STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Honorable Maite Murphy, Circuit Court Judge

DEMETRIUS D. SMALLS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000850

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find counsel ineffective for failing to contemporaneously object to the judge's curative instruction after a prospective juror, during jury selection, announced that he had been "locked up" with Petitioner?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the jury instruction on mutual combat when there was no evidence that Petitioner agreed upon a gun fight but instead armed himself in self-defense only after a fist fight escalated when others drew a gun first?

STATEMENT

On January 25, 2011, the same day the trial started[1], the Barnwell County Grand Jury indicted Petitioner Smalls for murder and assault and battery with intent to kill [ABWIK], indictments #2011-GS-00065, 66. The Honorable Doyet A. Early, III, presided over the trial. Josh Koger represented Petitioner Smalls. David Miller and Kip McAlister prosecuted the case. Judge Early presided over a Jackson v. Denno hearing on January 24, 2011, and the trial that started on January 25, 2011. The jury found Petitioner guilty of ABWIK and the lesser included offense of voluntary manslaughter. Judge Early sentenced Petitioner to twenty-five (25) years for voluntary manslaughter and concurrent twenty years for ABWIK. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Smalls, 2015-UP-028 (S.C. Ct.App. filed January 15, 2015).

On November 2, 2015, Petitioner filed an application for post-conviction relief [PCR]. On January 29, 2016, the State filed a return. On August 22, 2016, Petitioner filed a first amendment to the PCR application. On September 1, 2016, petitioner filed a second amendment to the PCR application.

On January 26, 2017, an evidentiary hearing was held before the Honorable Maite Murphy. Lance Boozer represented Petitioner at the PCR hearing. Julie Coleman represented the State. In a written order signed March 1, 2017, Judge Murphy denied and dismissed the application. A timely notice of intent to appeal was served on April 10, 2017. This petition for writ of certiorari follows.

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[1] See App. pp.48-49.

ARGUMENTS

1. The PCR judge erred in refusing to find counsel ineffective for failing to contemporaneously object to the judge's curative instruction after a prospective juror, during jury selection, announced that he had been "locked up" with Petitioner.

During jury selection the trial judge asked members of the jury panel, "Any member of the jury panel now or in the past been related by blood or marriage to Demetrius D. Smalls or you now or in the past had a close personal or social relationship with Mr. Smalls, if so, please stand." (App. p. 30, lines 14-17). Juror number 3 answered out loud in front of the entire panel, "Real close to them, personal friend, known the family a long time. Me and him had an incident a couple of years ago where we had been locked up together, and I feel, I feel I would, I feel that I would - - - " (App. p. 34, lines 21-25). The judge excused the juror and then told the jury panel, "Ladies and Gentlemen, the fact, be seated, the fact that this young man mentioned that they were locked up in the past, that ain't got anything to do with this trial. Disregard, disregard that statement. I mean we all grow up sometimes and we may get in it a little. That ain't got anything to do with this case. Just disregard that." (App. p. 35, lines 5-10). Trial counsel did not object to the instruction.

After the jury was selected, Appellant moved to dismiss the jury and the panel based on the comment from the excused juror. Counsel for Petitioner stated, "I do not have the juror number, but, but the comment summarily that there, they were locked up together for a period of time. It is our position that with the whole, with the entire jury panel and the subsequent jury that we selected, that those comments brings about the strong possibility that the jury, that the jury pool was tainted, that it would be prejudicial against my client and subsequently the jury we selected is tainted. So, we would ask that this jury panel and the jury be dismissed. (App. p. 49,

line 24 – p. 50, lines 1-7). The judge denied the motion finding that his curative instruction and other comments to the jury were adequate.

The issue of the judge's refusal to dismiss the entire jury panel was raised on direct appeal. In an unpublished opinion the South Carolina Court of Appeals wrote:

> We find the issue of whether the circuit court erred by failing to dismiss the entire jury panel when during voir dire a prospective juror stated he and Smalls had been previously incarcerated together was not preserved for appellate review because Smalls failed to contemporaneously object to the circuit court's curative instruction. See State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("If the [circuit court] sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured. No issue is preserved for appellate review if the objecting party accepts the [circuit court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial." (citations omitted)).

State v. Smalls, 2015-UP-028 (S.C. Ct.App. filed January 15, 2015).

