ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 2013-UP-058 (S.C. Ct. App. filed 1/30/2013)

09-GS-23-10018.

THE STATE,

RESPONDENT,

V.

BOBBY J. BARTON,

PETITIONER

APPELLATE CASE NO. 2013-000804

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 3/20/2013.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court's denial of Barton's motion to suppress the identification via the photo lineup when the lineup was not reliable because the alleged victim was inebriated at the time of the incident, and had seen Barton's photo in a "mug shot" magazine prior to the photo lineup?

2. Whether the Court of Appeals erred in affirming the trial court's refusal of Barton's complete Request to Charge #7 on the accuracy of identification?

3. Whether the Court of Appeals erred in affirming the trial court in giving the jury a second charge on armed robbery at the request of the state solely to include the words "or representation of a weapon" when neither the victim nor the co-defendant witness saw the knife allegedly used?

4. Whether the Court of Appeals erred in affirming the trial court's refusal to relieve Barton's trial attorney and appoint another attorney, after Barton argued that his attorney breached his confidentiality by bringing to light at the preliminary hearing that co-defendant witness, Patricia Rice, had lived with Barton previously?

STATEMENT OF THE CASE

On February 16, 2010, the Greenville County Grand Jury indicted Bobby Joe Barton on the charges of armed robbery (AR) and possession of a weapon during the commission of a violent crime. On August 9 – 10, 2010, Barton proceeded to trial before the Honorable Edward W. Miller and a jury. Barton was represented by Susannah Ross, and the state was represented by L. Mark Moyer, assistant solicitor. The jury found Barton guilty of armed robbery, but found him not guilty of the possession of a weapon during the commission of a violent crime. Judge Miller sentenced Barton to confinement for twenty-five years. Barton's attorney filed a notice of appeal. The Court of Appeals affirmed Barton's convictions and sentences on January 30, 2013. State v. Barton, Op. No. 2013-UP-058 (Ct. App. filed January 30, 2013). App. 1-5. Barton's attorney filed a petition for rehearing on February 14, 2013. The Court of Appeals issued an order denying the petition on March 20, 2013. App. 24. This petition for a writ of certiorari to the Court of Appeals follows.

QUESTION

1.

The Court of Appeals erred in affirming the trial court's denial of Barton's motion to suppress the identification via the photo lineup when the lineup was not reliable because the alleged victim was inebriated at the time of the incident, and had seen Barton's photo in a "mug shot" magazine prior to the photo lineup.

On July 25, 2009, Edwin Perez was sitting behind his trailer in the trailer park where he lived with his brothers. The brothers were inside at this time. He had been drinking beer since he got home from his landscaping job on that Friday. R. 32, ll. 18 – 25; R. 36, ll.16 – 18; R. 70, ll. 4 – 11; R. 72, ll. 14 – 25; R. 73, ll. 1 – 25; R. 74, ll. 1 – 10. All of a sudden, a man and woman appeared. The man allegedly pushed him down, and held a knife to his throat and took his wallet which contained $500. Perez did not see the knife but felt it against his throat. R. 75, ll. 1 – 25; R. 76, ll. 1 – 25; R. 77, ll. 1 – 25. He had seen the woman before a few times when she took the path through the trailer park to another neighborhood. He had seen the man maybe twice. R. 78, ll. 1 – 25; R. 79, ll. 1 – 4.

He said it was dark outside as it happened around midnight. However, there were some lights at the entrance of the trailer. R. 35, ll. 21 – 25; R. 36, ll. 1 – 25; R. 92, ll. 3 – 8.

Perez called 911 but hung up because the police were speaking in English. The police could not understand him.[1] The police called back, and talked to his brother who spoke English. His brother interpreted for him. R. 41, ll. 15 – 25; R. 42, ll. 1 – 3; R. 82, l. 1 – 10; R. 79, ll. 5 – 25.

[1] Perez did not speak English and required an interpreter during the trial to translate. R. 32, ll. 18 – 20.

The description Perez gave to the police was that the robber was a black male in his mid-twenties to early thirties. R. 32, ll. 5 – 8; R. 108, ll. 3 – 25; R. 109, ll. 1 – 23. Perez admitted on cross examination during the Neil v. Biggers [2] pretrial hearing that he was not surprised that the officers described him as "grossly intoxicated" on the night of the incident. R. 42, ll. 8 – 17.

