STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ON PETITION FOR A WRIT OF CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
The Honorable Doyet A. Early III, Trial Judge

Appellate Case No. 2018-001946

WILLIAM R. PEARSON, ...Petitioner,

v.

STATE OF SOUTH CAROLINA, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED ON CERTIORARI

Petitioner's Statement of Issue Presented

Trial counsel was ineffective for failing to obtain and/or otherwise use law enforcement's dash cam video of Officer Detroit Spire's conversation with Petitioner's son, William James Pearson, Jr., to impeach son's trial testimony implicating Petitioner.

Respondent's Counterstatement of Issue Presented

The post-conviction relief court properly found Petitioner failed to meet his requisite burden of proof to establish trial counsel was constitutionally ineffective for failing to introduce a dash camera video from a law enforcement patrol car of officers talking to Petitioner's son and co-defendant as extrinsic evidence of a prior inconsistent statement because the video was inadmissible under Rule 613(b), SCRE when his son unequivocally admitted to the prior inconsistent statement, thereby rendering the extrinsic evidence inadmissible, and Petitioner could not establish any resulting prejudice because other evidence was properly admitted as to the substance of the video.

STATEMENT OF THE CASE

During its October 2012 term, the Aiken County Grand Jury indicted Petitioner for first-degree burglary (2012-GS-02-01518). App. 257-58. Assistant Public Defender Barry Thompson, II of the Aiken County Public Defender's Office represented Petitioner. App. p. 1. Deputy Solicitor David Miller and Assistant Solicitor Samuel Grimes of the Second Circuit Solicitor's Office prosecuted the case. App. p. 1.

On October 16, 2012, Petitioner proceeded to a jury trial before the Honorable Doyet E. Early, III. App. 1. The jury convicted Petitioner as indicted, and Judge Early sentenced Petitioner to imprisonment for a term of fifteen years.

After the trial, Petitioner filed a timely motion for a new trial. Judge Early denied the motion by a written order filed on January 3, 2014.

Petitioner filed a timely Notice of Appeal, and the appeal was perfected by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission of Indigent Defense – Appellate Defense Division. On appeal, Petitioner raised the following issue:

1. Whether the court erred by refusing to direct a verdict of acquittal on the burglary indictment since there was no direct or substantial circumstantial evidence appellant participated in the burglary committed by his son?

The South Carolina Court of Appeals dismissed Petitioner's appeal, and relieved counsel, after review pursuant to *Anders v. California*[1] on November 19, 2014. *State v. Pearson*, Op. No. 2014-UP-404 (S.C. Ct. App. filed November 19, 2014). The remittitur was issued on October 25, 2017.

On January 23, 2015, Petitioner filed an application for post-conviction relief (PCR). Petitioner raised the following issues:

[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1296 (1967).

1. Ineffective Assistance of Counsel,
    a. Failing to investigate, interview, and call witnesses.
    b. Failing to use the taped phone conversations of co-defendant with Petitioner and various other individuals.
    c. Trial Counsel was ineffective for failing to move for a continuance to allow additional time to subpoena various witnesses.
    d. Failure to object to prosecutors improper remarks.
    e. Failing to object to the "hand of one hand of all."

Respondent filed its return on February 19, 2015, requesting an evidentiary hearing.

On September 18, 2017, an evidentiary hearing convened before the Honorable J. Mark Hayes, II. Petitioner, and trial counsel Barry Thompson, Esquire both testified. At the evidentiary hearing Petitioner proceeded forward with the following allegations:

1. Counsel failed to investigate, interview, and call witnesses.
2. Counsel failed to use the taped phone conversations of co-defendant with Petitioner and various other individuals.
3. Trial Counsel was ineffective for failing to move for a continuance to allow additional time to subpoena various witnesses.
4. Counsel failed to object to prosecutors improper remarks.
5. Counsel failed to object to "hand of one hand of all."

At the evidentiary hearing, Petitioner's counsel introduced a DVD of the dash cam footage of James conversation with Officer Spires into evidence without objection. On February 5, 2018, Judge Hayes issues an Order of Dismissal denying relief and dismissing Petitioner's PCR application.

Petitioner filed a motion to reconsider on February 21, 2018. The State filed their return to Petitioner's motion to reconsider on May 18, 2018. Judge Hayes denied the motion by written order signed on September 21, 2018, and filed on October 8, 2018.

