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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County

Honorable Debra R. McCaslin, Circuit Court Judge

CORY NETTLES ALLEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001925

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ARGUMENT
The PCR court erred by ruling defense counsel was not ineffective for failing to object to petitioner's former employer testifying petitioner made a threat about harming the victim four or more years before the shooting where counsel made a motion *in-limine* to exclude this testimony on the grounds of remoteness but failed to renew her objection when the witness testified, since that failure to contemporaneously object meant this legal issue was not preserved for appellate review, particularly where this Court on direct appeal found the error argued on appeal was cumulative to the former employer's unobjected to testimony about the threat. 11

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ISSUE PRESENTED

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to object to petitioner's former employer testifying petitioner made a threat about harming the victim four or more years before the shooting where counsel made a motion *in-limine* to exclude this testimony on the grounds of remoteness but failed to renew her objection when the witness testified, since that failure to contemporaneously object meant this legal issue was not preserved for appellate review, particularly where this Court on direct appeal found the error argued on appeal was cumulative to the former employer's unobjected to testimony about the threat?

STATEMENT

Petitioner was indicted at the November 20, 2014, term of the Florence County grand jury for the offense of murder. App. 584-585. His case was called to trial on March 21, 2016, before the Honorable R. Knox McMahon, and a jury. Rose Mary Parham represented petitioner. Solicitor Edgar L. Clements, III, represented the state. App. 1.

Trial and appellate facts

Petitioner's defense at trial was self-defense. The state's theory of the case was that petitioner waited many years to shoot the decedent as revenge for the decedent killing his brother. Petitioner conversely maintained the decedent was a very violent man who was going to harm petitioner at the time of the fatal encounter, and petitioner had to shoot him in that moment of imminent peril. Florence County Sherriff's Deputy Andrew Hardin testified that on June 4, 2014, he went to Tara Village, which was referred to as "the hood" during the trial, to a "shots fired" dispatch. Trial counsel would later testify at PCR that this was a dangerous neighborhood, and the decedent was a violent man. App. 144, l. 6 – 146, l. 8.

Hardin got out of his police car, and he pulled his gun. He pointed the gun at the ground as he was trained. App. 144, l. 13 – 146, l. 16. Hardin ordered petitioner -- who waited for the police to arrive after 911 was called -- and his brother Fred to "get on their knees." He said petitioner pulled a pistol from around his back side where he was holding it, "and then placed it on the ground and got on his knees and spread his arms and legs out." App. 146, l. 21 – 147, l. 3.

Hardin read petitioner his Miranda[1] warnings. App. 147, ll. 10-18. Petitioner then told Hardin that the decedent pulled a gun on him, and that he shot him in self-defense. App. 148, ll. 14-22. The shooting occurred in front of Debra Coe's house, and petitioner asked Coe to call

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

911. App. 423, ll. 6-15. Petitioner told Coe that the decedent "[p]ulled a gun on me and I shot [him]." App. 423, ll. 21-22.

The state's theory of the case was that petitioner intentionally shot the decedent because the decedent had killed his brother years before, and the decedent was acquitted of murder in that case. The decedent went to prison for a short time for illegally being in possession of a gun, and for a probation violation. "Revenge" was the solicitor's theme and his theory of this case.

The 911 caller, Ms. Coe, was not called to testify before the jury because the solicitor claimed he could not trust her to tell the truth. The 911 tape was published to the jury, over defense objection, without the opportunity for cross-examination before the jury.

Defense counsel agreed that the first portion of the 911 tape describing the emergency -- that the decedent had been shot -- was admissible. However, defense counsel Parham argued the portion of the 911 tape where Coe speculated about petitioner's "motive" to shoot the decedent – which Coe incorrectly said was "an incident that occurred *about [one] year before*" -- no longer qualified as an excited utterance or a present sense impression. That portion of the 911 tape should be redacted since it was inadmissible speculative hearsay that tended to confuse the jury. The trial judge ruled against the defense, and he let the entire 911 tape into evidence.

