

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Thomas A. Russo, Circuit Court Judge

ROBERT LEE WRIGHT,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002249

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
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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ISSUES PRESENTED

- I. Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments by abandoning her request for a jury instruction on the defense of accident where the evidence supported such an instruction?
- II. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to testimony regarding toxicology testing and results from the pathologist where the pathologist did not perform the actual toxicology tests and acted as a mere conduit for the results?
- III. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to the state's questioning of Petitioner, which pitted his testimony against the testimony of the state's key eyewitnesses, where the only evidence the state presented to contradict Petitioner's testimony that he acted in self-defense was from those eyewitnesses, making credibility critical?
- IV. Did trial counsel provide ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments by failing to object to inaccurate and misleading portions of the jury instructions?

STATEMENT

Petitioner's mother, Betty Scott, was involved in a romantic relationship with Christopher "Chris" Jenkins for several years. App. 748, ll. 20-21; App. 749, ll. 2-9; App. 773, ll. 1-3. When Betty ended the relationship, Chris vacillated between trying to win Betty's affections back through gifts and expressing his anger by berating her publicly or stealing from her. App. 750, l. 1 – App. 751, l. 9; App. 757, ll. 8-12; App. 758, l. 17 – App. 761, l. 25; App. 764, ll. 14-25; App. 773, ll. 14-16; App. 745, ll. 13-21; App. 747, ll. 4-9.

In April 2010, Petitioner learned that Chris made his mother cry. At the insistence of his grandmother, who was worried about Betty's safety, Petitioner went to talk to Chris. Petitioner found Chris at a nearby basketball court. In April 2010, Petitioner attempted to reason with Chris regarding his behavior toward Betty. App. 775, ll. 2-9; App. 794, ll. 3-14; App. 775, l. 19 – App. 776, l. 3; App. 794, ll. 17-24; App. 798, ll. 3-9. However, Chris was not receptive to Petitioner's intervention; instead, Chris was belligerent and combative. The two men fought for a few seconds with both men walking away uninjured. App. 776, ll. 3 – 12; App. 793, ll. 13-19; App. 795, ll. 1-15.

On June 10, 2010, Petitioner learned that Chris had been bothering Betty that day. App. 752, l. 14 – App. 753, l. 15; App. 763, ll. 9-25; App. 764, ll. 11-18; App. 796, ll. 11-20; App. 797, ll. 3-6; App. 738, ll. 10-19; App. 739, ll. 2-8; App. 739, l. 25 – App. 740 l. 1; App. 740, ll. 11-17. While driving home from his mother's house, Petitioner saw Chris walking down the street. Petitioner stopped his car, got out, and called out to Chris. App. 779, ll. 9-15; App. 783, ll. 3-5; App. 783, ll. 17-22; App. 799, ll. 4-10. Chris reacted by stepping into the street with his fists up. App. 784, ll. 1-9; App. 799, ll. 10-11; App. 799, l. 25 – App. 800, l. 3. Although Petitioner repeatedly told Chris he did not want to fight, Chris continued to approach in a

threatening way. App. 784, ll. 11-25; App. 799, ll. 11-13. The two men then started fighting. This fight, like the previous one, lasted only seconds with both men walking away at the end. App. 785, ll. 2-25; App. 786, ll. 1-6; App. 800, l. 21 – App. 802, l. 6.

Chris walked home and went to bed. App. 556, ll. 1-21; App. 572, ll. 4-8; App. 604, ll. 3-5; App. 611, ll. 6-8; App. 628, ll. 2-7. The following day, Chris appeared to be having a seizure, so his family called for help. Chris was transported to a hospital where he later died. App. 557, ll. 8-10; App. 614, l. 9 – App. 615, l. 6. The pathologist concluded Chris died from blunt force trauma to the chest. App. 705, ll. 4-16. There were almost no external injuries, but Chris suffered ten fractured ribs on his right side and internal bleeding. App. 697, l. 9 – App. 699, l. 1; App. 714, l. 6 – App. 715, l. 14. Had Chris received medical attention more quickly, he would have survived. App. 715, ll. 15-25.

On June 12, 2010, a Charleston County grand jury indicted Petitioner for murder (2010-GS-10-6153). App. 1282-1283. The state, represented by Benjamin Simpson and Jessica Baldwin, called the case for trial before the Honorable Kristi L. Harrington and a jury on February 24, 2014. Lorelle Proctor and Alicia Penn represented Petitioner. App. 472. The judge instructed the jury concerning murder, voluntary manslaughter, involuntary manslaughter, and self-defense. App. 863, l. 3 – App. 869, l. 24. During its deliberations, the jury requested a definition of malice. App. 872, ll. 22-24. In response, the judge re-instructed the jury on malice. App. 873, l. 25 – App. 875, l. 2. Just over one hour later, the jury reached a verdict. App. 875, ll. 7-8; App. 475, ll. 21-22. The jury found Petitioner guilty of murder. App. 876, ll. 4-10. Judge Harrington sentenced Petitioner to forty years' imprisonment. App. 884, ll. 5-9; App. 1284.

On February 27, 2014, Petitioner filed a motion to reconsider sentence. App. 887-888. On that same date, Petitioner filed a motion for new trial. App. 889. By an order filed March 25, 2014,

Judge Harrington denied Petitioner's requests. App. 890. Thereafter, Petitioner filed a notice of appeal. On April 7, 2015, undersigned counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 891-907. On March 3, 2016, the Court denied undersigned counsel's motion to be relieved and directed the parties to brief the following issue: Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether this issue is preserved for appellate review. App. 908. Thus, undersigned counsel filed a brief addressing the question presented by the Court. App. 909-928. On January 11, 2017, the Court of Appeals affirmed Petitioner's conviction, finding trial counsel abandoned her request for a jury instruction on accident. App. 955-956; State v. Wright, 2017-UP-005 (S.C. Ct. App. filed Jan. 11, 2017). Remittitur issued on January 27, 2017. App. 957.