About a week after the incident, on August 3, 2009, Investigator Mike Jarvis of the Greenville County Sheriff's Office talked with Perez. They rode through the nearby neighborhoods and found the woman who was at the robbery. R. 123, ll. 20 – 25; R. 125, ll. 1 – 25; R. 126, ll. 1 – 25.

The woman was identified as Patricia Rice who had been in a romantic relationship with Petitioner Barton off and on for ten years. R. 127, ll. 1 – 25; R. 128, ll. 1-2; R. 110, ll. 18 – 25; R. 112, ll. 8 – 23. Rice told the investigators that she was present when the robbery occurred. R. 115, ll. 1 – 25. Rice was arrested and charged with this robbery. The charges were later dismissed. R. 111, ll. 1 – 12. Rice told the investigators on August 3, 2009, that Barton had committed this robbery of Perez on July 25, 2009. R. 115, ll. 14 – 25; R. 117, ll. 1 – 25; R. 128, ll. 1 – 20. Barton was arrested the next day, August 4, 2009. R. 128, ll. 21 – 25; R. 129, ll. 1 – 3.

About two weeks after Barton was arrested, Perez found a "mug shot" magazine which contained hundreds of pictures of people who had been arrested. He looked through the magazine and saw Barton's mug shot. R. 88, ll. 1 – 25; R. 89, ll. 1 – 25; R. 90, ll. 1 – 6. Barton and Rice were the only mug shots for armed robberies in the magazine. R. 106, ll. 2 – 25; R. 107, ll. 1 – 3. Perez did not call the police and tell them of the mug shot. R. 96, ll. 16 – 25; R. 97, ll. 1 – 12; R. 98, ll. 15 – 20.

[2] Neil v. Biggers, 409 U.S. 188 (1972).

On January 8, 2010, about five months after the robbery, Investigator Tracy King called Perez to come into the sheriff's office and view a photo line up. Six photos were included with Barton in the lower center of the six. The photo used of Barton was the mug shot taken when he was arrested on August 4, 2009. R. 99, ll. 9 – 25; R. 100, ll. 1 – 24. Perez selected the photo of Barton as the person who robbed him. R. 102, ll. 1 – 25; R. 103, ll. 1 – 25; R. 104, ll. 1 – 23.

Investigator King agreed that the picture used in the photo line up was the same mug shot that appeared in the "mug shot" magazine. R. 105, ll. 24 – 25; R. 106, ll. 1 – 23; R. 107, ll. 1 – 3; R. 45, l. 1 – 6.

During the Neil v. Biggers hearing, defense counsel called an expert witness, Dr. Lori Van Wallendael, who was an associate professor of psychology at the University of North Carolina at Chapel Hill. R. 47, ll. 16 – 25. She was qualified as an expert in eyewitness identification. Her specialty was eyewitness memory. R. 48, ll. 1 – 25.

Dr. Van Wallendael testified that the identification by Perez was unreliable. R. 49, ll. 13 – 25; R. 50, ll. 1 – 4. She explained the factors that made the identification unreliable. The first one was that the victim/witness was inebriated at the time of the incident. People who were inebriated did not take in as much information from a scene as someone who was not inebriated, and were thus more likely to make a false identification. R. 50, ll. 4 – 18.

The second factor was that a weapon was said to be involved which created a greater likelihood of false identification because the person was more focused on the weapon. R. 50, ll. 22 – 25; R. 51, ll. 1 – 10.

The fact that Perez was able to give a better description of the female co-defendant Rice meant that he was paying less attention to the male than female. R. 52, ll. 1 – 12.

The photo lineup was not reliable because Perez had prior exposure to the mug shot. The fact that the state was not involved actually made the situation worse because there was no controlled circumstance. Also, because Perez had seen the photo before, he may have selected it because it looked familiar due to the prior exposure. R. 52, ll. 13 – 25; R. 53, ll. 1 – 25; R. 54, ll. 1 – 8.

The doctor said the photo lineup should have been based on the description given by the victim, not on Barton's physical description. R. 54, ll. 9 – 25; R. 55, ll. 1 – 25.

The doctor testified that the two most significant factors which made the identification unreliable were the victim's state of intoxication, and the prior exposure to the "mug shot" magazine. R. 56, ll. 1 – 5.

The solicitor objected to the testimony of the expert concerning the prior exposure to the mug shot because there was no state action involved. R. 52, ll. 17 – 25.

