

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Jul 13 2022

S.C. SUPREME COURT

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Certiorari to Spartanburg County

Honorable William A. McKinnon, Circuit Court Judge

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MARK ALLEN BRADBERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001449

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JOHNSON PETITION FOR WRIT OF CERTIORARI
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ISSUE PRESENTED

Did the post-conviction relief judge err by finding trial counsel was not ineffective when counsel failed to elicit testimony from Petitioner concerning why Petitioner did not call 911 when he discovered his mother's body, specifically he feared being treated as a suspect based on his prior experience with law enforcement after the tragic death of his son from a firearm accident, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the jury would have acquitted Petitioner if it had known this history?

STATEMENT OF THE CASE

In October 2014, Petitioner lived with his mother, Connie Bataille, in Pacolet, South Carolina. App. 283, ll. 24-25. He found his mother dead on the night of October 29, 2014. App. 284, ll. 8-10. When Petitioner returned home that evening, his mother's bedroom door was closed. App. 288, ll. 22-25. Bataille usually went to bed early and would fall asleep watching television in bed. App. 288, ll. 16-16-21. Petitioner started watching a movie in his bedroom. He was drinking beer. App. 285, ll. 7-9. He eventually walked to the front porch where he kept empty cans. App. 287, ll. 8-12. When Petitioner stepped onto the porch, he kicked a metal object on the ground. App. 287, ll. 13-16. He discovered it was the strike plate for the front door, the metal plate screwed to a door frame necessary for a door to properly latch. App. 290, ll. 8-12. The strike plate had fallen off the door frame and was on the ground between the wooden front door and the glass storm door. App. 287, ll. 13-125. Petitioner knew the strike plate "wasn't supposed to be like that." App. 287, ll. 13-16; App. 290, ll. 5-12. He was "confused why it would be there." App. 291, ll. 10-12.

Concerned, Petitioner went to check on his mother. He opened her bedroom door and found her "laying there all bloody on the bed." App. 291, ll. 14-15. She was covered by a blanket and there were papers thrown on top of her. App. 292, ll. 15-25. Petitioner "could see her feet hanging out." App. 291, l. 17. He touched her and found she was cold. App. 291, ll. 16-18. He knew she was dead. App. 291, l. 19. Petitioner "didn't know what to do." App. 291, ll. 14-20. He was in shock and panicked. App. 291, ll. 19-21. He stood in the room with his mother for a couple of hours. App. 293, ll. 7-15. Despite having a phone, Petitioner did not call the police. App. 293, ll. 16-19. He knew "whoever called first" became "a suspect" and he was afraid of being falsely accused. App. 293, ll. 18-24.

The next morning, still mourning the recent loss of his son and traumatized by the sight of his deceased mother, Petitioner left the residence in his mother's car. App. 291, ll. 22-24; App. 294, ll. 7-23. His own car was unreliable and he only drove it around town. App. 296, ll. 9-18. Petitioner ended up in Myrtle Beach, the last place where he spent time with his deceased son. App. 294, ll. 20-23.¹ Overcome with grief at the loss of his son and now his mother, he decided to commit suicide. App. 294, ll. 18-23; App. 295, l. 25 – 296, l. 8. Petitioner planned to jump off the pier to drown, but he lacked the courage. App. 296, ll. 19-24. He also tried jumping off the roof of his hotel, but was unable to go through with it. App. 296, ll. 19-24; App. 297, ll. 2-12. Petitioner even drafted a last will and testament and wrote letters to his family regarding his desire to die. App. 145, l. 20 – 146, l. 2; App. 239, l. 17 – 241, l. 4; App. 257, l. 25 – 258, l. 13.

Unable to kill himself, Petitioner returned to Spartanburg County several days later. App. 297, ll. 22-24. He went to the home of a friend, but the friend did not answer when he knocked on the door. App. 298, ll. 14-20. Petitioner returned to his car and swallowed approximately thirty pills, including Klonopin, again attempting to commit suicide. App. 298, l. 22 – 299, l. 10. The strong prescription medicine rendered him unconscious. App. 299, ll. 11-12. The next thing Petitioner remembered was being in the county detention center. App. 299, ll. 13-23.

On November 2, 2014, Bataille's daughter-in-law, Karrie Looney, and adult granddaughter, Emily, went to Bataille's home to check on her because no one in the family had heard from her for several days. App. 104, ll. 15-21; App. 105, ll. 8-14; App. 106, ll. 2-11.

¹ On his way to Myrtle Beach, Petitioner stopped at BI-LO in Spartanburg, where he picked up his prescription medicine. App. 153, l. 25 – 156, l. 21; App. 295, ll. 19-21. Petitioner also sold some jewelry at a local pawn shop. App. 167, ll. 16 – 168, l. 21; App. 294, l. 24 – 295, l. 18. In Columbia, Petitioner stopped at a gas station, where he used Bataille's debit card to withdraw four hundred dollars. App. 179, l. 21 – 180, l. 11; App. 245, l. 8 – 246, l. 2; App. 317, ll. 3-6.

