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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Charleston County

Thomas A. Russo, Circuit Court Judge

ROBERT LEE WRIGHT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002249

BRIEF OF PETITIONER

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ISSUES PRESENTED

- I. 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?

- II. 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?

- III. 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. 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. On July 8, 2019, Petitioner filed his petition for writ of certiorari raising four issues for review. This Court granted certiorari as to Questions 2, 3, and 4 on September 29, 2021, which have been renumbered to 1, 2, and 3 in the brief for ease of reference. This brief follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue presented. The appellate courts defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, the reviewing court examines questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

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

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 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.

The toxicology results contradicted testimony from witnesses that the deceased abused alcohol, which trial counsel elicited. Timeka Jenkins, the deceased’s sister, admitted the deceased had a problem with alcohol and had had seizures previously as a result of his addiction. App. 618, ll. 21-24. In fact, the family had called EMS for the deceased previously. App. 618, l. 25 – App. 619, l. 1. According to Timeka, the deceased was experiencing “[a]lcohol withdrawal” shortly before his death. App. 619, l. 25. Even the deceased’s mother confirmed

the deceased had an alcohol problem and experienced seizures during withdrawal. App. 637, ll. 9-21.

Betty Scott, Chris's former girlfriend and Petitioner's mother, informed the jury that she wanted Chris to get some help for his alcoholism, particularly because he was "falling out." App. 768, ll. 1-12. Chris would "fall real hard and stop breathing" at times. App. 768, ll. 15-20. She learned these were seizures resulting from Chris's alcohol abuse. App. 768, l. 21 – App. 769, l. 1.

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-Diaz 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 the 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).

The plurality concluded that even if the outside lab’s report had been introduced for its truth, there was still no violation of the Confrontation Clause. Id. at 81-82. The plurality reformulated the test derived from precedent by stating that the abuses that prompted the adoption of the Confrontation Clause shared two characteristics – “they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct” and “they involved formalized statements such as affidavits, depositions, prior testimony, or confessions.” Id. at 82. Turning to the case before it, the plurality determined the outside lab’s report “viewed objectively, was not to accuse [Williams] or to create evidence of use at trial.” Id. at 84. Rather, the “primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [Williams], who was neither in custody nor under suspicion at that time.” Id.

Justice Thomas concurred with the result.¹ Id. at 103 (Thomas, J., concurring). He reached this conclusion “solely” because the outside laboratory’s statements “lacked the requisite formality and solemnity to be considered testimonial.” Id. at 103-104 (internal quotations omitted) (Thomas, J., concurring). Justice Thomas rejected the argument that the outside laboratory’s statements – that it produced a male DNA profile from the swabs – were introduced to show the basis for the expert’s opinion and not for their truth. Id. at 104 (Thomas, J., concurring). As he explained, “there was no plausible reason for the introduction ... other than to establish their truth.” Id. (Thomas, J., concurring). The testifying expert opined that the defendant’s DNA profile matched the male profile derived from the swabs by the outside laboratory. Id. at 107-108 (Thomas, J., concurring). The testifying expert relied on the outside laboratory’s out-of-court statements; therefore, the validity of the testifying expert’s opinion ultimately turned on the truth of the outside laboratory’s statements. Id. at 108 (Thomas, J., concurring). He warned against allowing hearsay simply because an expert provides some opinion based on that hearsay. Id. at 110 (Thomas, J., concurring).

