

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Honorable R. Kirk Griffin, Circuit Court Judge

MARQUITA SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000502

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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The PCR court erred in denying Petitioner a new trial based on after-discovered evidence where State’s key witness Kerry Hollins recanted his trial testimony, and where Hollins and Kareem King both testified Petitioner did not set up Decedent to be robbed, since this newly-discovered evidence would probably change the result if a new trial is had8

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ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner a new trial based on after-discovered evidence where State's key witness Kerry Hollins recanted his trial testimony, and where Hollins and Kareem King both testified Petitioner did not set up Decedent to be robbed, since this newly-discovered evidence would probably change the result if a new trial is had?

STATEMENT

On August 22, 2007, a Berkeley County Grand Jury indicted Marquita Smith, Petitioner, for accessory before the fact to murder and accessory before the fact to armed robbery. App. 1767 – 1768; App. 1770 – 1771. Petitioner was tried jointly with codefendants Gary Grant and Jermaine Hartwell, before the Honorable Deadra Jefferson and a jury, from August 27 – 30, 2007. App. 1. Grant and Hartwell were both charged with two counts of first-degree burglary, four counts of kidnapping, one count of armed robbery and one count of murder.¹ App. 56, l. 13 – 63, l. 21.

The State alleged that Petitioner “set up” her cousin Dexter Perry (Decedent) to be robbed by her ex-boyfriend Kerry Hollins. App. 109, ll. 10-24; App. 397, l. 23 – 398, l. 6. Kerry Hollins claimed that Petitioner called him at the end of July 2006 and “said she had a lick” he could do. Hollins claimed he understood the term “lick” to mean an armed robbery. App. 403, ll. 7-16. Decedent and his best friend Chris Nelson were both known to sell drugs. App. 228, l. 19 – 229, l. 6.

On the night of August 1, 2006, Petitioner met up with Decedent, Decedent’s girlfriend Tawana Deas, and Decedent’s best friend Chris Nelson for dinner. According to Tawana Deas, Petitioner left the table to talk on her phone during dinner. Deas alleged that after dinner, Petitioner told Deas they should follow Decedent’s car, but the two women lost sight of Decedent. After the two women went their separate ways, Decedent came over to Tawana Deas’ apartment. Then Petitioner came over to Deas’ apartment. App. 130, l. 14 – 137, l. 22; App. 232, ll. 5-11.

According to Tawana Deas, the three of them—Decedent, Petitioner, and Deas—walked outside. It was approximately 1:30 a.m. Petitioner then said something didn’t feel right and they

¹ Petitioner was represented by V. Craig Jones. Michael Bolus represented Gary Grant. Elliot Barnwell represented Jermaine Hartwell. Blair Jennings and Scarlett Wilson prosecuted the case. App. 1.

should go back in the apartment. Deas saw someone in the bushes, and she ran back inside with Decedent behind her. They made it into the apartment and Deas heard the door being kicked open. Deas ran to her balcony, jumped off the balcony, ran away and called 911. Deas returned to her apartment once police officers arrived. Petitioner was still there, but Decedent was gone. Decedent's blood was splattered in the apartment. App. 140, l. 6 – 147, l. 7; App. 503, l. 18 – 504, l. 8; App. 159, ll. 5-10.

Shortly thereafter, police officers were dispatched to a shooting at the home of Odoner Cobbs. App. 369, l. 16 – 370, l. 22; App. 167, ll. 11-12. Decedent's best friend Chris Nelson was a nephew of the Cobbs. Chris Nelson was staying at the Cobbs' home at the time. App. 169, ll. 11-25. Odoner Cobbs' wife Birdie Cobbs, his daughter Amber Cobbs, and his nephew Joe Husser were all staying at the Cobbs' home. App. 167, l. 20 – 169, l. 5. Around midnight, everyone was in their bedrooms except Odoner Cobbs. Odoner Cobbs was eating a sandwich and watching television when Decedent ran in through the Cobbs' unlocked front door followed by several strange men brandishing guns. The men were unmasked. One of the men pointed his gun at Odoner Cobbs, told him to get on the floor, and threatened to shoot him. App. 170, l. 18 – 174, l. 14. Birdie Cobbs was told to come out of her room. App. 174, l. 22 – 175, l. 1. Amber Cobbs heard the commotion but stayed in her room. App. 356, l. 1 – 360, l. 22.