Upon their arrival, the two women found Petitioner's car in the driveway, but Bataille's car was gone. App. 106, ll. 16-25. They rang the doorbell and knocked but no one answered. App. 108, ll. 10-11. They eventually entered the house with a key. App. 107, l. 25 – 108, l. 11. Everything in the home appeared as usual until the women opened Bataille's bedroom door. App. 108, l. 12; App. 109, ll. 6-15. Upon opening the door, Looney was "completely mesmerized by the mess." App. 109, ll. 14-16. Generally, Bataille was "very clean and ... very tidy." App. 109, l. 17. There were drawers pulled out, clothes on the floor, and papers everywhere. App. 109, ll. 21-23. While standing in the doorway, Emily saw a foot. The women immediately left the home and called 911. App. 109, l. 24 – 110, l. 15.

When the police arrived, they found Bataille, who was dead, lying on her bed. App. 236, l. 23 – 237, l. 2. Upon learning that Petitioner lived in the home and was not there, he became the prime suspect in Bataille's death. App. 237, l. 21 – 238, l. 9. The blood evidence collected from the home matched Bataille, except for one spot of blood found on Petitioner's bedroom door, which matched Petitioner. App. 211, l. 4 – 213, l. 18; App. 265, ll. 7-23.

The following day, the police learned Petitioner was asleep in a car at a residential address. App. 239, ll. 1-5. The officers raced to the location and found Petitioner inside the car. App. 239, ll. 6-9. The police got him out of the car, interrogated him at the scene, and transported him to the sheriff's office, where he was interrogated again. App. 239, ll. 10-13. The police charged Petitioner with the death of his mother.

The autopsy revealed Bataille died as a result of multiple stab wounds and incised wounds with blunt force trauma to the head. App. 277, l. 20 – 278, l. 2. According to the pathologist, who performed the autopsy on November 3, 2014, the decomposition was consistent with Bataille dying three to six days prior to the autopsy. App. 269, l. 21 – 270, l. 14.

A Spartanburg County Grand Jury indicted Petitioner on February 9, 2015 for murder, armed robbery, and possession of a weapon during the commission of a violent crime. App. 508-511. His case was called to trial on June 20, 2016 before the Honorable J. Derham Cole, and a jury. App. 1. Solicitor Barry Barnette represented the state and Robert Hall represented Petitioner. App. 1. On June 22, 2016, the jury found Petitioner guilty as indicted. App. 378, ll. 8-23. He was sentenced to life without parole for murder, thirty years for armed robbery, and five years for the weapons offense. App. 382, l. 21 – 383, l. 13.

The Court of Appeals dismissed Petitioner’s appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Bradberry, 2018-UP-018 (S.C. Ct. App. filed January 10, 2018); App. 402-403. On January 14, 2019, Petitioner filed an application for post-conviction relief (PCR). App. 404-410. The state filed a return to this application on April 19, 2019. App. 411-426. With the assistance of counsel, Petitioner filed an amended application on August 17, 2020. App. 427-428. An evidentiary hearing was held on September 14, 2021 before the Honorable William A. McKinnon. App. 429-430. Assistant Attorney General William Ray represented the state. App. 430. Susannah Ross represented Petitioner. App. 430.

Petitioner testified at the evidentiary hearing that his son was tragically killed a few years before his mother’s death from a firearm accident. App. 448, ll. 8-18. Petitioner explained that he and his son were “target practicing” and his son dropped a pistol “and it shot him right in the chest.” App. 441, ll. 5-9. The bullet pierced his son’s heart. App. 441, ll. 7-9. Petitioner called 911. App. 441, ll. 18-19. Despite emergency medical treatment, his son died. App. 441, ll. 16-24. Petitioner explained that he was investigated as a possible suspect by law enforcement after his son’s death. He was questioned and his hands were swabbed for gunshot residue. However, he was not charged with any offenses related to his son’s death. Afterward, Petitioner was

diagnosed with post-traumatic stress disorder (PTSD) and prescribed medication to manage his illness. App. 441, l. 25 – 442, l. 1.

Petitioner testified at the PCR hearing that, if permitted, he would have told the jury about his prior experience concerning the death of his son and being treated as a suspect afterwards. App. 443, l. 15 – 444, l. 5. He would have explained that he did not call 911 after he found his mother's body because he was afraid he would be accused of killing her. App. 450, ll. 12-25. Moreover, Petitioner asserted that when he called 911 after his son was accidentally shot, his son was still alive. However, when he found his mother's body, she was already dead and he knew he could not help her. App. 451, ll. 1-13.