Petitioner timely filed a notice of appeal. On July 8, 2019, Petitioner, through current counsel, filed a *Johnson*[2] petition for writ of certiorari in the South Carolina Supreme Court. Thereafter,

[2] *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

this case was transferred to this Court pursuant to Rule 243(l), SCACR. On April 16, 2021, this Court issued an order denying appellate counsel's request to be relieved, and requesting counsel address the following question:

1. Was trial counsel ineffective for failing to obtain and/or otherwise use law enforcement's dash cam video of Officer Detroit Spires's conversation with Petitioner's son, William James Pearson, Jr., to impeach son's trial testimony implicating Petitioner?

On May 24, 2021, Petitioner, through counsel, filed his petition for writ of certiorari addressing the issue listed above.

STATEMENT OF THE FACTS

On May 28, 2012, Officer Detroit Spires of the New Ellenton Police Department spotted Petitioner and his son, William James Pearson ("James") driving in a Mercury Cougar with the trunk propped open and various items hanging out of the back of the vehicle. App. p. 49, l. 2- p. 51, l. 1. Officer Spires followed Petitioner to Petitioner's home and witnessed Petitioner removing a charcoal grill from the trunk of the vehicle. App. p. 50, l. 25- p. 51, l. 23. Officer Spires asked Petitioner and James where the grill came from, Petitioner did not respond and James stated they bought it from a "guy" who lived around the corner. App. p. 52, l. 4-22. James brought Officer Spires to a residence allegedly belonging to the "guy" they bought the items from, however the resident of the house informed Officer Spires that she had not sold anything to James, and he had not taken anything from her house that day. App. p. 53, l. 14- p. 54, l. 9.

In contrast, Petitioner told a different police officer, Chief Rushton, the items came from a different house located on Sabra Avenue. App. p. 54, l. 13-25. Chief Rushton called Officer Spires and requested he come to the house on Sabra Avenue for a suspected break in. App. p. 54, l. 20-25. Officer Spires testified the window of the house on Sabra Avenue was broken, and that he found a hammer laying on the ground. App. p. 55, l. 18- p. 56, l. 8. Officer Spires testified he spotted a laceration on Petitioner's hand, and blood on Petitioner's shirt. App. p. 58, l. 21- p. 59, l. 3; App. p. 60, l. 19-25. Officer Spires testified no fingerprints were taken from the crime scene, stating it rained on the day of the burglary. App. p. 66, l. 11-20.

At Petitioner's trial, James testified Petitioner helped him commit the burglary. App. p. 68, l. 7-24. James testified he does not have a license, so Petitioner drove James to the house on Sabra Avenue, and helped James carry items from the porch of the Sabra Avenue house to Petitioner's car. App. p. 68, l. 14- p. 69, l. 9. James testified Petitioner went into the house and took various

items from the house. App. p. 70, l. 3- p. 71, l. 9. James testified he initially lied to police about where the items came from. App. p. 72, l. 21; App. p. 77, l. 1-7. James testified he has previously been convicted of lying to the police on two different occasions. App. p. 76, l. 9-15. James testified he initially told police his father did not have anything to do with the burglary. On cross-examination, when asked if he told the police Petitioner did not participate in the burglary he responded "I may have. I may have, yes, sir." App. p. 77, l. 8-18. At Petition's trial, James testified he told the police two different stories through the course of their investigation. When asked if he told the police a different story when it came time to deal with his burglary charge, James admitted to giving inconsistent statements. App. p. 77, l. 8-18. James testified he later told the police Petitioner was involved in the burglary. App. p. 77, l. 15-18. James testified he may have told Petitioner that he would tell the police Petitioner was not involved in the burglary. App. p. 78, l. 1-17. However, James testified he denied telling inmates David Rogier and Jimmy Sikes that his father was not involved in the burglary. App. p. 78, l. 18- p. 79, l. 10.

Sue Ann Beerman, the resident of the Sabra Avenue house, testified the items found in Petitioner and James possession were taken from her home. App. p. 85, l. 5-22; App. p. 88, l. 7-p. 88, l. 16.