Having concluded the evidence was offered for its truth, Justice Thomas examined whether the evidence was testimonial for purposes of the Confrontation Clause. Id. (Thomas, J., concurring). According to Justice Thomas, the Confrontation Clause reached only formalized testimonial materials, such as depositions, affidavits, and prior testimony, or statements resulting from formalized dialogue, such as custodial interrogation. Id. at 111 (internal quotations omitted) (Thomas, J., concurring). He then determined the outside laboratory’s report lacked the

¹ Justice Breyer concurred as well; however, he concurred in the plurality’s opinion in full. Williams v. Illinois, 567 U.S. 50, 99 (2012) (Breyer, J., concurring). In light of Justice Thomas concurring, but not in full, his opinion is generally viewed as the concurring opinion. United States v. Turner, 709 F.3d 1187, 1189 n.1 (7th Cir. 2013) (referring to Justice Thomas’ opinion as the concurrence because Justice Breyer concurred in full).

solemnity of an affidavit or deposition because it was not sworn or a certified declaration of fact. Id. (Thomas, J., concurring). The report did not contain an attestation that its statements accurately reflect the DNA testing processes used or the results obtained. Id. (Thomas, J., concurring). Naïvely, Justice Thomas rejected the dissent’s warning that prosecutors would elude the Confrontation Clause by using informal extrajudicial statements against the accused if his position were adopted as the majority. Id. at 113 (Thomas, J., concurring).

Justice Thomas rejected the notion that for a statement to be testimonial it need only survive the primary purpose test. Id. at 113-114 (Thomas, J., concurring). Instead, he required testimonial statements also exhibit formality and solemnity so as not to be divorced from history. Id. at 114 (Thomas, J., concurring). Nevertheless, he noted the “shortcomings of the original primary purpose test pale in comparison ... to those plaguing the reformulated version” suggested by the plurality. Id. (Thomas, J., concurring). He remarked that the “new primary purpose test asks whether an out-of-court statement has ‘the primary purpose of accusing a targeted individual of engaging in criminal conduct.’” Id. (Thomas, J., concurring). Justice Thomas found no “grounding in constitutional text, in history, or in logic” to this formulation. Id. (Thomas, J., concurring).

The four dissenting justices remarked that the plurality opinion authored by Justice Alito is actually a dissent because “[f]ive Justices specifically reject every aspect of its reasoning and every paragraph of its explication.” Id. at 120 (Kagan, J., dissenting) (referring to Justice Thomas stating he shared the dissent’s view of the plurality’s flawed analysis). The dissent explained that Justice Thomas concurred in the result based upon his view that the report was nontestimonial on a different rationale than the plurality, “[b]ut no other Justice joins his opinion or subscribes to the test he offers.” Id. (Kagan, J., dissenting).

Agreeing with Justice Thomas, the dissent also determined the outside lab's report was hearsay as it was offered for the truth of the matter. Id. at 126 (Kagan, J., dissenting). The dissent differed with Justice Thomas, however, on the question of whether the outside lab's report was testimonial. Id. at 133-134 (Kagan, J., dissenting). The dissenting justices criticized Justice Thomas' approach for granting constitutional significance to minutia. Id. at 139 (Kagan, J., dissenting). The fact that the outside lab's report was not marked as a certificate amounted to only a "nickel's worth of difference." Id. at 139 (Kagan, J., dissenting). Adopting Justice Thomas' approach "would turn the Confrontation Clause into a constitutional geegaw – nice for show, but of little value." Id. at 140 (Kagan, J., dissenting). "The prosecution could avoid its demands by using the right kind of forms with the right kind of language." Id. (Kagan, J., dissenting). In doing so, the prosecution would "turn the Confrontation Clause upside down" by introducing evidence – not excluded by the Confrontation Clause – simply by not requiring any sort of certification, which would likely make the evidence less reliable. Id. The dissent ultimately held the prosecution used the testifying expert as a conduit for the report of the outside lab. Id. at 123 (Kagan, J., dissenting).

