. 16-23.

While walking on the path, Kelvin claimed he saw Petitioner, whom he knew as "Chips." App. 27, l. 14 – App. 28, l. 16. According to Kelvin, Chips asked him for his "chains and stuff around [his] neck." App. 28, ll. 1-2. When asked by Chips for money, Kelvin said he did not have any money. App. 28, ll. 3-4; App. 29, ll. 14-22. Kelvin claimed Chips had a gun when he requested Kelvin's chains and money. App. 29, ll. 1-5.

Later during the state's case-in-chief, Kelvin elaborated, in narrative form, regarding what allegedly took place while he was walking along that path to return home from a night of drinking.

> Well when I was coming through the path, I was walking with my head down. I heard a gun click. And I looked back. It was George behind me. George is called "Chips." He was behind me. I didn't pay no attention. I walked, he fired the gun and missed. Next I had decided to ran. When I ran, I was in front of my apartment building at the time. He shot me. I fell. After he shot me in my leg, I fell. And I scooched myself back to the mailbox. In front of the mailbox. He was coming behind the mailbox. And this was my wife who was looking back through the window. Calling the police. He came over to me with the gun, and get my two chains. And he asked me if I had any money. I didn't have no money at the time. He clicked the gun again and for some reason, it didn't fire.
>
> At the time he made a statement and he ran off. And I scooted myself back to the door. I tried to stand up, and when I stand up, I fell forward into my wife's arms, and I don't remember nothing else from there.

App. 30, ll. 3-24.[1]

Kelvin did not consider Petitioner a friend. App. 33, ll. 1-3. He recalled he and Petitioner went to a bar one night. App. 33, ll. 4-7. According to Kelvin, he and Petitioner talked, "[a]nd it all started from there." App. 33, ll. 7-8.

Tasha Cannon, Kelvin's wife, called Kelvin between 12 and 1 o'clock telling him to return home. App. 61, ll. 16-23. While waiting for Kelvin, Tasha put their baby to bed upstairs. App. 62, ll. 19-21. Tasha opened the bedroom window and lay down to sleep. App. 62, ll. 21-24. She then heard Kelvin behind the apartment, arguing. App. 62, ll. 24-25. Tasha heard another voice as well. App. 63, l. 11. When she heard gunshots, she ran downstairs. App. 63, ll. 12-13. Upon hearing another gunshot, Tasha ran outside. Tr. 64, ll. 11-13.

Tasha claimed Kelvin was running toward the apartment and "Chips" shot a gun. App. 64, ll. 16-23. Tasha ran back in the house, locking the door behind her. App. 64, ll. 19-20. Tasha called 911, while her sister who lived with them, looked out an upstairs window. App. 65, ll. 13-16. Tasha identified Petitioner as the person who shot Kelvin. App. 68, l. 23 – App. 69, l. 8. Tasha had identified Petitioner to the police from a photographic line-up. App. 69, ll. 11-18; App. 82, ll. 1-10.[2]

On August 21, 2008, a Clarendon County grand jury indicted Petitioner for assault and battery with intent to kill (ABWIK), armed robbery, and possession of a weapon during a violent crime (2008-GS-14-0352). App. 292-293. The state, represented by Amy A. Land, called the

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[1] Although Kelvin Black did not testify regarding viewing a photographic line-up, the lead investigator, Thomas Burgess, told the jurors that he showed Black a photographic line-up. App. 88, l. 5 – App. 89, l. 3. Burgess claimed that Kelvin identified Petitioner from the line-up, but that the line-up did not show any markings because Burgess did not permit Kelvin to touch it because he had blood on his hands. App. 89, ll. 4-20. There was no objection to the identification procedure. App. 88, l. 20.

[2] There was no objection to the identification procedure. App. 85, ll. 12-23; App. 86, l. 22.

case for trial on December 8, 2009, before the Honorable R. Ferrell Cothran and a jury. App. 1. Harry Devoe represented Petitioner. App. 1. The jury found Petitioner guilty as charged. App. 138, l. 21 – App. 139, l. 7.