On March 31, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 958-1194. Subsequently, Petitioner, through counsel, filed amendments to his PCR application. App. 1195-1196. The matter proceeded to an evidentiary hearing before the Honorable Thomas Russo on March 1, 2018. App. 1212. Megan Jameson represented the state. App. 1212. James K. Falk represented Petitioner. App. 1212. By an order filed December 6, 2018, Judge Russo denied Petitioner relief. App. 1256-1281.

Petitioner served his notice of appeal on December 18, 2018. This petition for writ of certiorari follows.

ARGUMENT

Introduction

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.

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 factfinder 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.

I. Trial counsel provided ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments by abandoning her request for a jury instruction on the defense of accident where the evidence supported such an instruction.

Relevant facts

Trial

During the charge conference, the state objected to Petitioner's request for an instruction on accident. App. 808, ll. 7-21. Petitioner argued he was entitled to a jury instruction on accident because the evidence showed he did not intend to cause the death of the decedent. Citing State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) for the proposition that in order to charge the law of accident, the evidence must demonstrate the killing was unintentional and that the defendant was acting lawfully, Petitioner argued the evidence showed just that. App. 809, ll. 1-8.

The judge asked Petitioner to explain "the difference between accident and self-defense in this particular case" because the judge was "having a hard time distinguishing between the two." App. 809, ll. 10-15. According to the judge's view, in order to claim self-defense, Petitioner was admitting that he "intended to do that act of defending himself." The judge further expressed that "even if the facts did fit those two are apposite defenses, meaning you can't act in self-defense and

it be an accident.” App. 809, ll. 19-23. Thereafter, the judge asked defense counsel to reconcile the two. App. 809, l. 25 – App. 810, l. 1. Defense counsel responded, “I’m probably not that good, Your Honor, but if the Court is telling me that it’s one or the other in that case we would ask for self-defense.” App. 810, ll. 2-4. The judge indicated she wanted the charge to be “the accurate statement of law based upon the facts as presented.” App. 810, ll. 5-7. Further, the judge stated she did “not know in this scenario how it can be both.” App. 810, ll. 7-8. To this, defense counsel responded, “In that case we would just ask for self-defense.” App. 810, ll. 9-10. Thereafter, the judge announced she would “not be charging accident.” App. 810, l. 14.

During her closing argument, defense counsel argued the case involved “a fight between two grown men.” App. 825, ll. 17-18. Further, defense counsel argued the question before the jury was what Petitioner “thought.” App. 826, ll. 1-2. It was necessary for the jury to “look at the intent, the intent behind the act.” App. 826, ll. 5-6. The jury would be required to examine what Petitioner intended. App. 826, ll. 7-8. According to defense counsel, the evidence showed Petitioner “did not intend to kill Chris.” App. 826, ll. 8-10. Defense counsel told the jury “[i]t never crossed [Petitioner]’s mind that he would be charged with murder because he didn’t mean it. He didn’t mean to kill Chris.” App. 834, ll. 11-13. She told the jury that Petitioner “did not mean for any of this to happen. He never wanted to hurt Chris that bad. He never wanted him to die.” App. 835, ll. 7-9.

Direct appeal

Initially, undersigned counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Petitioner’s behalf. App. 891-907. The issue presented was whether the trial judge erred in failing to instruct the jury regarding the defense of accident. App. 891-907. Subsequently, the Court of Appeals denied undersigned counsel’s motion to be relieved and directed the parties to

brief the following issue: Whether the trial court erred in ruling the defenses of accident and self-defense are mutually exclusive and whether this issue is preserved for appellate review. App. 908. Thus, undersigned counsel filed a brief addressing the question presented by the Court. App. 909-928. The state responded by arguing the issue was not preserved for appellate review because trial counsel withdrew her request for the instruction. App. 929-954. In the alternative, the state argued the trial judge correctly concluded that accident and self-defense are mutually exclusive, despite clear case law to contrary, and that Petitioner was not entitled to the charge of accident because the evidence did not support the charge. App. 929-954. The Court of Appeals affirmed Petitioner's conviction, finding trial counsel abandoned her request for a jury instruction on accident. App. 955-956; State v. Wright, 2017-UP-005 (S.C. Ct. App. filed Jan. 11, 2017). The Court of Appeals expressed no opinion on the merits of the claim. App. 955-956; State v. Wright, 2017-UP-005 (S.C. Ct. App. filed Jan. 11, 2017).

PCR hearing

Trial counsel revealed that her "overall trial strategy" was that Petitioner acted in self-defense or that the death was the result of an accident. App. 1235, ll. 2-6; App. 1240, ll. 1-2. During the PCR hearing, trial counsel indicated she thought "accident would have been appropriate" because "there was this issue of whether or not the strikes were accidental or whether [Petitioner] meant to cause the death." App. 1217, ll. 1-10. Counsel explained "there was no question" the alleged victim "walked away," and Petitioner "walked away" from the altercation. App. 1217, ll. 1-10. Counsel said there was "no doubt in [her] mind that the death was accidental." App. 1235, ll. 7-11. Trial counsel admitted she requested a jury instruction on accident, but also admitted that when the trial judge challenged her on the request for both accident and self-defense, she failed to preserve her request for an instruction on accident. App. 1217, l. 11 – App. 1218, l. 18.

