STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable Thomas A. Russo, Circuit Court Judge

DESMOND J. SAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001617

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR judge err in refusing to find appellate counsel ineffective for not arguing on direct appeal that the trial judge erred in refusing to grant a mistrial based on the State's failure to timely disclose videotaped statements by two eye witnesses, failure to timely disclose a video interview of Petitioner and failure to timely disclose a written statement by another witness?

STATEMENT

In October of 2008, the Colleton County Grand Jury indicted Petitioner, Desmond J. Sams, for murder and assault and battery of a high and aggravated nature [ABHAN], indictments #2008-GS-15-370, 371. On January 28, 2009, Petitioner proceeded to jury trial before the Honorable Perry M. Buckner. David Matthews represented Petitioner at trial. Deputy Solicitor Sean Thornton prosecuted the case. The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter and not guilty of ABHAN. Judge Buckner sentenced Petitioner to twenty-four (24) years suspended upon the service of eighteen (18) years with five (5) years of probation.

A timely notice of intent to appeal was filed and the direct appeal perfected. Joseph L. Savitz represented Petitioner on direct appeal. The South Carolina Court of Appeals affirmed the conviction. State v. Sams, Op. No. 2011-UP-205 (S.C.Ct.App. May 4, 2011). Petitioner filed a petition for writ of certiorari in the South Carolina Supreme Court which was granted on October 17, 2012. Tristan Shaffer and Susan Hackett represented Petitioner. Following additional briefing and argument, the South Carolina Supreme Court affirmed the decision by the Court of Appeals. State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014). A petition for rehearing was filed on October 9, 2014, and denied on November 7, 2014.

On March 27, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on October 30, 2015. On October 10, 2017, an evidentiary hearing was held before the Honorable Thomas Russo. James Falk represented Petitioner at the PCR hearing. Ruston Neely represented the State. In a written order signed April 4, 2018, Judge Russo granted post-conviction relief. The State filed a motion to amend and motion to reconsider. In an amended order filed August 17, 2018, Judge Russo denied relief and dismissed the

application. A timely notice of intent to appeal was served on September 4, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find appellate counsel ineffective for not arguing on direct appeal that the trial judge erred in refusing to grant a mistrial based on the State's failure to timely disclose videotaped statements by two witnesses, failure to timely disclose a video interview of Petitioner and failure to timely disclose a written statement by another witness.

A jury found Petitioner guilty of voluntary manslaughter for the fatal choking of Jake "Red" Frazier, Petitioner's friend and first cousin. (App. p. 178, lines 2-6). Petitioner, Frazier, Lisa Strickland and Stephanie Ballard were at Strickland's trailer drinking when an argument turned physical between Petitioner and Frazier. (App. pp. 180-185). Petitioner testified at trial that Frazier accused him of touching Ballard and then Frazier began punching him. (App. p. 181, lines 8-25). Petitioner testified that Frazier "was trying to pull out my windpipe." (App. p. 182, lines 10-12). Petitioner testified that Frazier bit his finger. (App. p. 182, lines 15-20). Petition testified that he was trying to protect himself and restrain Frazier. (App. pp. 184-185). Petitioner testified that he was not trying to kill Frazier. (App. p. 191, line 1). The judge instructed the jury on the law of self-defense. (App. pp. 273-276).

The only issue presented on direct appeal was whether Petitioner was entitled to a jury instruction on involuntary manslaughter. Both the South Carolina Court of Appeals and the South Carolina Supreme Court found that Petitioner was not entitled to an instruction on involuntary manslaughter. In a footnote in the Court of Appeals opinion the Court wrote, "We are disturbed by the brevity of the legal argument in Sams's appellate brief, which consists of less than a page." State v. Sams, Op. No. 2011-UP-205, n. #2 (S.C.Ct.App. May 4, 2011).

In the *pro se* application for post-conviction relief Petitioner alleges, "Due process Brady violation." (App. p. 322). During the PCR hearing trial counsel testified that during the trial,

after Strickland and Ballard testified, he learned that the State had not turned over the videotaped statements from these two witnesses. (App. p. 342, line 1 – p. 343, lines 1-3). Trial counsel had written statements from Strickland and Ballard but not the videotaped statements. (App. p. 345, lines 1-4). In addition to the videotaped statements of Strickland and Ballard, trial counsel also testified that he did not have a written statement from witness Sharon Glover prior to her testimony at trial. (App. p. 344, line 16 – p. 345, lines 1-9). Trial counsel testified that he moved for a mistrial based on the State's failure to timely disclose evidence. (App. p. 342, line 21 – p. 343, lines 1-3).