The men pistol-whipped Decedent and dragged him to the back of the house. App. 358, ll. 1-5; App. 175, l. 10 – 177, l. 6. Joe Husser got up to see what the commotion was, and he saw two men with guns. The men pointed guns at Joe Husser, asked him where the money was, and told him to find money. Husser started searching for money. App. 301, l. 2 – 304, l. 19. The Cobbs could hear someone saying, "It's in the wall. Tear up the wall." App. 358, ll. 6-7. Joe Husser was pistol-whipped. App. 304, l. 22 – 305, l. 6. No one had been shot yet.

Chris Nelson was walking back to the Cobbs' home for the night when he noticed a strange car parked out front with the driver's door hanging open and blood inside. Chris Nelson peeked in through a window of the home and he saw Decedent, bleeding, being held at gunpoint. Chris Nelson heard Decedent being questioned about money; Decedent said he did not have any money. App. 238, l. 16 – 242, l. 2. Chris Nelson ran to a relative's home a few doors down, he asked someone to call the police, and he grabbed a gun. Chris Nelson ran back to the Cobbs' house where he saw a man about to enter the house through the front door. Chris Nelson began firing at the man. Then "all hell broke loose" inside the house. App. 242, l. 19 – 245, l. 24; App. 264, ll. 5-11.

Decedent was shot several times in the back by at least one of the armed men. App. 385, ll. 15-24. Forensic analysis revealed Decedent was hit with bullets from two different guns shot by one or more of the robbers. App. 515, l. 9 – 524, l. 4. He was still alive when police arrived. Police asked Decedent who had shot him and Decedent said, "Manny did it." App. 371, l. 12 – 372, l. 5. Jermaine Hartwell, who was called Manny, was shot in the chest that night. Kerry Hollins testified at trial, and he implicated Petitioner, Jermain Hartwell, Gary Grant, and Kareem King in the crimes. App. 400, l. 14 – 415, l. 14.

Kerry Hollins, who was a drug dealer, claimed Petitioner identified Decedent as a robbery target and Hollins put together the men to do the robbery. Hollins alleged that Petitioner "set it up" and told them where to find Decedent that night. According to Hollins, he was the driver and the other three men had guns. Hollins claimed he stayed in the car the whole time. App. 400, l. 14 – 414, l. 21. However, Joe Husser identified Hollins as the person who had pistol-whipped him in the house. App. 339, l. 17 – 340, l. 9. Odoner Cobbs and Birdie Cobbs both identified Gary Grant as one of the armed men. App. 186, l. 10 – 187, l. 13; App. 211, l. 21- 213, l. 18. Chris Nelson and Joe Husser identified Jermaine "Manny" Hartwell as the man they saw holding Decedent at

gunpoint. App. 322, l. 20 – 323, l. 5; App. 250, l. 20 – 251, l. 20. Kerry Hollins claimed Gary Grant said he had shot Decedent. App. 415, l. 18 – 416, l. 3.

Petitioner gave a statement to police in which she explained that she identified Decedent to Kerry Hollins as someone he could rob. However, Hollins assured Petitioner that Decedent would not be hurt. App. 539, l. 15 – 548, l. 15; App. App. 767, ll. 12-18. Crime scene technicians found \$1653 and 48 grams of marijuana in the back bedroom at the Cobbs' house, where Chris Nelson stayed. App. 484, ll. 1-14. It was unclear what, if anything, was stolen that night, although Kerry Hollins claimed Gary Grant told him they stole jewelry from Decedent. App. 415, l. 18 – 417, l. 1.

As seen, Petitioner was tried jointly with Gary Grant and Jermaine Hartwell. Kerry Hollins testified for the State. Kareem King was not present. Petitioner, Grant, and Hartwell were convicted as indicted. App. 741, l. 24 – 745, l. 14. Petitioner was sentenced to serve concurrent terms of imprisonment of 30 years. App. 1769; App. 1772; App. 778, l. 22 – 779, l. 4. Petitioner's convictions were affirmed on direct appeal. App. 826 – 831. Petitioner then sought post-conviction relief (PCR) for ineffective assistance of counsel. App. 850 – 857. PCR was denied and the Court of Appeals denied certiorari.² App. 1091 – 1110; App. 1196. Petitioner then exhausted her federal habeas corpus remedies. App. 1216 – 1562.