Discerning the import of Williams has plagued courts and scholars. See e.g., id. at 141 (Kagan, J., dissenting) (remarking that the plurality and Justice Thomas' concurrence only create significant confusion); Stuart v. Alabama, 139 S. Ct. 36 (Mem.) (2018) (Gorsuch, J. dissenting from the denial of certiorari) (remarking that Williams "yielded no majority and its various opinions have sown confusion in courts across the country"); Chavis v. Delaware, 141 S. Ct. 1528 (Mem.) (2021) (Gorsuch, J. dissenting from the denial of certiorari) (same); United States v. Turner, 709 F.3d 1187, 1189 (7th Cir. 2013) (stating "the divergent analyses and conclusions of the plurality and dissent sow confusion as to precisely what limitations the Confrontation

Clause may impose when an expert witness testifies about the results of testing performed by another analyst, who herself is not called to testify at trial”). Typically, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” Marks v. United States, 430 U.S. 188, 193 (1977). Finding the position taken by the Members who concurred in the judgments on the narrowest grounds is no small feat here. See Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (acknowledging “there are cases in which the Marks test is more easily stated than applied to the various opinions supporting the result”); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 66 (1996) (providing that a decision is “of questionable precedential value” when “a majority of the Court expressly disagree[s] with the rationale of the plurality”); see also King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (explaining that “[t]he Marks rule presupposes, however, that the narrowest concurrence will represent a ‘common denominator’ rationale” and “[i]f one opinion ‘does not fit entirely within a broader circle drawn by the others,’ the Marks approach ceases to function as it was intended, and adhering to it in such circumstances would ‘turn a single opinion’ to which ‘eight of nine Justices do not subscribe’ into law”).

“The problem with Williams, as the Second Circuit Court of Appeals has aptly observed, is that the Court made it impossible to identify the narrowest ground because the analyses of the various opinions are irreconcilable.” State v. Sinclair, 210 A.3d 509, 522 (Conn. 2019) (referring to United States v. James, 712 F.3d 79, 95 (2d Cir. 2013)); see also State v. Dotson, 450 S.W.3d 1, 68 (Tenn. 2014) (explaining the “fractured decision” “provide[d] little guidance and [was] of uncertain precedential value because no rationale for the decision – not one of the three proffered tests for determining whether an extrajudicial statement [was] testimonial –

garnered the support of a majority of the Court”); State v. Michaels, 95 A.3d 648, 665-666 (N.J. 2014); The four dissenting justices advised lower courts to continue to use Melendez-Diaz and Bullcoming until a majority of the Supreme Court reversed them.² Williams, 567 U.S. at 141 (Kagan, J., dissenting). Most courts examining this issue have followed the dissent’s advice. See e.g., James, 712 F.3d at 95-96; Sinclair, 210 A.3d at 522; Commonwealth v. Yohe, 79 A.3d 520, 554 (Penn. 2013) (distinguishing Williams and being guided by Melendez-Diaz and Bullcoming); State v. Kennedy, 735 S.E.2d 905, 916 (W. Va. 2012) (viewing Williams “with caution” and applying Melendez-Diaz and Bullcoming to resolve the issue presented). While others have tried to make sense of it all by concluding that a “statement is testimonial at least when it passes the basic evidentiary purpose test plus either the plurality’s targeted accusation requirement or Justice Thomas’s formality criterion.” Young v. United States, 63 A.3d 1033, 1043-1044 (D.C. 2013); State v. Dotson, 450 S.W.3d 1, 69 (Tenn. 2014); see also State v. Deadwiller, 834 N.W.2d 362, 373-374 (Wisc. 2013) (applying the plurality decision and Justice Thomas’ decision because Deadwiller and Williams were in substantially identical positions); Commonwealth v. Brown, 139 A.3d 208, 218 (Penn. 2016) (gleaning that the Confrontation Clause is not violated when an expert expresses his or her independent conclusions based upon his or her review of inadmissible evidence).