The trial transcript reflects that Detective Inabinett was called as a defense witness and testified that there were videotaped statements from Strickland and Ballard. (App. p. 169, lines 16-25). The judge held a bench conference and then later the State made the videotaped statements available. (App. pp. 194 – 196). Trial counsel noted that, in addition to the videotaped statements pf Strickland and Ballanrd, the State also failed to disclose a written statement form Sharron Glover. (App. p. 196, lines 18-19). Trial counsel moved for a mistrial. (App. p. 196, line 7 – p. 197, lines 1-3). The judge withheld ruling on the mistrial motion until the next morning after both sides reviewed the videotaped statements. (App. p. 197, lines 4-10; p. 199, lines 1-6).

The next morning trial counsel moved for a mistrial and argued:

> I received tapes yesterday, and through no fault – I could ascertain no fault in the Solicitor's Office[1], but I just got these. I've viewed them, have been provided

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[1] But see Kyles v. Whitley, 514 U.S. 419, 436–40, 115 S.Ct. 1555, 1567–68, 131 L.Ed.2d 490, 508 (1995) (prosecutor can establish procedures and regulations to carry the State's burden of disclosure and to ensure communication of all relevant information on each case to every lawyer who deals with it); State v. Von Dohlen, 322 S.C. at 240, 471 S.E.2d at 693 (information known to investigative agencies may be imputable to prosecutor, but prosecutor has no duty to go on fishing expedition to find exculpatory or impeachment evidence).

> copies, I've viewed them and feel that were I allowed – if this were mistried, I would handle the witnesses differently and I believe there are – made some serious inconsistent statements, in my opinion, on this that would have affected the way I would have handled the witnesses on cross, the first time around, and so, upon that basis, I would ask for a mistrial.

(App. p. 200, lines 15-24). The State stipulated that Petitioner filed all appropriate Brady and Rule 5 motions but argued there was no prejudice. (App. p. 202, lines 3-25). The judge denied the motion for a mistrial but required the State to recall the witnesses to allow re-cross examination based on the videotaped statements. (App. p. 203, line 24 – p. 204, 205, lines 1-18). Both witnesses were re-called and their videotaped statements admitted in evidence. (App. pp. 211-220).

During the PCR hearing trial counsel was asked about the judge recalling the witnesses instead of granting the mistrial motion and trial counsel testified:

> Yeah, I could call the witness, but I – it's – I was really irritated with this. I mean, you – you—you know, it it's somewhat different, it can change the way you shape a case, but it wouldn't necessarily mean you wouldn't want to call the witness that's already testified because they may just confirm a lot of what was already said and reinforce it. And the little points you might have been able to make on cross if you'd had them, is lost, if they're just reconfirming, you know, if it's 90 percent the same and 10 percent difference, that can make a big difference if you're doing it one time. If you're doing it two times, you may be just affirming what they already said, and that's not so hopeful.

(App. p. 347, line 18 – p. 348, lines 1-5).

Appellate counsel also testified at the PCR hearing. When asked if it would distract from the brief to raise more than one issue, Appellate counsel testified:

> No. No, I mean, if there were other – if there were other issues, winning issues that I could have raised that I didn't raise, no. I mean, you know – we lost and the Court of Appeals, you know, wrote in the opinion that I should have written longer briefs. Can't argue with that. So, no, it wouldn't have hurt, it would have been – I mean, there's never a reason to waive a winning issue. I mean, that's always ineffective.

(App. p. 369, lines 4-11). When asked about why he did not challenge the trial judge's refusal to grant a mistrial based on the State's failure to timely disclose evidence, appellate counsel testified that he did not remember this issue and may have missed the issue. (App. p. 371, lines 1-7). Appellate counsel testified, "But as far as any other issues that, you know, that I may have missed. If I missed a winning issue, then I missed it. I didn't abandon any issues of this case for strategic reasons." (App. p. 371, lines 19-22). Appellate counsel missed a winning issue in failing to argue that the trial judge erred in refusing to grant a mistrial based on the Brady violations.

In the order of dismissal the PCR judge wrote:

> In conclusion, because the trial court was able to remedy the failure of the State to disclose the videotapes, this Court finds Applicant was not prejudiced, and the fairness of his trial was preserved. The trial court also acted within its discretion in denying trial counsel's motion for a mistrial. Finally, because appellate counsel is under no duty to raise unsuccessful arguments, and because there is not a reasonable likelihood that the appellate courts would have reached a different outcome had the mistrial issue been briefed, this Court finds Applicant has failed to satisfy the second prong of Strickland as to this ground of his PCR application.

(App. p. 428). The PCR judge erred. Appellate counsel was ineffective in failing to argue on direct appeal that the trial judge erred in refusing to grant a mistrial based on the Brady violations. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an

objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009), the South Carolina Supreme Court wrote:

> A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance.