On appeal, the defense continued to argue that this 911 call could have easily been redacted to remove Coe's speculation that petitioner shot the decedent because of a prior incident -- which incorrectly stated -- happened about a year ago. Further, it was extremely prejudicial, and, as defense counsel correctly argued -- it was confusing. The 911 call pertaining to the prior incident had a spurious tendency to "corroborate" the state's theory of the case that petitioner shot the decedent because of that prior incident, and not in self-defense. In context, it also showed Coe did not believe the shooting was in self-defense. Finally, the trial allowed Coe not

to make herself available for cross-examination where the state refused to call her, and the 911 tape did the state's undeserved damage without an opportunity for cross-examination of Coe by the defense.

The state called Veronica Peoples, the 911 worker, as its first witness. Peoples testified on June 4, 2014, at 8:30 p.m., Deborah Coe called 911 about the shooting in Tara Village. App. 122, l. 10 – 123, l. 22. When the solicitor went to publish the 911 call, defense counsel unsuccessful objected, and the damaging 911 tape with the Coe commentary about the prior murder of petitioner's brother by the decedent was played for the jury.

Nicole Bethea was an employee of the Florence County Clerk of Court's office. She testified that the decedent, Edward Windham, had been indicted for murder, possession of a weapon in the commission of a violent crime, and possession of a weapon by a person convicted of a violent crime. The victim in that case was petitioner's brother "Robert Allen." The decedent was found not guilty of murder, not guilty of voluntary manslaughter, and not guilty of possession of a weapon during the commission of a violent crime in the death of petitioner's brother. However, he was found guilty of possession of a pistol by a person convicted of a violent crime. The decedent received a five year prison term at that time, and a consecutive sentence for the resulting probation violation. App. 132, l. 1 – 133, l. 13.

There was evidence presented that following the shooting of the decedent by petitioner that a crowd gathered in the area, and "there were several disorderly people" in the crowd. Florence County Sherriff's Deputy Jake Chamberlain testified petitioner was cooperative with the police, and he sat in the grass with his handcuffs on while this disorderly crowd gathered. Coe also told the 911 operator that a crowd was gathering after the shooting. App. 150, l. 18 – 155, l. 7.

A Lincoln Town Car, that belonged to petitioner's brother, Fred, was parked down the street from the site of the shooting. Inside the glove compartment was a pistol and a holster which the police witnesses would acknowledge was legal. App. 168, l. 3 – 170, l. 16.

SLED gunshot residue expert Whitney Berry testified that the gunshot residue tests on the decedent "were negative for gunshot residue." Petitioner obviously tested positive since he admitted shooting the decedent in self-defense. Petitioner's brother, Fred, also did not have gunshot residue on his hands. App. 353, l. 22 – 358, l. 13. The jury was read a stipulation that a twenty-five caliber pistol found near the moped after the shooting belonged to the decedent in this case, Edward Windham. App. 413, ll. 14-23.

A nine millimeter Ruger, a magazine which was partially full, and another magazine that was completely full, were found at the scene of the shooting, as was the twenty-five caliber pistol. Shell casings were also found at the scene. App. 199, l. 3 – 205, l. 13. The decedent's money and a cigarette lighter were in the decedent's pocket. The state chose not to have the twenty-five caliber pistol analyzed for DNA since it stipulated the gun belonged to the decedent. App. 424, l. 17 – 243, l. 16.

The decedent's cell phone was also inspected, and it was determined there was no evidence on either the decedent's cell phone or petitioner's phone linking the two men to each other by phone call, text message or otherwise. App. 272, l. 10 – 274, l. 13. Petitioner acknowledged he knew the decedent, and that he was afraid of the decedent. Petitioner told the solicitor that the decedent had made threats to him through "other people" while he was in jail, and petitioner was afraid because the decedent "had killed before." App. 446, ll. 9-25.

Petitioner's former employer – Glyn Farnum

Defense counsel Parham made a motion *in-limine* to exclude the testimony of Glyn Farnum about an alleged threat made by petitioner against the decedent four or more years before the shooting. Petitioner last worked for Farnum in 2010 and the shooting was on June 4, 2014. Counsel argued that Farnum's allegation that petitioner threatened to kill the decedent was too remote in time to the shooting. The judge denied the motion *in-limine*. App. 97, l. 17 – 101, l. 7.

The state called later Farnum as a witness. Farnum ran Farnum's Frame and Body Shop in Florence. He was from Barbados. App. 307, l. 14 – 309, l. 3. Defense counsel Parham did not renew her *in-limine* remoteness objection when Farnum testified before the jury.