Order denying relief

The PCR judge found trial counsel was not ineffective for failing to preserve her request for a jury instruction on accident because Petitioner “was not entitled to such a jury instruction.” App. 1279. After reciting the elements of accident, the PCR judge found “[t]he first element, an unintentional killing, [was] not met, as the testimony from multiple witnesses and [Petitioner] himself show[ed] that [Petitioner] intended to beat the [alleged] victim.” App. 1279. The PCR judge also concluded that Petitioner’s awareness of the problems between Petitioner’s mother and the alleged victim showed Petitioner’s desire to harm the alleged victim. App. 1279. Thus, the judge concluded the evidence “establishe[d]” Petitioner intentionally attacked the alleged victim. App. 1279.

Turning to the second element, the PCR judge concluded Petitioner was not acting lawfully. App. 1279. According to the PCR judge “[u]nder both versions of the facts, [Petitioner] was committing an assault and battery, a criminal act, at the time of the incident, and was not acting in self-defense because he initiated the contact with the victim and was not in imminent danger when he slammed the victim to the ground.” App. 1279.

Finally, the PCR judge determined Petitioner was not exercising due care in the handling of a weapon – his hands and feet – because Petitioner “used a substantial amount of force to inflict the deadly blows.” App. 1279-1280. Thus, the judge concluded that “[b]ased on the severity of the victim’s injuries, the only reasonable conclusion was that [Petitioner]’s hands and feet were used as deadly weapons with which he did not use due care.” App. 1280.

Discussion

During the prosecutor’s opening statement, he told the jury “the central issue in this case, is that exactly what [Petitioner] had in mind when he violently beat Christopher Jenkins? I don’t

know. *And at the close of this trial you won't either.*” R. 59, lines 3-10 (emphasis added). From the very beginning, the jury was put on notice – by the prosecution – that the evidence was not definitive as to what Petitioner intended to do. Rather, the jury would be required to examine the evidence before it to deduce Petitioner’s intent. Continuing in his opening statement, the prosecutor asked the jury if Petitioner “set out to do violence? Did [Petitioner] set out to hurt someone? If the answer to that question is yes and the person died as a cause of those injuries then the correct verdict is guilty of murder.” R. 59, lines 3-10. Thus, the prosecutor understood that the facts before the jury would require a determination of what Petitioner intended to do, specifically whether he intended to cause harm, the issue at the very heart of the accident defense. Nevertheless, when the time arrived for the jury to make this determination, the defense of accident was not permitted due to the judge’s misapprehension that self-defense and accident were mutually exclusive defenses, and trial counsel’s abandonment of her request for the instruction.

The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). A trial court’s refusal to grant a jury instruction based upon a sound principle of law applicable to the case before the trial court is an error of law. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). If there is any evidence to support a jury charge, the trial judge should give the charge in question. State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); State v. Light, 378 S.C. 641, 648, 664 S.E.2d 465, 468 (2008).

Much of the case law in South Carolina involving the defense of accident includes discussions of the elements of self-defense and how those elements integrate with the defense of

accident. “In South Carolina, the defense of accident requires a showing that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon.” State v. Harris, 382 S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2010); see also State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) (citing Burriss, 334 S.C. at 259, 513 S.E.2d at 106); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994); State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945); State v. Williams, 400 S.C. 308, 316, 733 S.E.2d 605, 610 (Ct. App. 2012).

In the context of a death caused by a gunshot wound, the homicide is excusable as an accident when the evidence shows the defendant was acting lawfully in self-defense and the victim was shot by accident through the unintentional discharge of a gun. Goodson, 312 S.C. at 281, 440 S.E.2d at 372 (citing State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990)). “[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.” Burriss, 334 S.C. at 262, 513 S.E.2d at 108. Thus, a person armed in self-defense is entitled to a charge of accident if the killing was unintentional. Id.

In State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999), this Court affirmed a trial court’s refusal to instruct the jury on accident. The evidence showed Chatman was holding another person in a non-traditional chokehold. Id. at 152-153, 519 S.E.2d at 101-102. Analyzing the requirement that a defendant must act lawfully in order for accident to apply, this Court reasoned that Chatman “was not acting lawfully, since he was engaged in an assault and battery, unless he was acting in self-defense.” Id. at 153, 519 S.E.2d at 102. Thereafter, this Court analyzed the evidence of Chatman’s conduct to conclude he was not acting in self-defense. This Court reasoned “[i]f [the defendant] was not acting in self-defense, then he could not have

been acting lawfully and he was not entitled to an accident charge.” Id. at 154, 519 S.E.2d at 102.

In Tisdale v. State, 378 S.C. 122, 124, 662 S.E.2d 410, 412 (2008), this Court held defense counsel provided ineffective assistance by failing to request an instruction as to accident. Id. At the trial, the defendant testified that when he refused to drive the alleged victim where he wanted to go, the alleged victim began yelling and punched him in the face. Id. Then, the alleged victim pulled a gun. Id. The two struggled over the gun. Id. The gun went off while it was still in the alleged victim’s hand. Id. The defendant testified that the gun was never in his hand. Id. This Court held that evidence indicated the alleged victim was the aggressor as shown by him punching the defendant in the face and presenting a gun. This evidence along with evidence that the gun discharged accidentally supported the charge of accident. Id. at 126, 662 S.E.2d at 412-413.