Petitioner testified he and James went to the house on Sabra Avenue to look at a rental house for James. App. p. 101, l. 12-18. Petitioner testified he went to the back yard of the house to check the fence behind the house. App. p. 103, l. 10-16. Petitioner testified when he returned from the back yard he noticed one of the windows of the house was broken. App. p. 104, l. 18-24. Petitioner testified he noticed items were placed inside his car. App. p. 105, l. 9-14. Petitioner testified he went and touched the broken window and called for James, who appeared holding a microwave. App. p. 105, l. 15-24. Petitioner testified once James entered his car, he entered the

car and drove to James house with the stolen property. App. p. 105, l. 19- p. 106, l. 16. Petitioner testified he did not enter the house on Sabra Avenue, and did not take anything from inside the house on Sabra Avenue. App. p. 106, l. 19-23. Petitioner admitted he was wrong for driving away with James and a car full of stolen items. App. p. 106, l. 24- p. 107, l. 10. On cross-examination, Petitioner testified he did not know why he touched the broken window. App. p. 108, l. 23- p. 109, l. 4. Petitioner testified he recalls a phone call where he told James that Petitioner broke the window while attempting to get James out of the house. App. p. 109, l. 10-18. Petitioner eventually told Chief Rushton where the items were stolen from. App. p. 113, l. 9-21.

Jimmy Sikes was called to testify as a rebuttal witness at Petitioner's trial. App. p. 93; App. p. 206, l. 10- p. 207, l. 16. Jimmy Sikes testified he was placed in a holding cell with James. App. p. 94, l. 7-18. Jimmy Sikes testified James asked Jimmy Sikes to relay a message to Petitioner, stating "his father had nothing to do with it and he was going to take the rap for everything because his dad was in the car the whole time." App. p. 94, l. 24- p. 95, l. 2; App. p. 96, l. 9-22.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. *Id.* at 179, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly found Petitioner failed to meet his requisite burden of proof to establish trial counsel was constitutionally ineffective for failing to introduce a dash camera video from a law enforcement patrol car of officers talking to Petitioner's son and co-defendant as extrinsic evidence of a prior inconsistent statement because the video was inadmissible under Rule 613(b), SCRE when his son unequivocally admitted to the prior inconsistent statement, thereby rendering the extrinsic evidence inadmissible, and Petitioner could not establish any resulting prejudice because other evidence was properly admitted as to the substance of the video.

Petitioner contends the PCR court erred in finding Petitioner's counsel was not constitutionally ineffective for failing to use law enforcement's dash cam video to impeach his son James's trial testimony. Petitioner claims if counsel had used the inconsistent statements from William James Pearson, Jr. to impeach his testimony at trial there is a reasonable probability that the trial would have been different. However, the post-conviction relief court correctly found Petitioner failed to meet his burden of proof because the video was inadmissible under Rule 613(b), SCRE, where James unequivocally admitting to make the prior inconsistent statement and the result of his trial would not have been different because the contents of the video were already before the jury though the testimony of witnesses. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*, 466 U.S. 668. First, Petitioner must prove counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id., at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.at 117-18, 386 S.E.2d at 625. As the Supreme Court of the United States explained in *Strickland*, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695, 104 S.Ct. at 2068-69, 80 L.Ed.2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." *Id.* at 690.

Trial counsel was not deficient for failing to use the dash cam video of Officer Spire's conversation with Petitioner's son to impeach hiss trial testimony, where the use of the dash cam video was inadmissible as extrinsic evidence for impeachment purposes. Rule 613(b) of the South Carolina Rules of Evidence states:

> Extrinsic evidence of a prior-inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801 (d)(2).

Rule 613(b), SCRE. "A prior inconsistent statement may be admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." *State v. Stokes*, 381 S.C. 390, 398-99, 673 S.E.2d 434, 438 (2009). "it its mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement." *State v. McLeod*, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004). "Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence

proving the statement." *State v. Blalock*, 357 S.C. 74, 80, 591 S.E.2d 632, 636 (Ct. App. 2003). "in determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification." *Id.; See also State v. Bottoms*, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) (when a witness admits unequivocally that a prior inconsistent statement has been made by him, he has thereby impeached himself and further evidence is unnecessary and inadmissible).

In the present case, James was questioned about giving inconsistent statements, and admitted to giving inconsistent statements to police throughout the course of the investigation. App. p. 77, l. 8-18. When initially questioned by trial counsel regarding statements James made to Officer Spires that Petitioner was not involved in the burglary, James stated "I may have. I may have, yes, sir." *Id.* Immediately following this questions James was asked "When it came time to get this charge dealt with for you, you told them something different, correct?" to which James stated "Yes, sir." *Id.* When viewing these responses together, it is evident James unequivocally admitted to giving prior inconsistent statements to police throughout the course of the investigation. James was directly asked if he told the police different stories throughout the course of their investigation and instead of denying his inconsistent statements, or attempting to qualify his prior statements, James unequivocally stated "Yes, sir." App. p. 77, l. 15-18.