Judge Cothran sentenced Petitioner to twenty-six years' imprisonment for ABWIK, twenty-five years' imprisonment for armed robbery, and five years' imprisonment for the weapon. App. 146, ll. 8-15. Unaware that Judge Cothran's sentence exceeded the statutory maximum and was illegal, trial counsel moved to reconsider the sentence for ABWIK, asking to reduce the sentence by one year to twenty-five years' imprisonment. App. 146, l. 25 – App. 147, l. 2; App. 258, ll. 4-14; App. 294-196. Judge Cothran denied the motion. App. 147, ll. 3-9. Judge Cothran stated the "only reason" he "didn't max" Petitioner was because he was young and did not have a significant record. App. 147, ll. 7-9. However, at some point later, Judge Cothran changed Petitioner's sentence to twenty-five years' imprisonment, the statutory *maximum* for ABWIK. App. 294.

Petitioner filed a notice of appeal, which was perfected by Elizabeth A. Franklin-Best. App. 149-157. The only issue raised was whether the judge erred in sentencing Petitioner to twenty-six years' imprisonment for ABWIK because the sentence exceeded the statutory maximum, and was illegal. App. 149-157. The state responded that although Petitioner's sentence was illegal, the issue was not preserved for appeal because trial counsel failed to object. App. 158-167. The Court of Appeals affirmed. App. 168. Remittitur was sent on June 25, 2012. App. 169.

On August 22, 2012, Petitioner filed an application for post-conviction relief (PCR) on August 22, 2012. App. 170-177. On September 5, 2014, Petitioner filed an amendment to his application. Supp. App. 1-3. An evidentiary hearing convened on September 10, 2014, before

the Honorable Clifton B. Newman. App. 184. Daniel F. Gourley, II, represented the state, and Tricia A. Blanchette represented Petitioner. App. 184. During the hearing, Judge Newman agreed to leave the record open for Petitioner to present additional evidence. App. 263, ll. 13-14. On October 2, 2014, Petitioner's counsel wrote to Judge Newman asking the record be closed because the additional witness was unavailable. Supp. App. 5. By an order filed November 15, 2016, Judge Newman denied Petitioner relief from his convictions and sentences. App. 275-291.

After receiving notice of the order denying relief on December 20, 2016, Petitioner served his notice of appeal on January 9, 2017. This petition for writ of certiorari follows.

ARGUMENT

Trial counsel introduced evidence of Petitioner's alleged flight following the shooting incident while cross-examining the lead investigator in violation of Petitioner's right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.

Relevant facts

Only three people testified at Petitioner's trial. The lead detective on the case, Thomas Burgess, was the state's third and final witness. App. 79, ll. 5-7. Burgess described talking to Kelvin and Tasha about the shooting. App. 80, l. 21 – App. 82, l. 23. Burgess revealed that he knew Petitioner as Chips. App. 81, ll. 21-22; App. 87, ll. 19-22; App. 89, ll. 17-20. He told the jurors that the officers who went to the crime scene, but did not testify, "were already talking about 'Chips.'" App. 81, ll. 13-15. After describing the shell casings he allegedly found at the apartment complex, Burgess told the jurors that if law enforcement does not have a gun to use for comparison purposes, then SLED will not accept any shell casings. App. 92, ll. 16-22. He then told the jurors, in response to leading questions by the solicitor, that he had no gun in this case because the police "did not apprehend the suspect for 2 months." App. 92, l. 23 – App. 93, l. 2.

When trial counsel cross-examined Burgess, he queried whether Burgess had said "there were no suspects for two months." App. 99, ll. 4-5. Burgess quickly responded that Trial counsel was incorrect. App. 99, l. 6. Rather, Burgess explained, "I said we did not take him in to custody for 2 months. We were looking for him. And I had to actually have the assistance of marshal services to take him in to custody." App. 99, ll. 8-11. Despite this damning testimony, trial counsel persisted by asking if Burgess misspoke during his testimony on direct examination.

App. 99, ll. 12-13. Burgess repeated that he "never said" the police "had no suspect." App. 99, l. 14. Upon further questioning by defense counsel, Burgess reiterated that he knew who Chips was prior to Kelvin or Tasha identifying anyone from the photo line-up procedures. App. 99, ll. 15-20. Trial counsel then wanted to know how Burgess knew Chips' real identity. App. 99, ll. 21-22. At this, the solicitor objected and a bench conference, which was not recorded, ensued. App. 99, ll. 23-25. When questioning resumed, defense counsel did not continue with that line of questioning. App. 100, ll. 104.