Defense counsel argued that the in-court identification should not be allowed because the out –of – court identification was suggestive pursuant to Neil v. Biggers, 409 U.S. 188 (1972). Counsel argued there was state action involved in the identification process. R. 59, ll. 11 – 25.

Counsel argued the second inquiry related to due process and whether there was a substantial likelihood of misidentification. Counsel argued there was a violation of due process whether there was governmental action or not. Counsel argued that the exposure to the "mug shot" magazine was a violation of due process since Barton was the only man in the magazine with an armed robbery charge, and the state used the same mug shot in the photo lineup that the victim saw in the magazine. R. 60, ll. 1 – 25; R. 61, ll. 1 – 5.

The judge ruled that the "mug shot" magazine was not the result of government action, and was not admitted. He ruled that the photo lineup was appropriate and was admitted. The expert did not testify before the jury. R. 61, ll. 6 – 25; R. 62, ll. 1 – 3; R. 2 - 4.

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court set out a two prong process to determine if an out-of-court identification was admissible: (1) if the identification process was unduly suggestive and (2) if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, id.; State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003).

An in-court identification of an accused is inadmissible if the out-of court identification was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Neil v. Biggers cites five factors to determine reliability: (1) opportunity of witness to view the criminal at time of crime (2) witness' degree of attention (3) accuracy of witness's prior description of criminal (4) level of certainty by witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers, *supra.*

In State v. Traylor, 360 S.C. 74, 600 S.E.2d 523 (2004), and State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), the South Carolina Supreme Court held that a criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification.

The case of People v. McDonald, 37 Cal. 3d 351 (1984), held that there can be testimony that people who identify can be mistaken as there were factors that jurors would not think about

which may influence a person's ability to identify, such as cross-racial identification or the effects on memory of the witness's exposure to suggestions.

In State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991), the Supreme Court held that expert testimony on eyewitness reliability was admissible, where main issue is identity of the perpetrator, sole evidence of identity is eyewitness identification, and identification is not substantially corroborated by evidence giving it independent reliability.

In State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (Ct. App. 2000), the Court of Appeals ruled that the pretrial identifications based on media representations of the defendant did not violate the defendant's due process rights because the televised bond hearing and newspaper article were non-governmental sources of the suggestiveness.

Barton's case is distinguished because the suggestiveness came from the mug shot which was taken by the government when Barton was arrested. The "mug shot" magazine had to obtain the mug shot through the state.

In United States v. Holley, 502 F.2d 273 (4th Circuit 1974), the Court held that to guard against misidentification, it is not enough that the trial judge be specifically alerted to the detailed factors that enter into the totality of the circumstances; the jury should also be charged. In Holley, where there was no evidence of identification except of one eyewitness, the Fourth Circuit wrote:

> Where the identification testimony was so lacking in positiveness as to strongly suggest the likelihood of irreparable misidentification, the jury should have been specifically instructed to consider the possibility of misidentification under the specific circumstances revealed by the evidence.

In United States v. Telfaire, 469 F.2d 552 (U.S. Ct App. District of Columbia 1972), the District Court held that in deciding whether to permit a criminal case to go to the jury where the

identification rests on the testimony of one witness, trial court should determine whether the totality of the circumstances gives rise to a very substantial likelihood of irreparable misidentification.

Here, the Court of Appeals held that the trial court did not abuse its discretion in admitting the eyewitness identification because none of the circumstances affecting the reliability of the photo lineup were brought about by improper police conduct. App. 1-2. The Court misapprehended the issue as the magazine had to obtain the photo through the state in some way, and this same photo was used in the photo lineup which was prejudicial to Barton as it made the identification unreliable.

In Barton's case, the identification was unduly suggestive and should not have been allowed into evidence.

QUESTION

II.

The Court of Appeals erred in affirming the trial court's refusal of Barton's complete Request to Charge #7 on the accuracy of identification.

In his trial for armed robbery of Perez on July 25, 2009, defense counsel requested a jury charge on identification of Barton by Perez. Counsel said that her Request # 7 addressed identification specifically. The judge said: "Right." R. 134, ll. 10 – 24.

Following jury charges, the judge asked if there any objections to the charges. Defense counsel objected that the judge did not charge points 3 -6 on her Request # 7 regarding identification. She noted the judge did not charge these points which related to witness credibility, such as whether the witness was paying careful attention. Counsel asked the judge to present those points to the jury. R. 178, ll. 1 – 13.