Contrary to the trial judge’s contention that self-defense and accident were mutually exclusive, the two may work in conjunction. In fact, the Court of Appeals made exactly this point in State v. Williams, 400 S.C. 308, 317, 733 S.E.2d 605, 610 (Ct. App. 2012) by explaining that when the evidence in the record supports both charges, then both must be given. Thus, the trial judge committed a legal error in concluding that accident could not be charged if self-defense were also charged, and trial counsel provided ineffective assistance by abandoning her request and acquiescing in the judge’s erroneous legal conclusion. The judge’s legal error – and trial counsel’s acquiescence in the judge’s flawed reasoning – forced Petitioner to select a single defense. Further, the error prevented the jury from considering a defense supported by the evidence.

Without question, Chris's death was unintentional. The evidence before the jury was that Petitioner was defending himself when he struck Chris. Thus, Petitioner was acting lawfully.

There was no evidence that Petitioner used a weapon so the third requirement of exercising due care in the handling of a weapon is not applicable. However, if this Court were to determine Petitioner's use of his hands during the fight were to qualify as use of a weapon, then Petitioner still exercised due care. Petitioner recognizes that under South Carolina common law, "ordinary objects also may become deadly weapons when the facts indicate that they have been used to inflict serious bodily harm or death." State v. Davis, 309 S.C. 326, 343-344, 422 S.E.2d 133, 144 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). In Davis, 309 S.C. at 344, 422 S.E.2d at 144, the Court held that whether an object had been utilized as a deadly weapon depended upon the facts and circumstances of each case. The pathologist testified the deceased sustained blows to her head caused by being battered against a wall, which were consistent with injuries that a person who had been struck with a heavy object would receive. Additionally, the pressure from strangulation caused the deceased's thyroid gland and a portion of her larynx to hemorrhage. The Court "discern[ed] no reason to distinguish injuries caused by an instrumentality from similar injuries inflicted by a hand or fist." Id. The Court concluded "that a hand or fist may be found by the jury to be a deadly weapon or object, depending upon the manner and means of its use, the wounds inflicted, and other relevant facts." Id. Petitioner's testimony was that Chris approached him in a threatening manner, Petitioner swept his legs forcing Chris to fall, but Chris's momentum forced Petitioner to fall as well. R. 314, lines 2-8. Petitioner "threw punches" and the two men separated. R. 314, line 9. Petitioner's conduct during this fight was not reckless or negligent.

Even if the third element were to be read to require that a person exercise due care more generally, then Petitioner satisfied that element as well. There was no evidence that Petitioner was acting recklessly or negligently when he was fighting with Chris. The evidence established the two fought, the fight lasted mere seconds, and the two walked away from the fight.

Chris's death was an accident, and the judge's erroneous legal conclusion that the defenses of accident and self-defense were mutually exclusive denied Petitioner a just verdict. Trial counsel's abandonment of the request was ineffective assistance in derogation of the Sixth and Fourteenth Amendments.

II. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to testimony regarding toxicology testing and results from the pathologist where the pathologist did not perform the actual toxicology tests and acted as a mere conduit for the results.

Relevant facts

Trial

Nicholas Batalis performed the autopsy on the deceased on June 12, 2010. App. 697, ll. 2-5. The solicitor asked Dr. Batalis if he got the toxicology results "from another trusted source." App. 696, ll. 14-18. According to Dr. Batalis, the samples were sent "to a nationally accredited forensic laboratory" for testing. App. 696, ll. 18-19. When Dr. Batalis got the toxicology report he "would have reviewed them and interpreted them to determine whether they were significant in the death." App. 708, ll. 7-12. He told the jurors that there was no alcohol or narcotics in the deceased's system. App. 708, l. 13 – App. 709, l. 9. Very interestingly, Dr. Batalis indicated that "we tested blood that we obtained at the autopsy." App. 708, ll. 13-15 (emphasis added). Of course, Dr. Batalis had not tested the blood. He also informed the jurors

that “our screen tests for three to 400 different drugs.” App. 709, ll. 10-14. Again, Dr. Batalis vouched for the testing when he had no role in the testing.

PCR hearing

Trial counsel acknowledged the pathologist testified about the toxicology report, but he was not the person who actually performed the tests or wrote the report. App. 1219, ll. 1-20. Trial counsel did not even consider whether the pathologist’s testimony about the results of the toxicology tests created a confrontation clause issue. App. 1219, l. 21 – App. 1220, l. 2. She indicated she did not object to the testimony because she did not “think it was going to be helpful for our defense or that it hurt one way or the other.” App. 1220, ll. 2-5. In short, she did not object because she did not “think it was an issue.” App. 1220, ll. 9-13. Although the toxicology report purportedly for Chris indicated it was for someone of a different race and age, trial counsel was not concerned with the pathologist testifying about the results. App. 1226, ll. 1-14.

According to the toxicology report, Chris had no drugs or alcohol in his system. App. 1226, ll. 15-25. Trial counsel theorized that the state wanted testimony about the report “to show he didn’t have anything else in his system, no drugs, no alcohol.” App. 1227, ll. 1-5. She admitted her case would have been “stronger” if the deceased had drugs in his system. App. 1227, ll. 6-9. The toxicology report supported the state’s theory of the case regarding the fight between the two men. App. 1227, ll. 13-17.

Order denying relief

The PCR judge found trial counsel was not ineffective for failing to object to the testimony of the pathologist regarding the toxicology report. App. 1271. Specifically, the PCR judge found “the testimony in question from Dr. Batalis was proper because he did not act as a mere conduit for the toxicology results, but instead, took samples and interpreted results when

they arrived back from the laboratory for inclusion in his autopsy report.” App. 1271. Thus, the PCR judge found the testimony was not objectionable. App. 1271. Additionally, the PCR judge found Petitioner suffered no prejudice from the testimony because “it had no impact on the jury’s verdict.” App. 1272. According to the PCR Judge “[t]his testimony was ultimately irrelevant and dispositive to the main issue at hand trial counsel was able to fully cross-examine Dr. Batalis on the toxicology results which resulted in favorable testimony for [Petitioner].” App. 1272.