On July 29, 2019, Petitioner filed the PCR application in this case. Attached to her application were affidavits of newly-discovered evidence from two witnesses, Kerry Hollins and Kareem King. App. 1563 – 1577. On August 24, 2020, the State made its return and motion to

² During her 2011 PCR hearing, Petitioner testified that she identified Decedent as a robbery target to Kerry Hollins. However, Petitioner explained she thought the crime would be a nonviolent robbery. Petitioner did not foresee the tragic events that followed. App. 988, l. 9 – 990, l. 20.

dismiss. App. 1578 – 1596. On September 3, 2020, the PCR court issued a conditional order of dismissal. App. 1597 – 1615. On September 21, 2020, Petitioner filed a motion to reconsider. App. 1616 – 1648. On May 12, 2021, the PCR court granted the motion to reconsider. App. 1649.

A hearing was held on the matter on September 10, 2021, before the Honorable R. Kirk Griffin. Petitioner was represented by Christopher Geel. The State was represented by Samantha Weidauer. App. 1650. Kerry Hollins testified at the PCR hearing, and he recanted his trial testimony in which he incriminated Petitioner. Hollins said his trial testimony was false. Hollins explained there was never any agreement with Petitioner to set up Decedent or for him to be robbed. App. 1680, l. 2 – 1689, l. 6.

Kareem King, who was charged in the incident but did not testify at trial, testified at the PCR hearing. Kareem King agreed there was no agreement or plan to rob Decedent. Kareem King explained the men met up with Decedent to correct a prior bad drug deal between Jermaine Hartwell and Decedent. The idea was for Decedent to make Jermaine Hartwell whole by giving him his money back or giving him more drugs. App. 1662, l. 7 – 1668, l. 9.

On April 14, 2022, the PCR court issued an order of dismissal. App. 1741 – 1766. The order stated that the PCR court found the testimony of Kerry Hollins and Kareem King was not credible because both men were “nearing the end of [their] active prison sentence[s] and ha[ve] incentive to now assist [their] once co-defendant.”³ App. 1763 – 1764. The PCR court cited the factors required to be shown for an applicant to be entitled to a new trial based on after-discovered evidence. App. 1765. The order concluded that because the testimony of Kareem King and Kerry Hollins was not credible, there was no reasonable probability the evidence would change the result

³ Kareem King was serving a 22 year sentence for voluntary manslaughter, with a projected release date in 2025. App. 1754. Kerry Hollins was serving an 18 year sentence for voluntary manslaughter. App. 1754 - 1755.

at a new trial, so Petitioner failed to meet the first factor—that the evidence would probably change the result if a new trial was had. App. 1765. The order also noted that Petitioner’s confession implicated her in setting up the robbery of Decedent. App. 1764.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in denying Petitioner a new trial based on after-discovered evidence where State's key witness Kerry Hollins recanted his trial testimony, and where Hollins and Kareem King both testified Petitioner did not set up Decedent to be robbed, since this newly-discovered evidence would probably change the result if a new trial is had.

Hollins was the primary witness against Petitioner at trial. At the PCR hearing, Hollins recanted his trial testimony and both he and another codefendant, Kareem King, said that Petitioner was not part of the plan to rob Decedent. This newly-discovered evidence weighed in favor of granting Petitioner a new trial.

The South Carolina Uniform Post-Conviction Procedure Act allows an applicant to file an application for relief, "If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence[.]" S.C. Code Ann. § 17-27-45(C) (applications may be filed within one year of the date of actual discovery of the facts or from the date when the facts could have been ascertained by the exercise of reasonable diligence).

"Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (internal quotations and alterations removed) (quoting *McCoy v. State*, 401 S.C. 363, 368 n. 1, 737 S.E.2d 623, 625 n. 1 (2013)); see also *Clark v. State*, 315 S.C. 385, 387, 434 S.E.2d 266, 267 (1993).

Here, the PCR court concluded that Petitioner did not meet the first factor of the test because it found the testimony of Kerry Hollins and Kareem King was not credible. But a jury should be able to determine whether Hollins and King are credible witnesses, particularly since they were both codefendants of Petitioner and since King had not testified about what happened that night. *See Johnson v. Catoe*, 345 S.C. 389, 402–03, 548 S.E.2d 587, 594 (2001) (Pleicones, J., dissenting) (newly-discovered evidence from witness who confessed she, not the defendant, killed the decedent, should not be held incredible as a matter of law; “a jury should have the opportunity to determine the extent to which her testimony is colored by her mental problems, and to decide the relative weight her testimony is afforded”).⁴