The judge said he thought the issues were adequately covered in his charge. The solicitor agreed with the judge. The judge said the objection was noted for the record. R. 178, ll. 14 – 21.

Defense counsel's Request # 7 provided, in pertinent part:

> In evaluating the reliability of the identification of the defendant, you must consider the circumstances under which the eyewitness made the observations. In this regard, you may consider:
>
> 3. Whether the witness seemed as though he was paying careful attention to what was going on;
> 4. Whether any description given by the witness was close to the way the defendant actually looked;
> 5. How much time had passed between the crime and the first identification by the witness;
> 6. Whether, at the time of the first identification by the witness, the conditions were such that the witness was likely to make a mistake because he was "cued" by the circumstances. For example, was the

> witness asked to pick out the person he saw from a group of similar people, was the witness asked to pick out the defendant from a group of dissimilar people, or was witness asked if the defendant standing alone was the person involved.

See Request #7, R. 193.

The judge gave the following charge:

> An issue in this case is the identification of the defendant as the person who committed the crime charged. The state has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt the accuracy of the defendant---excuse me---the accuracy of the identification of the defendant before you may convict him. Identification testimony is an expression of belief or impression by a witness. You must determine the accuracy of the identification of the defendant. You must consider the believability of each identification witness in the same way as any other witness. You may consider whether the witness had an adequate opportunity to observe the offender at the time of the offense. This will be affected by things like how long or short a time was available to view, how far or close the witness was, the lighting conditions and whether the witness had the chance to see or know the person in the past. Once again, I instruct you that the burden of proof on the state extends to every element of the crime charged, and this burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed this offense.

R. 170, ll. 8 – 25; R. 171, ll. 1 – 11.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may

be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme Court held that in reviewing jury charges for error, the Supreme Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.

The Supreme Court held in State v. Day, 341 S.C. 439, 452, 529 S.E.2d 431 (2000), that the failure to tailor jury instructions to adequately reflect the facts and theories presented by the defendant constituted reversible error. In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Supreme Court reversed and remanded Fuller's conviction of voluntary manslaughter. The Court found reversible error where the trial court failed to charge on the elements of self-defense which were applicable to the issues raised by the defendant.

The only evidence against Barton consisted of the identification of him by Perez, the victim, and Co-defendant Rice. There was no physical evidence such as DNA. Rice did not see a weapon, and testified that she did not really see anything but saw Barton run. R. 131, ll. 11 – 14; R. 115, ll. 14 – 25; R. 213, ll. 5 – 25. Rice was a biased witness because she was initially charged with the armed robbery. Her charges were dismissed the week before Barton's trial after she spent eleven months in jail on the charges. R. 111, ll. 1 – 12; R. 121, ll. 17 – 25; R. 122, ll. 1 – 25. She was convicted in 2008 for lying to the police about her name. R. 111, ll. 13 – 21.

Therefore, Perez's identification was significant evidence. The jury asked to rehear Perez's testimony. R. 179, ll. 1 – 25; R. 180, ll. 1 – 14. Because his identification was suggestive based on his inebriation at the time, and his prior exposure to the mug shot which was used in the photo lineup, the judge should have given all of the requested jury charge which was more on point than

the charge he gave. The totality of the circumstances required that the trial judge give a detailed instruction to the jury on the identification.

The Court of Appeals wrote that Barton had ample opportunity, through cross-examination and closing argument, to highlight the circumstances that may have affected the two eyewitness identifications. App. 4. However, in State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981), the Supreme Court wrote in South Carolina, the argument of counsel is not a substitute for a jury charge.

The Court of Appeals misapprehended the issue because the judge's charge did not include the factors from Neil v. Biggers, *supra.* The requested charge contained factors very close to the Biggers factors which constitute the law applicable to the critical issue in this case. The court of Appeals over-ruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). The Court of Appeals' ruling is therefore an error of law.

QUESTION

III.

The Court of Appeals erred in affirming the trial court in giving the jury a second charge on armed robbery at the request of the state solely to include the words "or representation of a weapon" when neither the victim nor the co-defendant witness saw the knife allegedly used.

After the judge charged the jury, which included the charge on armed robbery and strong armed robbery, the jury requested the definitions of armed robbery and strong armed robbery again. R. 171, ll. 12 – 25; R. 172, ll. 1 – 25; R. 173, ll. 1 – 17; R. 180, ll. 19 – 25. The judge brought the jury to the courtroom and read the charges on armed robbery and strong armed robbery the second time. R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 8.