Discussion

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987); Pointer v. Texas, 380 U.S. 400 (1967). The South Carolina Constitution also provides that “[a]ny person charged with an offense shall enjoy the right ... to be confronted with the witnesses against him.” S.C. Const. art. I, § 14.

In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Court has held that statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006); see also State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009). “[I]nterrogations by law enforcement officers fall squarely within [the] class” of testimonial hearsay the Confrontation Clause forbade. Crawford, 541 U.S. at 53. “[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.” Michigan v. Bryant, 562 U.S. 344, 358 (2011).

In Davis, the United States Supreme Court sought to “determine more precisely which police interrogations produce testimony” that is barred by the Confrontation Clause. 547 U.S. at 813. During a 911 call, the victim identified the defendant as her attacker. Id. However, the victim did not testify at trial. Id. at 819. The Davis Court ruled the 911 call was admissible. Id. at 826-30. The Court stated, “A 911 call . . . and at least the initial connection with a 911 call is ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance.” Id. The Court noted an important distinction between calls for emergency assistance and interrogations by the operator about the facts of the incident. Id. at 828-29. The Court stated, “This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot... evolve into testimonial statements once that purpose has been achieved.” Id. at 828 (internal quotations and citations omitted). The Court noted that after the operator told the victim to be quiet and “proceeded to pose a battery of questions,” those statements could be construed as testimonial. Id. at 828-29. The Court noted that trial courts “should redact or exclude the portions of any statement that have become testimonial.” Id. at 829.

As explained by the Court, “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” Davis, 547 U.S. at 822. Conversely, statements “are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Id. However, in Bryant, 562 U.S. at 358, the Supreme Court explained “there may be *other circumstances*, aside from ongoing emergencies, when a statement is not procured with a primary purpose of

creating an out-of-court substitute for trial testimony.” (emphasis in original). When a court makes “the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” Id. at 358-359. According to the Court, “[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.” Id. at 359.

In Bryant, the Court provided “additional clarification with regard to what Davis meant by ‘the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.’” Id. (quoting Davis, 547 U.S. at 822). To make the determination about the primary purpose, the reviewing court must “objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.” Id. Two factors to consider are the location of the police encounter (at or near the scene of the crime versus at a police station) and the time of the police encounter (during an ongoing emergency or afterwards). Id. at 360. Another relevant inquiry is what purpose would reasonable participants have had as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred. Id.

“The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution.” Id. at 361 (internal citations omitted). This is because “the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished,” and “the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.” Id. Like an excited utterance, “[a]n ongoing emergency has a similar effect of focusing an individual’s attention on responding to the emergency.” Id.

Examining whether an on-going emergency existed, the Court explained the inquiry is “highly context-dependent.” Id. at 363. According to the Court, the examination must include whether the threat is to police and the public. Id. “[T]he duration and scope of an emergency may depend in part on the type of weapon employed.” Id. at 364. Even the “medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one.” Id. at 365. Additionally, the “victim’s medical state ... provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim; themselves, and the public.” Id.

However, the Court was quick to note that the presence of these factors does not suggest “that an emergency is ongoing in every place or event just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose.” Id. The evolution from statements to determine the need for emergency assistance to testimonial statements may occur if “a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or ... flees with little prospect of posing a threat to the public.” Id.

Nevertheless, the existence of an “ongoing emergency” is but one factor of determining the primary purpose of the police encounter, which in turn, relates to the testimonial inquiry. Id. at 366. Formality must be considered as well as it “suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past

events potentially relevant to later criminal prosecutions.” Id. at 366 (internal quotation omitted).

“[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.” Id. at 367. The Court explained that if the police tell a victim to tell who committed the crime so that person could be arrested and prosecuted, the victim’s identification of the culprit “appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.” Id. at 368.

The United States Supreme Court analyzed a case similar to the one *sub judice* – testimony regarding a forensic lab report from a witness who did not conduct the actual testing that resulted in the report. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). “The Massachusetts courts admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine.” Id. at 307. The Court was to answer whether those affidavits were testimonial, meaning the affiants were witnesses whose presence was required pursuant to the Sixth Amendment. Id. Police found numerous bags containing a white substance on Melendez-Diaz’s person and in a location where he had been. Id. at 308. The police submitted the evidence to a state laboratory for chemical analysis. Id. During Melendez-Diaz’s trial for distributing and trafficking cocaine, the prosecution presented three “certificates of analysis” showing the results of the chemical testing performed on the evidence at the state lab. Id. The certificates indicated the only key facts necessary for the prosecution of Melendez-Diaz – the weight of the substance and that the substance was cocaine. Id. Melendez-Diaz objected to the certificates as violating his right under the Confrontation Clause. Id. at 309.

The Supreme Court held there was “little doubt” that the certificates fell “within the core class of testimonial statements” described in Crawford. Id. at 310. While the documents were labeled certificates, the documents were “quite plainly affidavits.” Id. The certificates were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” Id. at 310-311 (quoting Davis, 547 U.S. at 830). “[N]ot only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’” but under state law, the sole purpose of the affidavit was to provide evidence of the composition, quality, and net weight of the substance. Id. at 311 (quoting Crawford, 541 U.S. at 52). Thus, the Court held Melendez-Dias was entitled to be confronted with the analysts at trial. Id.