Petitioner did meet the first factor for newly discovered evidence, that the evidence: (1) would probably change the result if a new trial is had. *See Jamison*, 410 S.C. 467, 765 S.E.2d 128. The State largely relied on Kerry Hollins to provide evidence that Petitioner set up the crimes. The actions of both Kerry Hollins and another codefendant, Kareem King, were integral to the offenses. One of the victims, Joe Hussar, placed Kerry Hollins inside the Cobbs’ house when Decedent was killed. Kareem King was also alleged to have been one of the gunmen in the house. The testimony of these two men that Petitioner had nothing to do with setting up the crimes—the new testimony by Kareem King and the recantation by Kerry Hollins—would surely change the result if a new trial were had.

Petitioner also met the other four factors required to be established for the granting of a new trial. *See Jamison*, 410 S.C. 467, 765 S.E.2d 128. It was undisputed that the evidence: (2) has been discovered since trial. The affidavits of Hollins and King were both dated September of 2018.

⁴ *Contra State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (“The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered”).

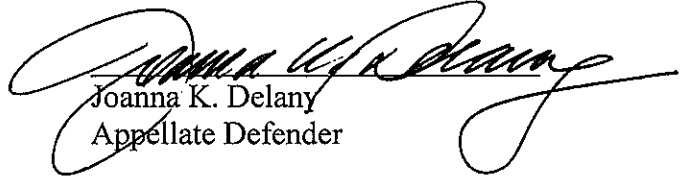
See App. 1569 – 1574. The evidence: (3) could not have been discovered before trial. Kerry Hollins did not recant until 2018. Kareem King was represented by counsel and charged in the offenses, so he had a Fifth Amendment right to remain silent and could not have been forced to testify at the time of trial. Petitioner also showed that the evidence: (4) is material to the issue of guilt or innocence. The evidence was material for the same reasons it would probably change the result if a new trial were had—it was direct evidence from eyewitnesses/codefendants that Petitioner was not involved in setting up the crimes.

As to the fifth factor, Petitioner has shown that the evidence: (5) is not merely cumulative or impeaching. *See Jamison*, 410 S.C. 467, 765 S.E.2d 128. Newly discovered evidence which merely impeaches or contradicts the testimony of a witness at the trial affords no sufficient ground for a new trial, but “when it is made clear by after-discovered evidence that a witness was mistaken in giving the only or controlling testimony to a material fact, or that the testimony of witnesses on which the verdict proceeded was founded on particular circumstances which have been clearly falsified, a new trial should be granted.” *State v. Pittman*, 137 S.C. 75, 134 S.E. 514, 518 (1926). Kerry Hollins admitted his trial testimony was false. While Hollins’ recantation would normally not afford sufficient grounds for a new trial, it does afford so here since he was the State’s key witness. Hollins gave the controlling testimony on material facts as to Petitioner’s guilt. Kareem King’s testimony also passes the fifth factor—it was not merely cumulative or impeaching but was truly new evidence never before heard from the witness.

The PCR court erred in denying Petitioner a new trial based on after-discovered evidence pursuant to S.C. Code Ann. § 17-27-45(C). *Jamison v. State*, 410 S.C. at 467, 765 S.E.2d at 128; *Clark v. State*, 315 S.C. at 387, 434 S.E.2d at 267. This Court should grant certiorari.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2022.

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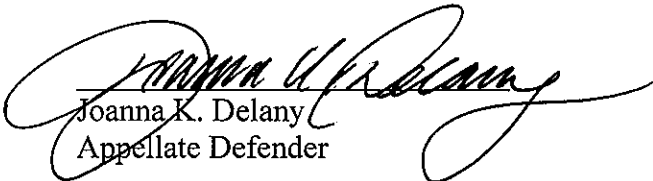
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Marquita Smith states:

1. She is 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 before Judge R. Kirk Griffin, which was held on September 10, 2021, 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 Marquita Smith.

Respectfully Submitted,


Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2022.

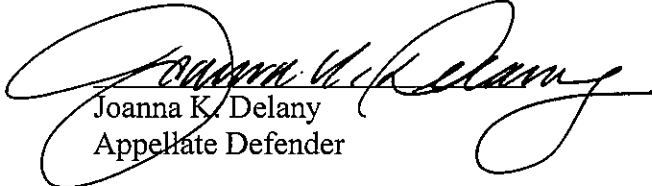
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CERTIFICATE OF COUNSEL

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."



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