Robert Hall, Petitioner's trial counsel, testified that Petitioner told him about the accidental death of his son and the traumatic impact it had on Petitioner. App. 460, l. 20 – 461, l. 11. When asked whether he thought this prior experience could have assisted Petitioner's defense if the jury had heard about it, Hall said he thought it would have been "a far stretch." App. 461, ll. 21-24. He asserted, "When a horrible thing happened with his son, he called 911. When this horrible thing happened with his mother, he went to bed, slept it off, and went to the beach." App. 461, l. 21 – 462, l. 3. Hall concluded it would have been a "very hard sell." App. 462, ll. 3-4.

By order filed December 6, 2021, the PCR judge denied Petitioner relief. App. 486-507. He found trial counsel was not deficient for failing to elicit testimony from Petitioner at trial about the investigation into his son's death and why this experience led Petitioner not to call 911 after he discovered his mother's body. App. 501. The PCR judge emphasized that the trial court sustained the state's objection when Petitioner attempted to testify about his son's death during trial. App. 501. The judge found that in light of the trial court's finding "it is likely that counsel

had no way to put the story in front of the jury.” App. 501. Moreover, the judge cited to trial counsel’s testimony during the PCR hearing that “in his professional judgement” he believed the explanation was a “stretch.” App. 501.

As far as prejudice, the PCR judge concluded, “[I]t is unclear how the story would have benefitted [Petitioner]. He stated that he called 911 when his son died accidentally, but did not call 911 when his mother’s body was found, beaten and bloodied. It is very likely that the jury could, and would, have inferred that [Petitioner] called 911 when he was innocent, but did not do so when he was guilty . . . Because pursuing such a story could have interjected such irreparable harm into his trial, counsel’s failure to do so cannot be prejudicial.” App. 501.

Because Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated by trial counsel’s failure to elicit testimony from Petitioner concerning why Petitioner did not call 911 when he discovered his mother’s body, specifically he feared being treated as a suspect based on his prior experience with law enforcement after the traumatic death of his son from a firearm accident, and since Petitioner was prejudiced by counsel’s deficient performance because there is a reasonable probability the jury would have acquitted Petitioner if it had known this history, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief judge erred by finding trial counsel was not ineffective when counsel failed to elicit testimony from Petitioner concerning why Petitioner did not call 911 after he discovered his mother's body, specifically he feared being treated as a suspect based on his prior experience with law enforcement after the tragic death of his son from a firearm accident, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the jury would have acquitted Petitioner if it had known this history.

The post-conviction relief judge erred by finding trial counsel was not ineffective when counsel failed to elicit testimony from Petitioner concerning why Petitioner did not call 911 after he discovered his mother's body. Petitioner testified during the evidentiary hearing that he did not call 911 after he found his mother deceased in her bed because he was afraid he would be investigated and accused of killing her. This fear was a result of his prior experience after the tragic death of his son from a firearm accident. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the jury would have acquitted Petitioner if it had known this history, particularly where the evidence against Petitioner was merely circumstantial and centered around his actions after his mother was murdered.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Trial counsel was ineffective for failing to question Petitioner about his son’s death during Petitioner’s testimony before the jury. Petitioner would have told the jury that his son died from a terrible firearm accident. App. 448, ll. 8-18. He would have explained that he and his son were “target practicing” and his son dropped a pistol “and it shot him right in the chest.” App. 441, ll. 5-9. Petitioner called 911, but, despite emergency medical treatment, his son died. App. 441, ll. 16-24. Petitioner would have told the jury that he was investigated as a possible suspect by law enforcement after his son’s death. He was questioned and his hands were swabbed for gunshot residue. However, he was ultimately cleared of any wrongdoing. App. 441, l. 25 – 442, l. 1.

Petitioner was prejudiced by counsel’s deficient performance because, if counsel had elicited this testimony from Petitioner, there is a reasonable probability the outcome of Petitioner’s trial would have been different. See Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625. If the jury had heard this reasonable explanation as to why Petitioner acted as he did after he discovered his mother’s body, the jury likely would have acquitted Petitioner. The evidence against Petitioner was solely circumstantial and centered around his actions after his mother was murdered. If the jury learned Petitioner’s actions were justified, it would have concluded there was reasonable doubt and found Petitioner not guilty.

Respectfully, this Court should hold the PCR judge erred by denying Petitioner relief, reverse Petitioner's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of July, 2022.

STATE OF SOUTH CAROLINA
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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Allen Bradberry states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on September 14, 2021 before the Honorable William A. McKinnon, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Mark Allen Bradberry.

Respectfully Submitted,

s/ Lara M. Caudy _____

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of July, 2022.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

s/ Lara M. Caudy

Lara M. Caudy
Appellate Defender

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ATTORNEY FOR PETITIONER

This 13th day of July, 2022.