Petitioner compared the present case to *State v. Carmack*[3] to support of his argument that James failed to unequivocally admit he made prior inconsistent statements to the police. However, this case differs noticeable from *Carmack.* In *Carmack,* Carmack was charged after a shooting occurred at a party on a farm in Fairfield County. *Carmack,* 388 S.C. 195-96, 694 S.E.2d at 226-

[3] *State v. Carmack*, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010).

27. A bullet was fired into a barn by the defendant which hit multiple partygoers. *Id.* At trial, Carmack's brother testified, and gave an account of the events which provided more detail and slightly different details than the written statement he originally gave to police. *Id.* Carmack's brother testified that his prior statements were "accurate" but alleged that certain details were not in his original statement because "everything was chaotic," and he was not asked about these details when he provided his written statement. *Carmack,* 388 S.C. at 201-02, 694 S.E.2d at 230. The court in *Carmack* held that Carmack's brother did not unequivocally admit making a prior inconsistent statement and therefore the extrinsic evidence of Carmack's brothers written statements were admissible. *Id.*

This case differs from the present case, where Carmack's brother did not admit that he gave inconsistent statements and maintained that his original statement was accurate. However at Petitioner's trial, James admitted that he initially told the police that Petitioner was not involved in the burglary, but when it came time for James to plead guilty he told the police a different story. App. p. 77, l. 8-18.

Additionally, Petitioner has compared the present case to *State v. Fossick*[4] to support his argument that the dash cam footage of James conversation with Officer Spires was admissible. In *Fossick,* Fossick was charged with the murder of a seventeen-year-old coworker named Marilee, after forcing her into the trunk of his car, driving to a wooded area, and attempting to rape her. *Fossick,* 333 S.C. at 68, 508 S.E.2d at 32. Fossick and Marilee's fellow coworker Shane Parker was called to testify at trial regarding a conversation he had with Fossick and Marilee on the day that Marilee was murdered. *Id.* Shane testified he, Fossick, and Marilee, left work shortly after 1:00pm on the day Marilee was killed. *Id.* Shane testified he was driving around a near-by

[4] *State v. Fossick,* 333 S.C. 66, 508 S.E.2d 32 (1998).

neighborhood when he saw Fossick and Marilee's cars parked on the side of the road around 1:30. *Id.* Shane testified he spoke with Fossick and Marilee briefly before driving away. *Id.* On cross-examination Shane was questioned about a statement he made to an ex-girlfriend and a friend, Lee Keeffe, after Marilee's death, where Shane alleged said "I killed that bitch. I will kill you too." *Id.* at 68-69, 508 S.E.2d at 33. Shane expressly denied making this statement to his ex-girlfriend. *Id.* Defense counsel proceeded to call Keeffe to testify that he witnessed Shane tell his ex-girlfriend "I killed that bitch and I'll kill you." *Id.* The court in *Fossick* held the proffered extrinsic evidence was admissible under Rule 613(b) to impeach Shane's credibility because Shane expressly denied making the statement. *Id.* at 69-70, 508 S.E.2d at 33. However the court held that the trial courts error in excluding this evidence was harmless because Fossick confessed to committing the murder before trial and led police to the murder weapon. *Id.* at 70, 508 S.E.2d at 34.

The present case differs from *Fossick,* since James expressly admitted making inconsistent statements to police throughout the course of their investigation. In *Fossick,* Shane expressly denied making the statement in question, where in the present case James admitted to giving differing statements to the police regarding Petitioner's involvement in the burglary. App. p. 77, l. 8-18.

Petitioner has alleged James failed to unequivocally admit to making the prior inconsistent statements, and used *Carmack*, and *Fossick,* in support of his position that the dash cam footage was admissible. However, unlike *Carmack*, where Carmack's brother claimed his written statement was "accurate" and attempted to qualify why his testimony differed at trial, and *Fossick,* where Shane unequivocally denied making the alleged statement, James unequivocally admitted to giving inconsistent statements to police. Therefore, since James unequivocally admitted making inconsistent statements, extrinsic evidence of James's prior inconsistent statement would not be

admissible under Rule 613(b) of the South Carolina Rules of Evidence for impeachment purposes. Accordingly, trial counsel cannot be deficient for failing to attempt to introduce an inadmissible video into evidence.