In his amended application for PCR, Petitioner challenged trial counsel's prejudicial deficient performance of "introducing evidence of [Petitioner]'s flight through cross-examination of Investigator Burgess." Supp. App. 1. Petitioner pursued this claim at the PCR hearing. Petitioner testified that trial counsel "put in evidence of [his] flight for two months." App. 214, ll. 14-17. Petitioner knew this evidence was not "favorable" to him. App. 214, ll. 18-19.

Trial counsel explained that Petitioner's trial was called "with no notice." App. 247, ll. 20-23. In fact, he "had no notice of this trial under December 7th," the day before Petitioner's trial. App. 253, ll. 10-14; App. 254, ll. 3-7. Trial counsel so no need to explain the lack of notice to the trial judge because "Judge Cothran knows that because he used to be a solicitor. So, he did also." App. 253, ll. 15-18. He had never made any complaints about lack of notice on the record because he "never thought it was that important." App. 253, ll. 19-24. Incongruously, trial counsel testified that the lack of notice hindered his ability to provide Petitioner with a proper defense. App. 254, ll. 9-13. It was not until the day the case was called and the jury was selected that trial counsel met with Petitioner's mother and went to the crime scene. App. 254, ll. 15-18.

Although he "thought [he] was prepared enough to go to trial," he explained that as a public defender, he did not "get a lot of time sometimes." App. 249, ll. 1-3. Trial counsel elaborated on being a public defender in that county: "The public defender's office consisted of me and maybe the other public defender. We had no secretary; we had no investigator. We had really nothing." App. 252, ll. 11-16. He was aware that if he needed the assistance of an investigator, he could ask the court for funding. App. 252, ll. 17-21. However, in his fifteen years as public defender he had never requested funding for an investigator. App. 252, ll. 6-7; App. 252, ll. 22-24.

He recalled the state had a weak case against Petitioner as it depended solely on the testimony of eyewitnesses. App. 248, ll. 4-21; App. 250, ll. 6-11. His strategy was "to try to impugn the ability of the witnesses to see the victim outside" and "attack the identification" made by the "two witnesses." App. 249, ll. 7-21. According to trial counsel, Petitioner denied robbing Kelvin, but admitted to threatening him. App. 245, ll. 14-17. Kelvin shot Petitioner "several months earlier in the hand, and so there [was] some bad blood between the two of them." App. 245, ll. 18-20. Later, trial counsel claimed that Petitioner said he did not steal anything from Kelvin, but he did hit him. App. 261, ll. 1-7; App. 261, ll. 18-22.

Concerning his question of Burgess regarding the police not having a suspect for two months, defense counsel claimed it was "not intended to elicit the fact that [Petitioner] had fled for two months." App. 251, ll. 12-15. He further claimed Burgess's answer was not in response to his question. App. 251, ll. 16-17.

Denying Petitioner relief based upon trial counsel eliciting evidence of flight during the cross-examination of Burgess, the PCR judge found "the testimony elicited on cross-examination of Burgess was cumulative in nature." App. 287. Specifically, the court pointed to Burgess's

testimony "on direct that they 'did not apprehend the suspect for 2 months.'" App. 287. According to the court it was "clear from the record that trial counsel was merely attempting to clarify Investigator Burgers [sic] comments on direct." App. 287. Thus, the court concluded trial counsel's "actions were reasonable in the circumstances and did not fall below professional norms of reasonableness." App. 287.

Additionally, the court contended Petitioner could "show no resulting prejudice due to trial counsel's alleged deficiencies as there [was] clear evidence of overwhelming guilt." App. 288. Citing Franklin v. Catoe, 346 S.C. 563, 570 n.3, 552 S.E.2d 718, 722 n.3 (2001), the court contended "[w]here there is overwhelming evidence of guilt, a trial counsel's deficient performance will not be prejudicial." App. 288. The court also claimed it was in agreement with what it called trial counsel's "characterization of the state's evidence against [Petitioner] as 'overwhelming.'" App. 288.[3] Concerning this so-called "overwhelming" evidence, the PCR court claimed Petitioner "was positively identified by three separate witnesses" and that "[t]wo of those three witnesses made in court identifications of [Petitioner]." App. 288. The PCR court considered "[e]ven more significant" was trial counsel's claim that Petitioner "admitted guilt during the course of his representation." App. 288.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

[3] Trial counsel never testified that the evidence against Petitioner was "overwhelming."