The Court rejected the argument that forensic analysts were excepted from the Confrontation Clause because they conducted so-called “neutral scientific testing.” Id. at 318. The Court explained “[f]orensic evidence is not uniquely immune from the risk of manipulation.” Id. Noting that most laboratories producing forensic evidence are administered by police agencies and report to the heads of those agencies. Id. As a result, the forensic scientists “sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.” Id. (internal quotation omitted). Thus, “[c]onfrontation is one means of assuring accurate forensic analysis.” Id. “Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.” Id. at 319. “Like expert witnesses generally, an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.” Id. at 320.

Particularly important for the case *sub judice*, the Court pointed out that the affidavits submitted against Melendez-Diaz were “bare-bones” stating only that the substance was cocaine.

Id. “At the time of trial, [Melendez-Diaz] did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed.” Id. Such areas are ripe for cross-examination to explore the exercise of judgment and risk of error in the chosen methodology. Id.

Next, the Court rejected the argument that the affidavits were admissible because they were akin to the types of official and business records admissible at common law. Id. at 321. The Court explained that while “[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status,” such documents may not be admitted “if the regularly conducted business activity is the production of evidence for use at trial.” Id. (citing Palmer v. Hoffman, 318 U.S. 109 (1943)). Thus, the analysts’ certificates did not qualify as business or public records. Id. at 321-322.

Confronted with a variation on the issue presented in Melendez-Diaz, the Supreme Court held the Confrontation Clause affords an accused the right to be confronted with the actual analyst who conducted the forensic chemical testing of his blood which was used against him in his driving while intoxicated (DWI) trial – not a “surrogate witness.” Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011). Following an automobile accident involving Bullcoming, the police arrested him for DWI and obtained his blood for chemical testing. Id. at 652. To determine Bullcoming’s blood alcohol level, the police sent the sample to a state lab. Id. at 652-653. The lab produced a standard form identifying the participants in the testing and the forensic analyst’s finding. Id. at 654. The form was certified by the forensic analyst. Id. At Bullcoming’s trial, the state introduced the certified form against Bullcoming as a “business

record” through another analyst who neither observed nor reviewed the actual analyst; the state did not call the actual analyst who conducted the testing and produced the form. Id. at 655.

The Supreme Court held the “surrogate testimony” of the second analyst could not satisfy the Confrontation Clause. Id. at 659-662. The Court rejected the argument that the analyst was a “mere scrivener” of what the gas chromatograph machine generated. Id. at 659-661. For example, the actual analyst’s report indicated the sample arrived intact with the seal unbroken, the sample matched the lab number, that he performed a particular test on the sample, and that he adhered to certain protocol. Id. at 660. These representations were exactly the types of areas for a lawyer to probe on cross-examination. Id. Further, the Court rejected the suggestion that an analyst’s report drawn from machine-produced data overcomes the Sixth Amendment bar because the Constitution requires the reliability of such evidence be tested by the crucible of cross-examination. Id. at 661.

Addressing the argument that the surrogate witness was qualified as an expert witness with respect to the gas chromatograph machine and the lab’s procedures, thus enabling his testimony to satisfy the Confrontation Clause, the Court held the “surrogate testimony of the kind” the witness “was equipped to give could not convey what [the actual analyst] knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed.” Id. “Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.” Id. at 661-662. The Confrontation “Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another’s testimonial statements provides a fair enough opportunity for cross-examination.” Id. at 662.

This Court applied Melendez-Diaz and Bullcoming in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013). Brockmeyer objected to a witness reading into evidence computerized chain-of-custody logs of items that were introduced by the state. Brockmeyer, 406 S.C. at 339-340, 751 S.E.2d at 653. The Court concluded the chain-of-custody records at issue were non-testimonial. Id. at 352, 751 S.E.2d at 660. Reading Melendez-Diaz very narrowly, the Court concluded the chain of custody documents “were not created ‘for the sole purpose of providing evidence against the defendant.’” Id. (quoting Melendez-Diaz, 557 U.S. at 323). Additionally, the Court was persuaded that the documents were not testimonial because they did “not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items.” Id. Thus, the Court concluded “the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their ‘primary purpose’ is not to constitute evidence in a criminal trial.” Id. The statements were “exempt from the Confrontation Clause.” Id.

In a case analyzing the connection between the Confrontation Clause and expert testimony, the United States Supreme Court addressed whether an expert who testified that a DNA profile produced by an outside laboratory matched a profile produced by the state police lab using a sample of the defendant’s blood violated the Confrontation Clause. Williams v. Illinois, 567 U.S. 50, 56 (2012). Writing for four justices, Justice Alito noted that “an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true” as long as the party who calls the expert introduces other evidence establishing the facts assumed by the expert. Id. at 57. The Court carefully crafted the opinion to explain that “this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter

asserted.” Id. at 57-58. “Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause.” Id. at 58.

Very important to the resolution of the Williams case, the Court held the expert did not testify to the truth of the matter concerning the work done by outside laboratory in the case nor did the expert “vouch for the quality of the [outside laboratory]’s work.” Id. at 71. As mentioned, it was critical that the expert’s testimony concerning the conclusions of the outside laboratory was not offered for the truth of the matter, but merely to show what the expert relied upon on arriving at her own conclusions. Id. at 71-72. Finally, and perhaps most significantly, the Court explained its conclusion was dictated by the fact that Williams was tried by a judge, not a jury. Id. at 72.