In the first amendment to the application for post-conviction relief Petitioner sought relief based on the fact that, "Counsel failed to object, move for mistrial and/or preserve for appellate review the fact that during jury selection, one juror openly stated he had been previously incarcerated with the Applicant. A curative instruction was given, however, counsel failed to contemporaneously object to the instruction." (App. p. 635). When asked about why he did not object when the potential juror announced that he had been locked up with Petitioner trial counsel answered, "Well, I didn't want to draw additional attention to it. I mean, basically, it's the type of thing that, you know, he stated it, okay, you don't want to reinforce it in the jurors' mind by making an objection right then before the other jurors in the pool." (App. p. 691, lines 1-6). Counsel testified that he believed that by moving to dismiss the entire jury panel and jury after jury selection that he had preserved the issue for appellate review. (App. p. 693, line 16 – p. 694, lines 1-6). Trial counsel was incorrect.

In the order of dismissal the PCR judge wrote:

> Applicant alleges that Trial Counsel was ineffective for failing to object to a potential juror's comments about being "locked up" with Applicant during jury selection, which led the jury to hold his prior conviction against him. This allegation is meritless.
>
> Trial counsel gave a valid strategic reason for choosing not to object at the time the comment was made. He credibly testified that he chose not to draw the jury pool's attention to the comment by objecting. He objected immediately once he was outside the presence of the jury, he requested a new trial, and the trial court denied his motion but gave a curative instruction. Because Trial Counsel strategically chose not to object and made the appropriate objections once outside the presence of the jury, this Court finds that Trial Counsel was not deficient in his actions.

(App. p. 739). The PCR judge erred. Counsel could have preserved the issue for appellate review without drawing further attention to the issue. Counsel should have immediately asked to approach the bench and moved to dismiss the entire panel based on the comment from the potential juror. If the judge denied the motion at that point, trial counsel then should have contemporaneously objected to the curative instruction and moved for a mistrial. Because counsel could have preserved the issue for appellate review without drawing the jury panel's attention to the prejudicial comment from the potential juror, the purported strategic reason is not valid. When trial counsel untimely moved, outside the presence of the jury, to dismiss the jury and the panel based on the comment from the excused juror, trial counsel still failed to object to the curative instruction and failed to move for a mistrial. There is no strategic reason for failing to object to the curative instruction and move for a mistrial outside the presence of the jury.

The PCR judge additionally found that Petitioner failed to show prejudice from trial counsel's failure to contemporaneously object to the curative instruction writing:

> Furthermore, Applicant can show no prejudice in the lack of contemporaneous objection because the jurors heard about Applicant's prior convictions later at trial. Applicant has a prior cocaine conviction from 2005 which was brought to the jury's attention as admissible impeachment evidence when he took the stand

> to testify, which he had to do in order to advance his strategy of self-defense. This Court finds that, because the jury knew about the conviction anyway, Applicant has not shown any prejudice from the comment made by the potential juror.

(App. p. 739). The PCR judge erred.

The comment about being "locked up" with Petitioner was highly prejudicial because it was made at the very beginning prior to the jurors knowing anything about the case and setting a negative tone indicating that Petitioner had been incarcerated on some other charge. While the jury learned about a prior cocaine conviction from 2005, when Petitioner testified at trial, the questioning was brief and came close to the end of the trial after the jury heard Petitioner's testimony. (App. p. 421, lines 21-23). The jurors may have reasonably concluded that Petitioner was "locked up" with the excused juror on some other charge in addition to the 2005 cocaine charge.

Trial counsel testified at the PCR hearing that he believed the importance of Petitioner's self-defense testimony outweighed the jury learning of the 2005 cocaine conviction. (App. p. 694, line 23 – p. 695, line 1). Petitioner's testimony, however, was not necessary to establish self-defense. Agent Harley with the South Carolina Law Enforcement Division testified that Petitioner gave a statement indicating that he acted in self-defense. (App. p. 345, line 23 – p. 346, line 1). Petitioner's statements were introduced in evidence by the State. (App. p. 168, lines 19-23; p. 175, lines 1-6). Julius Tilley was called as a witness by the defense and testified that after the fist fight between Petitioner and Terrance Mayes ended, Terrance's brother, Zantrell Mayes pulled a gun, cocked the gun and put the gun in Petitioner's face. (App. p. 308, line 13 – p. 309, lines 1-25). Tilley testified that Terrance then came from behind a car and reached in his pocket for a gun. (App. p. 310, line 1 – p. 311, lines 1-20). Zantrell Mayes

admitted pulling a .380 pistol during a confrontation with Petitioner. (App. p. 78, line 1 – p. 79, lines 1-25).

In Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 345–46 (1991), the South Carolina Supreme Court wrote:

> It is well-settled that absent specific exceptions, evidence of other bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Here, evidence that petitioner was previously jailed on unspecified charges was not admissible under any exception. Nor was it admissible as impeachment evidence. See State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). This Court has held evidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper. State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986); see also People v. Bennett, 413 Ill. 601, 110 N.E.2d 175 (1954) (mere proof a party has been arrested is inadmissible). We therefore conclude counsel's failure to object to the repeated reference to petitioner's prior incarceration or to request a curative instruction constitutes deficient representation under an objective standard of reasonableness.