Additionally, Petitioner cannot establish any requisite prejudice because there is no reasonable probability the result of the proceeding would have been different had counsel attempted to introduce the video. To establish prejudice in regards to ineffective assistance of counsel, an applicant must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693). As the Supreme Court of the United States explained in *Strickland*, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695, 104 S.Ct. at 2068-69, 80 L.Ed.2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

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.").

Petitioner, in alleging trial counsel's actions prejudiced Petitioner, compares the case at hand with *Rutland v State*[5]. In *Ruthland,* Ruthland was convicted of murder, possession of a firearm during the commission of a violent crime, and pointing a firearm. *Ruthland,* 415 S.C. at 572, 785 S.E.2d at 350-51. Ruthland was romantically involved with the victim's estranged wife, Peele. *Id.* at 573, 785 S.E.2d at 351. On the day of the shooting, Ruthland and Peele drove to the "Bow Wow Boutique" to inquire about purchasing a car from an employee, Kimberly Kestner. *Id.* While Ruthland was at Bow Wow Boutique, the victim arrived and was subsequently shot and killed by Ruthland. *Id.* The only individuals at the boutique at the time of the shooting were Ruthland, the victim, the victim's wife, and Kestner. *Id.*

Prior to the trial, Kestner gave a written, signed, statement to police stating the victim was armed when Ruthland shot him. *Id.* At trial, Kestner testified she had a good view of the victim as he walked into the boutique and the only thing she saw in his hands was a pack of cigarettes. *Id.* Kestner further testified she heard two gunshots and after the victim was shot she witnesses Ruthland holding a handgun and saw a second handgun on the floor. *Id* at 574, 785, S.E.2d at 351-52.

At Ruthland's PCR hearing, Ruthland argued trial counsel was ineffective for failing to cross-examine Kestner about her prior inconsistent statements and her written statement to police. *Id* at 575, 785, S.E.2d at 351-52. Ruthland's trial counsel agreed Kestner's testimony was important as she was the only disinterested and objective witness to the shooting, he was aware of her prior inconsistent statements before the trial, and his failure to use the prior statement to police was due to his "oversight." *Id.* The PCR court denied relief finding trial counsel's performance

[5] *Ruthland v. State,* 415 S.C. 570, 785 S.E.2d 350 (2016).

was deficient, but Ruthland failed to prove he was prejudiced by trial counsel's performance. *Id* at 575-76, 785, S.E.2d at 351-52.

On appeal, the South Carolina Supreme Court found Ruthland's trial counsel's performance prejudiced Ruthland. The Supreme Court in *Ruthland* found Petitioner produced a written copy of Kestner's statement to law enforcement, along with affidavits from individuals attesting to have heard Kestner state the victim was armed at the time of the shooting. *Id* at 577, 785, S.E.2d at 353. Ruthland admitted to shooting the victim but maintained his actions were in self-defense. *Id* at 577-78, 785, S.E.2d at 353. Both Ruthland and Peele testified the victim entered the boutique and brandished a handgun, and the only other witness to the shooting was Kestner. *Id.* The Supreme Court in *Ruthland* stated "had trial counsel discredited Kestner's testimony by raising the prior inconsistent statements on cross-examination, Kestner's credibility at trial would have suffered." *Id.* The court in *Ruthland* found "there is a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting." *Id.* at 578, 784 S.E.2d at 353-54.

In the present case, Petitioner has failed to show prejudice, where the dash cam video was inadmissible under Rule 613(b) SCRE, where trial counsel confronted James regarding inconsistent statements made to police, and where trial counsel attacked James credibility through defense witness Jimmy Sikes. Furthermore, the State presented strong evidence of Petitioner's guilt outside of James testimony at trial.

First, as discussed above, the video was inadmissible under Rule 613(b), SCRE, so it would not have been played for the jury. Furthermore, the substance of the tape was already presented to the jury. Officer Spires testified when he initially approached Petitioner and James regarding the

items inside the vehicle, James stuttered and stated he bought the items from "a guy." App. p. 52, l. 4-7. Officer Spires testified he did not believe James, and the look of shock on James face raised a red flag in Office Spires mind. App. p. 52, l. 12-14. James brought Officer Spires to a residence allegedly belonging to the "guy" they bought the items from, however the resident of the house informed Officer Spires that she had not sold anything to James, and he had not taken anything from her house that day. App. p. 53, l. 14- p. 54, l. 9. Ultimately, Officer Spires was advised by Chief Rushton that Petitioner had led Chief Rushton to the house on Sabra Avenue where the burglary occurred. App. p. 54, l. 13-25. However, at Petitioner's trial, James testified that not only did he participate in the burglary at the house on Sabra Avenue, but Petitioner also participated. App. p. 68, l. 3-24. James further admitted to giving inconsistent statements to police through the course of the investigation, and ultimately admitted to telling the police a different story when it came time for James to plead guilty to burglary. App. p. 77, l. 8-18.