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. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the fact finding would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). The South Carolina Supreme Court has held "[f]light from prosecution is admissible as evidence of guilt." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 266 (2006). However, "the relevance of flight evidence is premised on a nexus between the flight and the offense charged." State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004). In fact, "[e]vidence of flight should be excluded when the flight is clearly linked to a separate offense for which the defendant is not on trial." Id. Along these lines, this Court held "[u]nexplained flight is admissible as indicating consciousness of guilt, for it is not as likely that one who is blameless and conscious of that fact would flee." State v. Crawford, 362 S.C. 627, 635, 608 S.E.2d 886, 890 (Ct. App. 2005).

"The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999). "It is sufficient that circumstances justify an inference that the accused's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose." State v. Walker, 366 S.C. 643, 655, 623 S.E.2d 122, 128 (2005). However, the Fourth Circuit has determined that when the state resorts to evidence of flight, the state generally has a weak case. See United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976)(stating "[t]he inference that one who flees from the law is motivated by consciousness of guilt is weak at best").

Although this Court has held that evidence of flight is admissible in the above-described circumstances, this Court held that an instruction on flight is inappropriate. State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980). Quoting State v. Jefferson, 524 P.2d 248 (1974), this

Court explained that charges on flight "merely sanction the use of circumstantial evidence" and "place undue emphasis upon that evidence." Grant, 275 S.C. at 407, 272 S.E.2d at 171. Further, this Court explained that "evidence of flight tends to be only marginally probative as to the ultimate issue of guilt or innocence." Id. (quoting Jefferson, 524 P.2d at 248). Ultimately, this Court concluded that "[t]he charge on flight oftentimes has the potential for creating more problems than solutions." Id. at 408, 272 S.E.2d at 171.

The state did not introduce evidence of Petitioner's alleged flight following the shooting. Thus, defense counsel's questioning of Burgess, which revealed that Petitioner was not apprehended by police for two months and that the local police had to seek assistance from the United States Marshall Service, informed the jurors of information they would not have had without defense counsel's blunder. In short, defense counsel opened the door to evidence of flight with his inept questioning.

In State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990), this Court explained "[w]hen the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct." The prosecution is restricted "to showing bad character only for the traits initially focused on by the accused." Id. When Major denied having ever used crack cocaine, the prosecutor was permitted to introduce evidence of a prior conviction for simple possession of cocaine. This Court found Major had made a "clear attempt ... to communicate to the jury that he [was] not the sort of individual who would become involved in the drug trade." Id. at 185-186, 391 S.E.2d at 238. In short, the state was permitted to respond with evidence of Major's previous drug conviction because Major had insinuated to the jury that he was not the type of person who would engage in the drug business. Id. at 186, 391 S.E.2d at 238.

In State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), this Court found a defendant had opened the door to his previous participation in two armed robberies because he had questioned an accomplice regarding prior housebreakings. The accomplice had been charged with the same crimes for which Stroman stood trial. However, the accomplice had entered guilty pleas and agreed to testify for the state. After Stroman questioned the accomplice about prior housebreakings, the prosecutor was permitted to question the accomplice about two robberies in which Stroman was an accomplice. Id. at 512-513, 316 S.E.2d at 398-399. This Court held "'[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.'" Id. at 513, 316 S.E.2d at 399 (quoting State v. Albert, 277 S.E.2d 439 (N.C. 1981)).