Recently, this Court held an expert’s testimony violated the Confrontation Clause because she had no independent basis for her testimony where the testifying expert served as the peer reviewer for the non-testifying analyst. State v. McCray, 413 S.C. 76, 89-90, 773 S.E.2d 914, 921-22 (Ct. App. 2015). The testifying DNA analyst in McCray “merely served as a

² Additionally, the plurality decision in Williams v. Illinois, 567 U.S. 50 (2012) may best be understood as applying only to bench trials, which was one rationale offered by the plurality for why the evidence did not violate the Confrontation Clause – it was not offered for its truth and would have been understood by the trier of fact – the judge – as not offered for its truth.

conduit for introducing the results of DNA tests that were performed by an expert who did not testify.” Id.; see also Matter of Bilton, 432 S.C. 157, 163-167, 851 S.E.2d 442, 445-446 (Ct. App. 2020) (remarking that if the case were a criminal matter, “the error would not be debatable” because a testifying expert may not act as a conduit or surrogate for someone else’s scientific analysis and holding the error violated due process where the state’s expert testified as to a test performed on Bilton that she neither administered nor observed).

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 off 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, the South Carolina Supreme 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. Batalis' 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, the Supreme Court relied heavily upon the fact that Williams was tried by a judge only, not a jury. As the 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.

Despite the state's insistence that Dr. Batalis interpreted and incorporated the toxicology results the necessary for the completion of an autopsy into a report, this was not a case of an expert offering his independent judgment based in part upon reliance upon the inadmissible toxicology report. Cf. United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009). Rather, Dr. Batalis was a conduit for the toxicology report. Dr. Batalis simply parroted the out-of-court testimonial toxicology report. The Fourth Circuit Court of Appeals determined that “an expert's use of testimonial hearsay is a matter of degree” and the question for the court to resolve is whether the expert is “giving an independent judgment or merely acting as a transmitter of testimonial hearsay.” Id. Here, Dr. Batalis merely transmitted the information from toxicology report to the jury.

Although Dr. Batalis was equipped to interpret the lab results for his purposes related to the autopsy, he was not equipped to give the testimony that would have been necessary from the lab technician who performed the actual tests – what the analyst knew, what the analyst observed about the testing, and the particular test used. 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.

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.

In light of the negative toxicology report, trial counsel resorted to questioning Dr. Batalis about the body's ability to metabolize alcohol. Dr. Batalis did not "know exactly when the incident occurred but if it was a number of hours before that he died he could have digested or metabolized any alcohol that was in his system." App. 716, ll. 1-11. After trial counsel provided Dr. Batalis with a timeline, he testified that the timeframe would allow time to metabolize alcohol. App. 716, ll. 17-20. However, the questioning allowed him to qualify his answer to eliminate the possibility that the deceased had an "extremely high level" of alcohol in his system. According to Dr. Batalis, "If there's an extremely high level in his system at that time even after metabolism there would still be some left but certainly if it was a lower level he could have metabolized it." App. 716, l. 22 – App. 717, l. 1. He clarified that because the body stops

metabolizing alcohol when a person dies, the deceased did not have alcohol in his system when he died on June 11 even though the autopsy was not performed until the following day. App. 717, ll. 2-6.

Dr. Batalis noted Chris's liver steatosis, meaning there were extra fat cells accumulating over it. App. 717, ll. 12-14. While this condition could be caused by chronic ingestion of alcohol, it could also be caused by other drugs and even medical conditions. App. 717, ll. 12-20. He admitted that if Chris steatosis were caused by alcohol ingestion, it would require "a fairly heavy amount ... more than just one occasion," but he could provide no additional details. App. 717, l. 21 – App. 718, l. 1.

The negative toxicology report forced trial counsel to curtail how she used the deceased's alcohol ingestion in her closing argument. Specifically, trial counsel constrained herself to two comments. She noted Chris was an alcoholic and experienced seizures as a result of his alcoholism. App. 830, ll. 22-25. The detrimental effect of the toxicology report meant trial counsel did not request a jury instruction tailored to the specific circumstances including intoxication by the deceased. See State v. Day, 341 S.C. 410, 418, 535 S.E.2d 431, 435 (2000) (holding "[a] self-defense charge is erroneous where the trial court fails to charge on elements of the defence which were applicable to the issues raised by the defendant" and the instruction given was incomplete because it failed to include that the defendant had the right to judge the conduct of the deceased more harshly than otherwise because of the deceased's drug consumption"); see also State v. Hendrix, 270 S.C. 653, 660-661, 244 S.E.2d 503, 507 (1978)(including the intoxication of the deceased under its analysis of the imminent peril element of self-defense and stating intoxication would provide a basis for the defendant to judge the conduct of

his adversary more harshly than otherwise). Trial counsel's failure to challenge Dr. Batalis' testimony on this matter as a mere conduit was error prejudicial to Petitioner's defense.