Farnum testified that petitioner worked for him at the body shop about sixteen months prior to the shooting in this case. App. 309, ll. 10-19. Farnum admitted he paid petitioner one hundred and twenty-five dollars a week in cash for his work, and he did not keep any employment records. Petitioner worked for him for about six months. App. 314, l. 16 – 315, l. 10. Farnum admitted he could not be exact about these timeframes since he did not keep any records.

The essence of Farnum's testimony was that petitioner had a concealed weapons permit, which was undisputed, but Farnum confronted petitioner about why he carried a gun. Petitioner explained to Farnum that his brother had been killed, and the man who killed him "didn't get a long time." Farnum claimed petitioner told him: "I'm going to kill him." Farnum said he told petitioner his mother had already lost one son, "If you do this, she gone (sic) lost two sons." App. 309, l. 24 – 311, l. 22. Farnum said he later saw a television report that petitioner had shot the decedent. Farnum claimed that he felt obligated to get involved. App. 312, ll. 12-24.

As stated, since defense counsel did not renew her objection to Farnum's remote testimony when he was called to testify before the jury, this Court on direct appeal found any error in admitting the 911 tape with Coe's testimony about the decedent killing petitioner's brother -- out of animus -- was cumulative to this unobjected to testimony. App. 586-587.

Other trial evidence

Patrick Woodberry had known petitioner "from the neighborhood" for about twenty years. Woodberry also knew the decedent, who was known in the neighborhood as "Littles." They were both from "the hood" -- Tara Village. App. 336, ll. 3-24. Littles also knew Debra Coe, the 911 caller, since the decedent had been Coe's neighbor. App. 344, ll. 18-20.

On the day of the shooting, Woodberry remembered seeing the Lincoln Town Car owned by petitioner's brother parked on the street. He also recalled seeing the decedent driving his moped in the area. App. 339, l. 11 – 341, l. 21.

Woodberry saw the decedent almost every other day in the neighborhood or down by "the store" riding on his moped. Woodberry remembered seeing the decedent that evening after he had been shot lying on his hands and knees near his moped. App. 342, l. 7 – 345, l. 17. Coe told the 911 operator that it was apparent that the decedent was dead.

Self-defense testimony

Petitioner testified that he was in Tara Village that day to help a friend work on a car. He did not expect to see the decedent in the neighborhood that day. App. 453, ll. 5-10. Petitioner said that he was walking on Candy Lane in the neighborhood. The decedent came up on his moped near where petitioner was walking. The decedent pulled a gun "on me and I fired at him." Petitioner was afraid of the decedent because the decedent had threatened him through other people. App. 422, ll. 1-20; App. 446, ll. 9-25.

The jury found petitioner guilty of murder. App. 509, ll. 18-22. Judge McMahon sentenced petitioner to forty years imprisonment. App. 515, ll. 5-9.

As stated, petitioner argued on appeal that part of the 911 tape – that did not constitute an excited utterance or present sense impression -- should have been redacted to remove Coe's hearsay inaccurate commentary about the prior murder of petitioner's brother by the decedent. However, petitioner's conviction was affirmed on direct appeal. See State v. Cory Nettles Allen, 2019-UP-152 (Filed May 1, 2019). App. 586-587. The panel of this Court found that the trial court's failure to redact the 911 tape was not error because the entire 911 call qualified as an excited utterance. The Court also found that the evidence in the 911 tape argued as improperly admitted hearsay was merely cumulative to other evidence making the error harmless. App. 586-587. That cumulative evidence was the Farnum remote threat testimony that came in without a contemporaneous objection which was therefore not preserved for appellate review. The Farnum remote threat by petitioner legal issue could not have raised as an independent legal grounds for reversal on appeal because it was not preserved for appellate review.

Petitioner then filed an application for post-conviction relief on July 19, 2019. App. 517-524. To this application, the state filed a return on July 20, 2020. App. 525-537.

An evidentiary hearing on convened on June 13, 2023, before the Honorable Debra McCaslin. Jonathan Waller represented petitioner. Russell Barlow was the assistant attorney general. App. 538.