In a post-conviction relief case, Vaughn v. State, 362 S.C. 163, 171, 607 S.E.2d 72, 76 (2004), this Court held a defendant was entitled to a new trial based upon the solicitor's improper closing argument where the defendant's attorney had opened the door to invited reply during the defense's closing argument. The defendant's attorney asked the jury to remember that only one officer testified on behalf of the prosecution concerning observing drugs despite the fact that another officer and civilians were present. Id. at 167, 607 S.E.2d at 74. The solicitor then informed the jury she did not present additional witnesses because she did not want to waste the jurors' time. She also stated that the rules of evidence did not permit the presentation of duplicative testimony. She told the jury that if any of the potential witnesses listed by the defendant's attorney would have testified differently than the testifying witness, then the defendant had the ability to subpoena those witnesses to testify. She also stated she did not call the other witnesses because they would have said "the very same thing" that the officer presented said. Id. at 168, 607 S.E.2d at 74.

This Court recognized that improper argument includes vouching for witnesses and initiating argument about the testimony of absent witnesses. Id. at 169, 607 S.E.2d at 75. Additionally, this Court recognized that the defendant "'opened the door' to some response from the solicitor" based on his closing argument concerning the absence of witnesses. Id. at 170, 607 S.E.2d at 75. This Court held that the solicitor's response was unfair and prejudicial in light of the lack of evidence of the defendant's guilt. Id. at 170, 607 S.E.2d at 75-76. Thus, this Court found trial counsel was ineffective for failing to object to the solicitor's closing argument. Id. at 171, 607 S.E.2d at 76.

The Texas Court of Appeals found defense counsel rendered ineffective assistance by opening the door to otherwise inadmissible extraneous offense or bad act evidence. Defense counsel asked if the defendant had ever sexually assaulted anybody, whether he had ever been accused of sexually assaulting anybody, and whether he had been arrested for sexually assaulting anybody. The defendant responded negatively to all three questions. The prosecution then presented a witness who testified that the defendant sexually assaulted her when she was a child. Despite the objection, the trial court ruled the evidence was admissible based upon defense counsel opening the door. Additionally, defense counsel questioned the defendant about a prior arrest for driving while intoxicated and possession of handguns. This allowed the prosecutor to question the defendant about a shooting in his home, two additional arrests for driving while intoxicated, and a statement he made to a doctor about having been arrested seven times for public intoxication. Garcia v. State, 308 S.W.3d 62, 66-67 (Tx. Ct. App. 2009). The Texas Court found that "[g]iven the inherently prejudicial nature of extraneous offense evidence, the fact that the evidence would not have been otherwise admissible by the state during guilt/innocence, and the fact that [the] defense

rested almost entirely on [the defendant's] credibility, there could have been no reasonable trial strategy" for opening the door to the inadmissible evidence. Id. at 68.

In People v. Cyrus, 848 N.Y.S.2d 67 (N.Y. App. Div. 2007), the New York Supreme Court found defense counsel provided ineffective assistance to Cyrus by inadvertently opening the door to a police officer's damaging testimony about the contents of a videotape showing Cyrus leaving the scene of the alleged armed robbery. At trial, Cyrus admitted to committing a larceny, but denied robbing the store clerk with a box cutter. Id. at 71. Two eyewitnesses testified that Cyrus had a box cutter, a box cutter was found on the street, and Cyrus admitted in a statement to having a box cutter. Id. Although the prosecution did not question the officer about the videotape and defense counsel did not investigate the contents of the videotape prior to trial, defense counsel still questioned the officer about the tape. This questioning permitted the prosecutor to ask the officer about the contents of the tape on re-direct. The officer claimed he saw the person in the video raise his right hand, which contained "like sort of a metallic object." Id. at 71-72. The video was not available for trial because the tape in evidence was blank; the officer "guess[ed] the copy was copied wrong." Id. at 72. Subsequently, a second officer testified that the video showed the defendant with a silver object that the officer later knew to be a knife. Id.

The Court found there was no rational justification for failing to investigate the videotape. Defense counsel's failure to investigate the tape "was compounded by counsel's even worse decision to ask [the first officer] about it." "Opening the door to the admission of damaging testimony against the accused, especially when due to a lack of investigation of the facts, has often led to a finding of ineffective assistance of counsel." Id. at 73. The testimony of two officers to having seen a metal object in the defendant's hand on the video provided objective corroboration of the store clerks' testimony. Additionally, the testimony of the officers was "virtually

unimpeachable" due to the destruction of the tape. Due to trial counsel's "one misguided line of questioning," the defense was "obliterated." Id.