The Court explained the trier of fact – the judge – would have understood that the expert’s statements regarding the work conducted by the outside laboratory were not offered as substantive evidence. Id. The Court held that if Williams had been tried by a jury “there would have been a danger of the jury’s taking [the expert’s] testimony as proof that the [outside laboratory] profile was derived from the sample obtained from the victim’s vaginal swabs.” Id. “Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could *not* have gone to the jury.” Id. (emphasis added). Where Williams was tried by a judge only, the Court “assume[d] that the trial judge understood that the portion of [the expert]’s testimony ... was not admissible to prove the truth of the matter asserted.” Id. at 72-73.

Recognizing that its opinion had the potential to open the door to abuse – allowing an expert to express an opinion based on factual premises not support by any admissible evidence

and revealing the out-of-court statements on which the expert relied – the Court posited “four safeguards to prevent such abuses.” Id. at 79-80.

First, trial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine “scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue.” Second, experts are generally precluded from disclosing inadmissible evidence to a jury. Third, if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert’s opinion is only as good as the independent evidence that establishes its underlying premises. And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert’s testimony, then the expert’s testimony cannot be given any weight by the trier of fact.

Id. at 80-81 (internal citations omitted).

Particularly helpful for resolution of the case *sub judice* is the Tenth Circuit Court of Appeals’ opinion in United States v. Garcia, 793 F.3d 1194 (10th Cir. 2015). Garcia challenged the admissibility of a “gang expert” whose testimony was based on conversations with gang members. Garcia, 793 F.3d at 1211. Garcia argued the expert’s testimony consisted of parroting testimonial hearsay from those he had interviewed. Id. The Tenth Circuit explained that “[s]pecial considerations arise under the Confrontation Clause in the context of expert testimony.” Id. at 1212. The relevant rule of evidence in federal court, much like the South Carolina rule, permits an expert to rely on testimonial hearsay; however, the rule cannot override the Confrontation Clause. Id. Thus, the Tenth Circuit reasoned that to reconcile the rule and the Confrontation Clause, the expert must exercise independent judgment in assessing and using the hearsay to reach an expert opinion. Id. In this way, “[t]he expert’s opinion will be an original product that can be tested through cross-examination.” Id. (citing United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009)).

In South Carolina, “[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” Rule 703, SCRE. Nevertheless, this Court has held that “merely because testimony does not violate applicable rules of evidence does not necessarily mean it meets constitutional standards.” State v. Hutto, 325 S.C. 221, 221, 481 S.E.2d 432, 433 (1997). Here, Dr. Batalis’s testimony regarding the testing and results of that testing by the unnamed lab violated Petitioner’s right to confront the witnesses against him.

The lab results were testimonial in nature and Petitioner did not have a prior opportunity to cross-examine the author of the statements contained within the lab report. Allegedly, the blood gathered from the deceased during the autopsy was sent to some unnamed lab for testing. The primary purpose of the lab report from the unknown lab was to establish past events that were potentially relevant to later criminal prosecution. The lab report was made under circumstances that would lead an objective witness reasonably to believe that the report, and the statements contained therein, would be available for use at a later trial. While the report was not admitted into evidence, it was clear from the testimony of Dr. Batalis that the report was a formal document.

Dr. Batalis vouched for the reliability of unknown and unnamed lab. In a leading question from the state, he described the lab as a “trusted source.” He elaborated that the lab was “a nationally accredited forensic laboratory.” Later, when describing the testing conducted by the lab, he directly aligned himself with the lab. He even gave misleading testimony by describing himself as someone who tested the blood we tested blood and screened for certain

drugs. Dr. Batalis placed his credibility behind the lab and the analysts. Not presenting the actual analyst prevented defense counsel from cross-examining the analyst on the lack of proper training, any deficiencies in judgment, and the risk of error in the chosen methodology – all areas protected by the Confrontation Clause.

There can be little question that the lab results testified to by Dr. Batalis were offered for the truth of the matter asserted. The results also were not offered simply to explain Dr. Fulcher's analysis or determination for the cause of death. The results were offered to inform the jury of lack of drugs or alcohol in the deceased's system because the uncontradicted evidence was that the deceased was a habitual alcoholic. Thus, unlike the DNA results offered in Williams, supra, the lab results presented in the instant case were offered for the truth of the matter asserted. Additionally, this Court relied heavily upon the fact that Williams was tried by a judge only, not a jury. As this Court explained, had Williams been tried by a jury, the evidence as presented – without the calling of the analyst who arrived at the result relied upon by the other analyst – could not have gone to the jury. Petitioner was tried by a jury, not a judge, who would have been able to discern when evidence was not being offered for the truth of the matter asserted.

Trial counsel's failure to object to Dr. Batalis' testimony regarding the toxicology report was deficient performance prejudicial to Petitioner. The state used the report to show the deceased was not intoxicated to buttress its claim that Petitioner was the aggressor. The report was not "neutral" as trial counsel indicated during her testimony at the PCR hearing. Rather, the report harmed Petitioner's defense, which highlighted the deceased's alcoholism, and supported the state's theory that Petitioner was the aggressor. Trial counsel's failure to challenge Dr. Batalis' testimony on this matter as a mere conduit was error prejudicial to Petitioner's defense.

III. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to the state’s questioning of Petitioner, which pitted his testimony against the testimony of the state’s key eyewitnesses, where the only evidence the state presented to contradict Petitioner’s testimony that he acted in self-defense was from those eyewitnesses, making credibility critical.

Relevant facts

Trial

When the solicitor cross examined Petitioner, the solicitor asked a series of questions pitting Petitioner against his accusers – the three young men who testified for the state. App. 800, ll. 13-20. He asked if Petitioner knew of a reason the men would “make up untruths” about him. App. 800, ll. 13-15. He also asked Petitioner to “admit that a person facing what [he was] facing here this week might have quite a powerful reason to come up with things that are untrue.” App. 800, ll. 16-19.