As in Geter, trial counsel's failure to contemporaneously object to the comment by the potential juror that he and Petitioner had been "locked up" together and failure to object to the curative instruction given and move for a mistrial constitutes deficient representation under an objective standard of reasonableness. Unlike Geter, however, Petitioner was prejudiced by the deficient performance. The jury had to determine if Petitioner acted in self-defense and his credibility was a critical factor to be determined by the jury.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was

deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Trial counsel was ineffective in failing to object to the curative instruction as inadequate and failing to move for a mistrial. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. The improper comment by the potential juror and inadequate instruction to disregard the comment occurred prior to jury selection. Petitioner had already been asked to waive the three day notice requirement provided in S.C. Code §17-19-80. (App. pp. 48-49). There is a reasonable probability that if trial counsel had objected when the improper comment was made and when the inadequate curative instruction was given, prior to jury selection and after the three day notice waiver, the judge would have dismissed the entire panel and started over. Instead, trial counsel waited until after the jury was selected to object to the comment and even then failed to object to the curative instruction as inadequate. Alternatively, there is a reasonable probability that, but for counsel's deficient performance, the result of the direct appeal proceedings would have been different, as the issue would have been preserved for appellate review.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to object to the jury instruction on mutual combat when there was no evidence that Petitioner agreed upon a gun fight but instead armed himself in self-defense only after a fist fight escalated when others drew a gun first.

The trial judge instructed the jury as follows:

> The first one, the first element for self-defense to apply, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense. If the defendant voluntarily participated in mutual combat, a fight, for purposes other than protection, the killing of the victim would not be self-defense. This is true even if, during the combat, the defendant feared death or serious bodily injury. However, before the killing is committed, the defendant withdraws and tried in good faith to try and avoid further conflict and either, by word or act, makes the fact known to the victim, he would be without fault in bringing on difficulty.
>
> For mutual combat, there must be a mutual intent and willingness to fight. This intent must be shown by the acts and conduct of the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with a deadly weapon. So, the first element is that the defendant must be without fault in bringing on the difficulty.

(App. p. 517, line 5 – p. 518, line 1). The evidence showed that Petitioner only armed himself with a deadly weapon after Zantrell Mayes pointed a gun at him and he thought Terrance Mayes was reaching for a gun. Trial counsel did not object to the mutual combat instruction. (App. pp. 520-522).

In the first amendment to the post-conviction relief application Petitioner sought relief based on the fact that, "Counsel failed to object to the jury instruction regarding mutual combat as it applied to both alleged victims." (App. p. 635). In the order of dismissal the PCR judge wrote, "Trial counsel testified that the mutual combat charge was given by the trial court not as a separate instruction but as part of the first element of self-defense. He stated that he believed it was a clarification of "bringing about the fault," because the fight between applicant and the

victims earlier in the day could be seen by the jury as "bringing about the fault" two hours later. Trial counsel testified that this confrontation initially began as just a fistfight. He stated that one of the victims produced a weapon and escalated the fight to a new level. He stated that someone then handed Applicant a gun, and applicant shot the victims." (App. p. 736).

The PCR judge denied relief finding that, "Because there was evidence that both Applicant and the victim were armed in this fight, the mutual combat instruction was properly given. Any objection to this instruction would have been overruled. Therefore, this court finds that Trial Counsel was not ineffective for failing to object to this charge. Because Applicant failed to meet his burden in proving deficiency and prejudice, this allegation is denied and dismissed with prejudice." (App. pp. 742-743). The PCR judge erred. The trial judge erred in instructing the jury with the law of mutual combat when there was no evidence Petitioner agreed to participate in a gun fight. Petitioner only armed himself with a gun after Zantrell Mayes pointed a gun at him and he thought Terrance Mayes was reaching for a gun. Trial counsel was deficient in failing to object to the charge.

In State v. Taylor, 356 S.C. 227, 233, 589 S.E.2d 1, 4 (2003), the South Carolina Supreme Court wrote:

> Georgia has limited the application of mutual combat in another way by holding that mutual combat arises only when the parties are armed with deadly weapons, and that mutual combat does not arise from "a mere fist fight or scuffle." Flowers v. State, 146 Ga.App. 692, 247 S.E.2d 217, 218 (1978); Grant v. State, 120 Ga.App. 244, 170 S.E.2d 55, 56 (1969). In both Flowers and Grant, the defendant admitted to killing the decedent, but claimed self-defense. In both cases, the disputes that ended in death began as fist fights, and so the court found the mutual combat charge erroneous. Significantly, the court found that commingling charges on mutual combat and justification was "ipso facto harmful" because "it placed upon the defendant a heavier burden than required" for self-defense. Grant, 170 S.E.2d at 56. The court in Flowers explained, "[t]o charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." 247 S.E.2d at 218.