Moreover, trial counsel proceeded to contradict James's trial testimony through the use of defense witness Jimmy Sikes. At Petitioner's PCR hearing, trial counsel testified he thought James "was the biggest liar I've ever seen on the witness stand." App. p. 206, l. 8-10. Trial counsel testified he used Jimmy Sikes as a defense witness at trial to "show the jury that the guy was lying." App. p. 206, l. 10-11. Trial counsel further testified, after speaking with his investigator, he felt that Jimmy Sikes had the best testimony of Petitioner's possible defense witnesses, and Sikes testimony would be enough to rebut James's trial testimony. App. p. 207, l. 6-16. Jimmy Sikes testified at Petitioner's trial that he spoke with James while both individuals were incarcerated, and stated that James admitted his father had nothing to do with the burglary and James was going to "take the rap for everything because his dad was in the car the whole time." App. p. 94, l. 24- p. 95, l. 2.

Finally, the State presented strong evidence of Petitioner's guilt. Despite Petitioner's claim that James's testimony was crucial to the State's case, the State had ample circumstantial evidence which could have lead a reasonable jury to convict Petitioner at trial. At Petitioner's PCR hearing, trial counsel indicated he believed a jury could have convicted Petitioner without James's testimony. Trial counsel indicated he believed Petitioner could have been convicted "Based on the car filled with stuff stolen from the house; there's the broken window. Mr. Pearson has his hand cut. The police get there right as the car is pulling up with all of the stolen stuff into the backyard of the house." App. p. 215, l. 13-17. Though trial counsel indicated he did not believe the State's case would have been as strong without the testimony of James, trial counsel believed it was possible a jury could have convicted Petitioner based on the circumstantial evidence presented at trial. Petitioner, at trial admitted to driving James and himself to the house on Sabra Avenue where the burglary occurred. App. p. 101, l. 12-18. Petitioner testified he recalls a phone call where he told James that Petitioner broke the window while attempting to get James out of the house. App. p. 109, l. 10-18. Petitioner further admitted he was wrong for driving away with James and a car full of stolen items. App. p. 106, l. 24- p. 107, l. 10. Officer Spires testified the window of the house on Sabra Avenue was broken, and that he found a hammer laying on the ground. App. p. 55, l. 18- p. 56, l. 8. Officer Spires testified he spotted a laceration on Petitioner's hand, and blood on Petitioner's shirt. App. p. 58, l. 21- p. 59, l. 3; App. p. 60, l. 19-25.

Based on the testimony of Petitioner, and the circumstantial evidence presented at Petitioner's trial. In conjunction with trial counsel's belief that a jury could have convicted Petitioner without the testimony of James, Respondent contends Petitioner has failed to show there is a reasonable probability the result of Petitioner's trial would been different if trial counsel had impeached James's testimony with the dash cam video. Therefore, Petitioner has failed to show

his trial counsel was constitutionally ineffective for failing to use prior inconsistent statements made by Petitioner's co-defendant James to impeach James testimony at trial.

CONCLUSION

For the foregoing reasons, this Court should deny this certiorari and affirm the decision of the PCR court. Should this Court grant certiorari, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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September 22, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ON PETITION FOR A WRIT OF CERTIORARI TO AIKEN COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
The Honorable Doyet A. Early III, Trial Judge

Appellate Case No. 2018-001946

WILLIAM R. PEARSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Victor R. Seeger, Esquire
vseeger@sccid.sc.gov

This 22nd day of September, 2021.

s/Michael J. Neubauer
MICHAEL J. NEUBAUER
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RECEIVED
Sep 22 2021
SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

September 22, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: **William R. Pearson v. State of South Carolina**
Appellate Case No. 2018-001946

Dear Ms. Kitching:

Enclosed please find the original Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

s/ Michael J. Neubauer
Michael J. Neubauer
Assistant Attorney General
SC Bar No. 104450

MJN/ks
Enclosures

cc: Victor R. Seeger, Esquire