II. 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. Pitting witnesses involves asking a witness to attack another witness’s credibility. See Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998); State v. Brown, 297 S.C. 27, 28-29, 374 S.E.2d 669, 670 (1988); State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988); State v. Harriott, 210 S.C. 290, 298, 42 S.E.2d 385, 388-389 (1947); State v. Daise, 421 S.C. 442, 458-459, 807 S.E.2d 710, 718 (Ct. App. 2017); State v. Benning, 338 S.C. 59, 63, 524 S.E.2d 852, 855 (Ct. App. 1999). “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.” Sapps, 295 S.C. at 486, 369 S.E.2d at 145-146. Trial counsel’s failure to object to the obvious pitting was deficient performance, as the PCR judge found. The state conceded this point as well. Ret. at 21.

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").

The state argued Petitioner suffered no prejudice as a result of the solicitor's improper pitting because Petitioner was pitted against multiple witnesses for the state instead of a single witness. Ret. at 20. The state characterized the differences between Petitioner's testimony and the testimony from the three young men as "minor discrepancies." Ret. at 21. The discrepancies between Petitioner's testimony and the men were anything but minor. The solicitor's closing argument provides the best example of how the testimony was drastically different. Referring to the three juvenile witnesses, the solicitor told the jurors that the three told "substantially the same story that this man came up behind Christopher Jenkins and body slammed him to the pavement." App. 838, ll. 3-7. According to the solicitor, Petitioner "grabbed him just like the boys showed [the jury] and slapped him down to the pavement punching, punching and then finished with stomping, stomping to the degree that scared a child." App. 838, ll. 10-13.

Importantly, the solicitor used his improper pitting in his closing argument. He reminded the jurors that he asked Petitioner, "What reason would these children have to make up stories about you?" App. 838, l. 25 – App. 839, l. 2. He reminded the jurors that Petitioner did not know why the juveniles would lie about him. App. 839, l. 2. Unabashed, the solicitor continued to embrace his improper pitting of witnesses when he recalled how he asked Petitioner, "Well, don't you admit that a person in your situation might have a reason not to tell the truth, might have the most powerful reason you could imagine not to tell the truth?" App. 839, ll. 3-6.

Giving “credit” to Petitioner for his answer, the solicitor explained that Petitioner admitted that he did. App. 839, ll. 7-8. Thereafter, the solicitor argued to the jury that Petitioner was lying:

I can’t imagine any more powerful reason to tell 12 people something that didn’t happen than to be where [Petitioner] sits today. Five witness[es]. Three tell you one story, one tells you a different story, the one with the most powerful motive to lie.

App. 839, ll. 11-16.

Again, credibility was critical to resolution of the central issue before the jury – whether Petitioner acted in self-defense. Petitioner admitted to fighting with Chris, but he claimed he did so only in self-defense. Thus, the central question for the jury was whether Petitioner acted in self-defense. Petitioner’s testimony presented a case for self-defense, but the three young men contradicted his testimony and, if believed, would defeat his claim of self-defense. By failing to object, trial counsel allowed the solicitor to pit Petitioner against the three young men and destroy the credibility of her own client. No greater prejudice could inure to a criminal defendant than to have his credibility lost.

III. 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.

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 SC. 45, 46, 317 S.E.2d 452, 453 (1984).

As the South Carolina Supreme 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. The state admitted the instruction was erroneous. Ret. at 22. Yet, the state argues Petitioner suffered no prejudice as a result of the erroneous instruction because his conduct did not satisfy the elements of self-defense. Ret. at 22-23.