PCR hearing

At the PCR hearing, trial counsel admitted the state “cross[ed] the line” in questioning Petitioner regarding the testimony of the state’s witnesses. App. 1222, ll. 17-22. Trial counsel candidly admitted she did not know why she did not object and that she simply “missed it.” App. 1222, ll. 21-22.

Order denying relief

The PCR judge concluded the solicitor’s questioning of Petitioner was pitting and improper. App. 1268-1269. However, the judge found Petitioner did not suffer prejudice as a result of the questioning. According to the PCR judge, “[t]he uncontroverted testimony from both [Petitioner] and the state’s witnesses all confirmed that [Petitioner] and the [deceased] were

involved in a physical altercation and that [Petitioner] admitted to flipping the [deceased] onto the ground and intentionally punching [the deceased] three to five times.” App. 1269. Thus, the PCR judge found “the state’s attempt to bring up rather minor discrepancies between [Petitioner]’s version of events and that of the state’s witnesses as ‘untruths’ had no impact on the outcome of the trial.” App. 1269.

Discussion

As the PCR court correctly determined, the solicitor’s questioning of Petitioner was improper as the questioning pitted Petitioner against other witnesses in the case. App. 1268-1269. “It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness.” State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988). Trial counsel’s failure to object to the obvious pitting was deficient performance, as the PCR judge found.

However, the PCR judge incorrectly concluded Petitioner was not prejudiced by the deficiency. Credibility was central to the case. Petitioner testified the deceased was the initial aggressor, which was critical to his defense of self-defense. The three young men claimed Petitioner was the initial aggressor. Where credibility is a critical issue in the case, this Court has held pitting witnesses prejudicial. See State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (holding Bryant was unfairly prejudiced by the improper cross-examination of a solicitor, which pitting Bryant’s testimony against that of a police officer because “[c]redibility was a critical issue in th[e] case”); State v. Sapps, 295 S.C. 484, 485, 369 S.E.2d 145, 145 (1988) (holding the solicitor’s improper questioning of Sapps, which forced him to attack the veracity of another witness, was prejudicial “[b]ecause credibility was the crucial issue in this case”).\

IV. Trial counsel provided ineffective assistance in derogation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments by failing to object to inaccurate and misleading portions of the jury instructions.

Relevant facts

Trial

When instructing the jurors on the elements of self-defense, the trial judge provided the jurors with the first three elements of self-defense, but when she described the duty of a person to retreat, the judge erroneously informed that jurors that:

The final element of self-defense is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance.

The defendant has a duty to retreat if by doing so, the danger of being killed or suffering serious bodily injury would increase.

App. 869, ll. 6-12.

PCR hearing

During the PCR hearing, trial counsel reviewed the erroneous instruction given by the trial judge governing one's duty to retreat. App. 1224, ll. 9-11. Trial counsel admitted it was an incorrect statement of the law. App. 1224, ll. 12-16. However, trial counsel did not object because she did not know it was an incorrect statement of the law at the time. App. 1224, ll. 12-16. In other words, counsel believed one had a duty to retreat even if doing so would expose one to greater danger. App. 1224, ll. 12-16.

Order denying relief

The PCR court admitted the instruction was an incorrect statement of law. App. 1276. Nevertheless, the PCR court found Petitioner could not "establish any constitutional ineffectiveness of counsel because it [was] clear from the record that [Petitioner] could not have

met all four elements of self-defense (namely, fear of imminent danger of death or serious bodily harm).” App. 1276.¹

Discussion

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978); see also State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

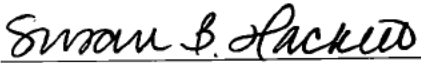
As this Court held in numerous cases, an individual has **no** duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury. State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989); State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955). The judge erroneously charged the jury that Petitioner had a duty to retreat even if by doing so he would increase the danger of dying or suffering serious bodily injury. This issue was

¹ During the charge conference, the state conceded the facts supported the judge instructing the jury on the law of self-defense. App. 807, lines 4-17. Therefore, the state’s argument during the PCR hearing that Petitioner suffered no prejudice from the admittedly erroneous instruction because the evidence did not support self-defense is an inconsistent position. See App. 1254, ll. 2-14.

critical because Petitioner claimed self-defense when he testified. Further, the specific element of duty to retreat was important because the altercation between Petitioner and the deceased occurred on a street. Pursuant to the judge's instruction, Petitioner was required to retreat even if doing so placed him at greater danger. However, just the opposite was true and was necessary for the jury to understand in light of the location of the altercation between the two men. Trial counsel failed to object to the erroneous instruction because she did not know it was erroneous – despite the plethora of case law directing that a jury must be charged that a person has no duty to retreat if doing so would increase the danger. Trial counsel's failure to object was deficient performance prejudicial to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Thomas A. Russo, Circuit Court Judge

ROBERT LEE WRIGHT,

PETITIONER

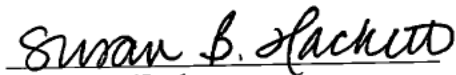
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

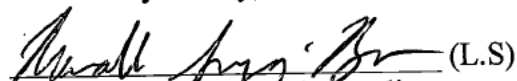
CERTIFICATE OF SERVICE

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 Megan Harrigan Jameson, 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 Robert Lee Wright, #358939, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 8th day of July, 2019.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of July, 2019.

 (L.S)
Notary Public for South Carolina

My Commission Expires: July 26, 2020