Trial counsel's testimony during the PCR hearing revealed he was unprepared for Petitioner's trial. He emphasized, repeatedly, the lack of notice he received from the state concerning the calling of Petitioner's case. Nevertheless, he failed to move for a continuance. Instead, he proceeded forward with little to no investigation or familiarity with the discovery. While the state's case was relatively simply, involved only three witnesses, and virtually no physical evidence, trial counsel was unprepared, as evidenced by his deficient performance. Nowhere was the deficient performance more apparent than in his cross-examination of Burgess. Not only did he not challenge the solicitor repeatedly questioning Burgess regarding his knowledge of Petitioner as "Chips," he elicited testimony that Petitioner absconded from law enforcement and evaded arrest for two months. Shortly after the solicitor underscored that Burgess, a law enforcement officer, very familiar with Petitioner as "Chips," defense counsel used his questioning of Burgess to inform the jury that Petitioner fled the area after the shooting. The questioning revealed that Petitioner's arrest was effectuated only with the assistance of the United States Marshall Service, leaving no question in the jury's mind that Petitioner must have been evading arrest.

Trial counsel rendered deficient performance by eliciting testimony that the state had not presented concerning Petitioner fleeing the area after the shooting. While the evidence was admissible according to state law, the prosecutor had not sought to introduce it. There was no reason for trial counsel to present such damaging evidence to the jury. Contrary to the PCR court's conclusion that the evidence was cumulative, it simply was not as even a cursory review of the transcript revealed. On direct examination, Burgess stated quite simply that the police did not arrest Petitioner for two months after the shooting. Dramatically different, on cross-examination, he told

the jury that Petitioner was not arrested for two months because he had fled and the local police necessitated the assistance of the federal government to effectuate the arrest. Direct examination revealed only that the police had not arrested Petitioner for two months; whereas, cross-examination revealed Petitioner was evading detection. Only the latter scenario suggested Petitioner was guilty.

The state's case against Petitioner was weak. The only witnesses were Kelvin and his wife, Tasha. While the two claimed to be eyewitnesses, claimed to know Petitioner, and claimed to have identified him from photographic line-ups, the two provided very few details of what transpired and very little physical evidence supported their rendition. The only physical evidence supported there was a shooting. There was no physical evidence connecting Petitioner to the shooting. Despite the shooting having occurred at an apartment complex, there were no other witnesses offered by the state. Despite the shooting having occurred in a location where Tasha's sister was allegedly watching from an upstairs window, the state failed to call the sister as a witness. Despite the shooting having occurred where there was video surveillance, the state offered no video of the shooting. To call the evidence against Petitioner "overwhelming" is a mischaracterization of the actual evidence presented and an insult to all cases in which overwhelming evidence actually exists. The presentation of two eyewitnesses is the very definition of a "weak" case, particularly in light of all the exonerations where the evidence used to convict the innocent was eyewitness identification. See State v. Liverman, 398 S.C. 130, 140, 727 S.E.2d 422, 427 (2012)(explaining the United States Supreme Court "acknowledg[ed] that eyewitness evidence is inherently imperfect"); William J. Morgan, Jr., Justice in Foresight: The Past Problems with Eyewitness Identification and Exoneration by DNA Technology, 3 S. Regional Black L. Students Ass'n L.J. 60 (2009).

The PCR judge misconstrued trial counsel's testimony concerning any alleged confession. In the order, the PCR judge surmised that Petitioner confessed to trial counsel. This is belied by the

transcript. According to trial counsel, Petitioner stated he had threatened Kelvin because there was bad blood between the two men, but Petitioner denied shooting and robbing Kelvin. Therefore, this was no confession at all. The PCR judge misconstrued trial counsel's testimony and to the extent, the judge relied upon that misconstruction in arriving at his decision, it must be reversed.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition, but dispenses with briefing, Petitioner respectfully requests this Court reverse the PCR court, vacate his convictions, and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Clifton Newman, Circuit Court Judge

GEORGE SMITH,

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, the Appendix, and Supplemental Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at P.O. Box 11549, Columbia, SC 29211; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on George Smith, #329531, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 2nd day of October, 2017.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of October, 2017.

Courtney Powell (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.