Appellate counsel's performance was deficient. Based on an objective standard of reasonableness, appellate counsel should have raised on direct appeal the trial judge's refusal to grant a mistrial based on the Brady violations. In Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999), the South Carolina Supreme Court wrote:

> A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution,[3] (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d

490, 505–10 (1995); Brady, 373 U.S. at 87, 83 S.Ct. at 1196, 10 L.Ed.2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985); State v. Von Dohlen, supra.

In the present case the videotaped statements of Strickland and Ballard constituted impeachment evidence that was suppressed by the prosecution. The remedy fashioned by the trial judge did not adequately cure the error because the impeachment value was diluted by not being able to cross-examine the witnesses directly following their testimony. The remedy also did not cure the Brady violation with regard to the video interview of Petitioner. In addition to the two suppressed video statements of Strickland and Ballard, and the written statement of Sharron Glover[2] the State also suppressed a video interview with Petitioner. During the PCR hearing trial counsel testified that the State failed to timely disclose a video interview of Petitioner. (App. p. 349, line 21 – p. 350, lines 1-6). Trial counsel reviewed the suppressed videotaped statements of Strickland and Ballard and the video interview of Petitioner during an evening break **after** the defense presented witnesses and after the defense introduced a photograph of Petitioner's injuries. (App. p. 173, lines 2-13). The next morning Petitioner moved to introduce the video interview of Petitioner in evidence because the video demonstrated the injuries and condition of Petitioner and supported self-defense better than the admitted photograph. (App. p. 206, lines 20-25). Unlike the videotaped statements from Strickland and Ballard that were admitted in evidence, the trial judge refused to admit the video interview of Petitioner. (App. p. 207, 208, 209, lines 1-7; p. 237, line 4 – p. 238, lines 1-14).

The trial judge ruled that the video was cumulative to the photograph that was already in evidence stating, "Let the record reflect that I've reviewed the tape now, and I'd like to say that

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[2] There does not appear to be further argument in regard to the suppressed written statement by Glover.

my review of the tape really does not show with the detail that Mr. Mathews has already been able to demonstrate to the jury, the extent of injuries to his client, like Defendant's Exhibit Number One. So, I certainly see no basis to admit the tape on the basis of showing the injuries, because I think they're clearly shown in the photograph, which is Defendant's Exhibit Number One." (App. p. 237, lines 4-12). During the PCR hearing trial counsel testified that if he had known about the video interview of Petitioner prior to trial he would have had the choice of moving to admit either the video interview or the photograph. (App. p. 350, line 19 – p. 351, 352, lines 1-3). Appellate counsel was deficient in failing to argue that the trial judge erred in refusing to grant a mistrial based on the Brady violations.

Petitioner was prejudiced by the deficient performance of appellate counsel. There is a reasonable probability that, if appellate counsel had argued that the trial judge erred in refusing to grant a mistrial based on the Brady violations, the result of the proceedings would have been different. Petitioner testified that he acted in self-defense. Impeachment of the two eye-witnesses and the video of Petitioner were important in establishing self-defense. The jury deliberated for over three hours and had many questions. (App. pp. 290 – 302). The jury asked to hear Ballard's videotaped statement again and asked for the legal term for voluntary manslaughter. (App. p. 292, lines 10-19; p. 293, lines 3-4). Ballard's videotaped statement was replayed for the jury and the judge recharged voluntary manslaughter. (App. pp. 296 – 299). The jury also asked to see a photo of Frazier after the altercation, asked to hear the 911 calls, asked about the time difference between the start of the fight and the first 911 call, and asked the height and weight of Frazier. (App. p. 293, lines 16-24). As to these questions, the judge simply instructed the jury that they must decide this case based on the evidence presented during the

of the case. (App. p. 295, lines 19-22). The jury returned with a verdict of guilty of the lesser included offense of voluntary manslaughter.

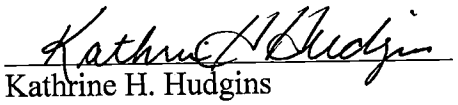
In Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), reh'g denied (Mar. 29, 2018), the South Carolina Supreme Court wrote:

> In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury."). In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. See Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 (stating "a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

Appellate counsel's failure to raise the trial judge's refusal to grant a mistrial based on the Brady violation directly impacted the outcome of the appeal. There is a reasonable probability that, if appellate counsel had argued that the trial judge erred in refusing to grant a mistrial based on the Brady violations, the result of the proceedings would have been different. While an appellate attorney does not have the duty to raise every non-frivolous issue, the appellate attorney is required to provide effective assistance of counsel. In the present case appellate counsel provided deficient performance by missing an issue. Petitioner was prejudiced by the deficient performance.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari in order to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of June, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

Honorable Thomas A. Russo, Circuit Court Judge

DESMOND J. SAMS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Benjamin Limbaugh, 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 Desmond Javon Sams, #332938, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 6th day of June, 2019.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 6th day of June, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022