As an initial matter, 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. Furthermore, the state's argument demonstrates a fundamental misunderstanding of the defense of self-defense. According to the state, "Petitioner was not prejudiced because he could not have met one of the elements of self-defense, let alone *proving* all of them." Ret. at 22 (emphasis added). In the state's view, Petitioner was required to prove all of the elements of self-defense. To the contrary, the law requires the state disprove self-defense beyond a reasonable doubt. State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). The burden is squarely on the state, not Petitioner. The state's prejudice analysis is flawed by this fundamental misunderstanding of the burden of proof at trial as shown by its consideration of the evidence in the light most favorable to the state.

This issue was 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.

Contrary to the state's contention on appeal, Petitioner was not at fault in bringing on the difficulty. See Ret. at 22. Admittedly, Petitioner stopped to speak to the deceased about the ongoing dispute between the dispute and Petitioner's mother. Petitioner's desire to talk, which he made clear to the deceased repeatedly, was in no way bringing on the difficulty. He did not

provoke the deceased or initiate the assault. Petitioner did not engage in any act in violation of the law and reasonably calculated to produce the occasion that amounted to bringing on the difficulty. See State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (explaining that a person who provokes or initiates an assault may not invoke self defense and that “[a]ny act of the accused in violation of the law and reasonably calculated to produce the occasion amounts to bringing on the difficulty”). Importantly, the state conceded this element at trial. In fact, the solicitor said, “the elements of self-defense, one, is the defendant was without fault in bringing on the difficulty. Again, after looking in the light most favorable to the defendant he said he was merely going to talk. Of course, I don’t believe that to be the case but if that is accepted that is some evidence.” App. 807, ll. 4-12.

Although Petitioner did not testify that he was in fear of serious bodily injury or death, such direct testimony is unnecessary, contrary to the state’s assertion. See Ret. at 22. Petitioner testified that the deceased approached him with his fists raised. Petitioner testified the deceased wanted to fight him. The jury could infer from these circumstances that Petitioner was in fear of serious bodily injury or death. See State v. Hendrix, 270 S.C. 653, 658 n.1, 244 S.E.2d 503, 505 n.1 (1978) (explaining that a defendant “may rely upon the circumstances of the case to show he actually was in imminent danger of losing his life or suffering serious bodily injury”). While the deceased may have only raised his fists, and not a tangible item, the jury could have determined the deceased’s fists were deadly weapons that placed Petitioner in fear of serious bodily injury or death. See State v. Bennett, 328 S.C. 251, 262-263, 493 S.E.2d 845, 851 (1997) (noting that whether a hand or fist may be considered a deadly weapon depends on the factual circumstances in the context of murder and armed robbery). Again, the state conceded at trial that Petitioner

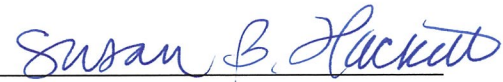
was in actual danger of serious bodily injury or death or reasonably believed he was in such danger.

In the PCR proceedings, the state claimed Petitioner could have avoided the danger by walking away or going to his nearby car. Ret. at 23. However, Petitioner's testimony showed he only wanted to talk to the deceased to settle the dispute between the deceased and his mother. Petitioner believed the deceased would act reasonably and speak to him as the two men had been friends for many years. It was only when the deceased was within striking range of Petitioner that Petitioner understood the deceased had one objective – to fight Petitioner. This realization occurred when Petitioner could not retreat as doing so would only increase the danger, which was the very point on which the judge erroneously instructed the jury. See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989) (explaining that an individual has no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury). Yet again, the state conceded at trial that evidence showed Petitioner had no other probable means of avoiding the danger than to act as he did.

Trial counsel failed to object to the undisputedly 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 hold trial counsel provided ineffective assistance of counsel in derogation of the Sixth and Fourteenth Amendments and order a new trial for Petitioner.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of November, 2021.