The solicitor objected because the judge did not include the words "or representation of a weapon" at the beginning of his charge on strong armed robbery when he was describing it as a lesser included of armed robbery. The solicitor argued that the judge did include those specific words when he defined armed robbery, but did not include them in his definition of armed robbery at the beginning of his charge on strong armed robbery. R. 184, ll. 11 – 25; R. 185, ll. 1 – 13.

The judge initially said he thought it was covered but then decided to charge the jury again on armed robbery and strong armed robbery. Defense counsel objected to the recharge because she argued that it would only highlight the issue. R. 185, ll. 14 – 25.

The judge then charged the jury the third time on armed robbery and strong armed robbery. R. 186, ll. 1 – 25. Defense counsel objected again arguing that the recharge only highlighted the aspect which was "especially problematic" since the victim did not understand English, and would not understand if the robber said he was armed with a deadly weapon. R. 187, ll. 1 – 12.

In State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011), the Supreme court held that a jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. The Court also held that in reviewing jury charges for error, the Supreme Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. Id.

The judge giving the charges on armed robbery and strong armed robbery a second and third time was prejudicial to Barton as it did highlight "representation of a weapon." This had an impact on the jury because the jury found him guilty of armed robbery but not guilty of the possession of a weapon. Without the judge's emphasis on the "representation of a weapon", there is a reasonable probability that the jury would have found him not guilty of armed robbery or may have found him guilty of only strong armed robbery.

All of the judge's three charges on armed robbery contained the words "or the representation of a weapon or alleged, either by action or words, that he was armed." R. 172, ll. 9 – 16; R. 182, ll. 11 – 18; R. 186, ll.3 – 15. His original charge and second charge on strong armed robbery did not include those words when he said if the jury believed the state did not prove he was armed with a deadly weapon. R. 173, ll. 3 – 7; R. 183, ll. 5 – 10. His third charge read: "if you find that the state has failed to prove that the defendant was armed with a deadly weapon or with the representation of a deadly weapon after having alleged that he was armed." R. 186, ll. 16 – 25.

On the third charge, the judge added a sentence which read:

> So, just remember it's not, uh, just a deadly weapon, but it could also be a representation of a deadly weapon once the person has alleged he was armed.

R. 186, ll. 21 – 24.

The Court of Appeals held that the trial court did not place undue emphasis on the phrase "representation of a weapon." The Court wrote that even if the object held against the victim's neck was not a knife, this act was designed to give the victim the impression that the object could inflict bodily harm App. 4. The Court misapprehended the issue because the trial judge gave the charge on armed robbery three times. Adding the words "representation of a weapon" after he gave a charge without them only drew attention to those words which was prejudicial to Barton.

In State v. Muldrow, 348 S.C. 264, 559 S.E.2d 847 (2002), the Supreme Court held that words alone were not sufficient to establish a representation of a deadly weapon , for purposes of the armed robbery statute. The court also wrote that where the evidence is insufficient to sustain a conviction on the greater offense but is legally sufficient on the lesser, the Court on appeal may direct the entry of judgment on the lesser offense.

In Barton's case, there were no words to go with the representation. Therefore, there was not a valid basis to support the armed robbery . The judge gave the jury a basis to convict of armed robbery that was not supported by the evidence.

QUESTION

IV.

The Court of Appeals erred in affirming the trial court's refusal to relieve Barton's trial attorney and appoint another attorney after Barton argued that his attorney breached his confidentiality by bringing to light at the preliminary hearing that the co-defendant witness, Patricia Rice, had lived with Barton previously.

On August 9, 2010, Barton filed a document with the clerk of court entitled: "Formal Complaint." In that document, Barton requested that his attorney be relieved and outside counsel be appointed to represent him. Court's Exhibit 1.

At the beginning of his trial, Barton's attorney told the court that there was an issue with hybrid representation, and her client, Bobby Barton, wanted to go forward with his motion at that time. R. 6, ll. 8 – 12. Barton presented a written copy of his motion to the judge which was made a Court's Exhibit. R. 6, ll. 13 – 25.

The judge told Barton after reading the motion that Attorney Ross was a competent attorney and zealous advocate who was appointed to represent him. The judge denied Barton's motion. R. 7, ll. 1 – 19.