> We believe the restrictions placed on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas are warranted. These limitations are consistent with the South Carolina cases in which the mutual combat charges given were deemed to be proper: Porter; Graham, and Mathis. As mentioned, mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the "no fault" finding necessary to establish self-defense. As such, it is only logical that the evidence of agreement to fight be plain, like the evidence of mutual combat present in the Porter; Graham, and Mathis cases.

The altercation between Petitioner and Terrance Mayes began as a fist fight. As the Court noted in Taylor, mutual combat does not arise from a fist fight. The parties must agree to fight on equal terms for purposes other than protection.

In the present case there was a prior dispute between Petitioner and Demetrius Mayes, the brother of the injured parties. Petitioner, who was unarmed, pushed Demetrius Mayes in the face. (App. p. 382, lines 1-25). There was no evidence that Petitioner agreed to a gun fight with any of the Mayes family. After the altercation with Demetrius, Petitioner went home and later met with friends. (App. p. 383, line 16 – p. 384-387). While Petitioner met with friends, Demetrius, Terrance and Zantrell Mayes and their sister, Whitney, looked for and found Petitioner. (Tr. p. 387, lines 3 – 25). Terrance and Petitioner fought, hand to hand. (App. p. 388, line 4 – p. 389, 390, lines 1-22). At some point Zantrell intervened and pointed a gun at Petitioner, who was still unarmed. (App. p. 390, line 15 – p. 391, lines 1-19). At the time Zantrell pointed the gun at Petitioner, Petitioner also believed that Terrance had armed himself. (App. p. 395, lines 4-15). It was only after Zantrell Mayes pointed the gun at Petitioner and Petitioner thought Terrance had armed himself that Petitioner obtained a gun to protect himself. (App. p. 395, lines 16-25).

As discussed in Taylor, in State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977), the Court held that "mutual combat precluded a plea of self-defense where Appellant returned to injured

party's property at least twice with a gun despite verbal warnings not to return and accompanying gunshots." Taylor, 356 S.C. at 232, 589 S.E.2d at 4. Unlike Taylor, in the present case the injured parties came looking for Petitioner after the initial altercation with Demetrius Mayes. In State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973), the Court found the "mutual combat charge proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other." Taylor, 356 S.C. at 232, 589 S.E.2d at 4. In the present case Petitioner and Terrance Mayes had a fist fight before Zantrell pointed a gun at Petitioner. Unlike Graham, the parties did not know that the others were armed until Zantrell pointed the gun. In State v. Mathis, 174 S.C. 344, 177 S.E.2d 318 (1934), the Court found the "mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other." Taylor, 356 S.C. at 233, 589 S.E.2d at 4. (Footnote #3 omitted). In the present case Petitioner was not on the lookout for the Mayes. Instead, the Mayes brothers and sister were looking for Petitioner. When they first found Petitioner, neither the Mayes nor Petitioner were armed. In the present case there is no evidence of a mutual agreement to fight on equal terms, with a gun, for purposes other than protection.

In Taylor there was no evidence that the deceased knew Petitioner was armed and there was no evidence of a pre-existing dispute. The Court wrote, "In their determination of mutual willingness to fight, the South Carolina cases discussed emphasize that *each party knew* the other was armed. Here, there is no indication that Kevin knew Petitioner was armed with a knife, and there was no pre-existing ill-will between the parties. Under these circumstances, there is insufficient evidence of mutual willingness to fight to submit the issue of mutual combat to the

jury." State v. Taylor, 356 S.C. 227, 234, 589 S.E.2d 1, 5 (2003). As in Taylor, in the present case there is insufficient evidence of a mutual willingness to fight, in this case with a gun, to submit the issue of mutual combat to the jury. The trial judge in the present case erred in instructing the jury on mutual combat.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Trial counsel was deficient in failing to object to the unwarranted charge on mutual combat. Petitioner was prejudiced by the deficient performance. The unwarranted mutual combat charge prevented the jury from considering self-defense. The unwarranted mutual combat charge allowed the jury to erroneously find that Petitioner was not without fault in bringing on the difficulty because he was willing to participate in a fist fight. As the court in Flowers explained, "[t]o charge on mutual combat, when there is no evidence to support it, effectively cancels the justification defense." 247 S.E.2d at 218. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari and allow further briefing on the issues.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of November, 2017.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Honorable Maite Murphy, Circuit Court Judge

DEMETRIUS D. SMALLS,

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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 a copy of the 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 a copy of the Appendix have been served on Demetrius D. Smalls, #344584, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of November, 2017.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of November, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.