Barton asked to speak which the judge allowed. Barton explained to the judge that his attorney had breached his confidentiality which was information that only the two of them knew at the time she divulged. R. 7, ll. 24 – 25; R. 8, ll. 1 – 16. He argued that his co-defendant was a woman whom he had lived with for two years. The co-defendant was acting as though he was a stranger that she had just me. He said this was not true. He told his attorney this and gave her the addresses where they had lived. Together. R. 9, ll. 1 – 25.

His attorney breached confidentiality when she told Investigator Jarvis at the Preliminary Hearing about this, and asked if he knew this. That removed the element of surprise which Barton wanted to use in the trial court. He told his counsel this in the "strictest of confidence." R. 10, ll. 1 – 22.

His attorney then told the court that the information was told in the context of a motion to reconsider the bond. She argued that she was not given this information in confidence. She said the main problem was hybrid representation. She said Barton had filed numerous motions on his own. R. 10, ll. 24 – 25; R. 11, ll. 1 – 25; R. 12, ll. 1 – 25; R. 13, ll. 1 – 11. The judge denied Barton's motion for a different attorney. The judge said the case was going forward. When the judge asked if Barton wanted his attorney to continue to represent him or did he want to represent himself, Barton said he did not want attorney Ross to represent him. R. 13, ll. 12 – 25; R. 14, ll. 1 – 23. The judge asked Attorney Ross to continue to represent Barton which she agreed to do. R. 14, ll. 24 – 25; R. 15, ll. 1 – 7.

The solicitor told the court at that point that he knew the information that Barton said was breached, because the solicitor had learned it through independent means. He said it was not based on anything Attorney Ross said. The solicitor said that his investigator learned this from talking to the co-defendant. R. 15, ll. 6 – 24.

Barton argued to the court that the solicitor did not know this information when his attorney disclosed it on November 12, because Investigator Jarvis said at the time that he did not know that. The judge denied Barton's motion again. R. 16, ll. 1 – 25.

In State v. Justus, 392 S.C. 416, 709 S.E.2d 668 (2011), the Supreme Court held that a motion to relieve counsel was addressed to the discretion of the trial judge and would not be

disturbed absent an abuse of discretion. The movant seeking to relieve counsel bears the burden to show satisfactory cause for removal. State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007).

Rule 1.6(a), RPC, Rule 407, SCACR, provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). Paragraph (b) provides that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.

In United States v. Mullen, 32 F.3d 891 (U.S. Ct App. Fourth Circuit 1994), the Fourth Circuit held that in evaluating whether the trial court abused its discretion in denying defendant's motion for substitution of counsel, the appellate court considers three factors: timeliness of the motion; adequacy of the trial court's inquiry into the defendant's complaint; and whether the attorney-client conflict whether it was so great that it resulted in a total lack of communication preventing an adequate defense.

In Barton's case, these three factors were met. Barton's Motion to Substitute counsel was filed timely (See Court's Exhibit 1). The trial court only gave Barton's complaint a cursory review without going into the details of the complaint. A breach of confidentiality, as Barton explained, is a violation of the Rules of Professional Responsibility. As Barton explained, trust no longer existed. A breakdown in communication occurred.

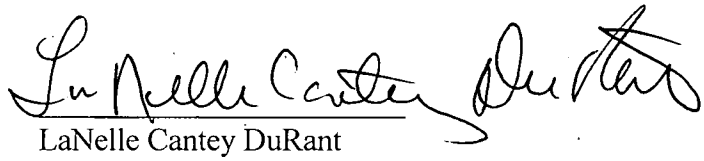
Barton disclosed the information concerning his co-defendant in confidence to his attorney. He did not give her permission to divulge or use this information. Barton did not need to tell her that it was in confidence because information he related to her should be considered in confidence. The attorney needed to seek consent from Barton to divulge anything he told her.

The Court of Appeals held that the trial court acted well within its discretion in denying Barton's motion to relieve trial counsel as Barton was not prejudiced by trial counsel's revelation of information prior to trial. App. 4. The Court misunderstood the issue because the relationship between Barton and his attorney was damaged since Barton perceived the disclosure as a breach of confidentiality.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentence of the trial court should be reversed and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of June, 2013

STATE OF SOUTH CAROLINA
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APPELLATE CASE NO. 2013-000804

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blitch, Jr., Esquire, and the S.C. Court of Appeals this 19th day of June, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of June, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.