Trial counsel testified that the neighborhood where the shooting occurred was a "very dangerous neighborhood." Counsel also remembered that the decedent was viewed as a very dangerous man, that petitioner obtained a concealed weapons permit after the decedent shot and

killed his brother years before the shooting in this case. His defense was self-defense. App. 543, l. 10 – Tr. 546, l. 13.

As to the 911 call, trial counsel Parham remembered that the caller, Ms. Coe, did not testify at trial. Parham said that was one of the basis of the direct appeal was that portions of the 911 call were not excited utterances, and they were inadmissible prejudicial hearsay instead. App. 546, l. 14 – Tr. 547, l. 9.

As to petitioner's former employer, Farnum, testifying that petitioner made a threat towards the decedent years before the shooting, Parham believed that she made a motion *in-limine* to exclude this threat testimony as being too remote. App. 550, ll. 5-19.

Petitioner confirmed that he worked for his former employer, Farnum, last in 2010. The shooting occurred on June 4, 2014, so this threat evidence was at least four years old by the time of the actual shooting in June of 2014. App. 585.

An order of dismissal was filed on November 13, 2023. App. 562-581. The order noted that petitioner alleged his defense counsel at trial was ineffective for failing to object to his former employer, Farnum's "testimony regarding what applicant told him." App. 577.

The order also noted that trial counsel testified that she filed a motion *in-limine* objecting to introduction of this threat testimony by petitioner's former employer. The PCR court reasoned that any further objection following the motion *in-limine* "would not have been meritorious, and trial counsel cannot be deficient for failing to make a non-meritorious objection, nor can [petitioner] be prejudiced by this failure." App. 578.

This overlooks the obvious fact, respectfully, that the failure of defense counsel to object to this remote testimony by Farnum waived this as an appellate issue, and it also was used by this

Court to affirm petitioner's conviction on direct appeal since it constituted cumulative unobjected to evidence of petitioner's hostility regarding the decedent. App. 586-587.

ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to object to petitioner's former employer testifying petitioner made a threat about harming the victim four or more years before the shooting where counsel made a motion *in-limine* to exclude this testimony on the grounds of remoteness but failed to renew her objection when the witness testified, since that failure to contemporaneously object meant this legal issue was not preserved for appellate review, particularly where this Court on direct appeal found the error argued on appeal was cumulative to the former employer's unobjected to testimony about the threat.

As seen, defense counsel Parham made a motion *in-limine* to exclude the testimony of petitioner's former employer, Farnum, that petitioner threated to kill the decedent. This threat was at least four years old since petitioner last worked for this employer in 2010 and the shooting occurred in June of 2014. Counsel correctly argued in the motion *in-limine* that this threat testimony was too remote.

The PCR court erred in its reasoning that there was no prejudice to petitioner from trial counsel's failure to renew her motion *in-limine* when the employer testified because it was unlikely the trial judge would have changed his ruling. However, the failure to contemporaneously object to this testimony in the presence of the jury waived it as an appellate issue. That was specifically prejudicial to petitioner since this was a viable remoteness appellate issue had trial counsel preserved it. Further, a panel of this Court on appeal found the error in admitting the Coe 911 call was cumulative to other evidence – *this testimony by petitioner's former employer* – and the 911 call error argued on appeal was therefore harmless. App. 586-587.

There was no logical reason for trial counsel not to renew her motion *in-limine* objection to this testimony as being too remote. If counsel had renewed her objection to the employer's threat testimony, the Court would not have found it cumulative on appeal. In addition, and importantly, there was a reasonable likelihood that petitioner would have prevailed on direct appeal if trial counsel had preserved this issue since this threat testimony was too remote. Cf. Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999); Strickland v. Washington, 466 U.S. 668, 685 (1984).

Petitioner recognizes that the trial judge cited State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000), for the general proposition that the remoteness between the making of a statement pertaining to a future crime goes only to the weight of the evidence and not its admissibility. However, in Beck, there was only a four-month lapse between Beck's statement evidencing his intent to perpetrate his crimes and the actual crimes which mimicked his earlier threat. Here, there was a four-year time difference between the alleged threat by petitioner against the decedent, and the actual shooting which petitioner consistently urged was in self-defense.

In State v. Glenn, 328 S.C. 300, 309, 492 S.E.2d 393, 397 (Ct. App. 1997), this Court held that there was no set rule "as to what lapse of time will make particular evidence too remote to be probative..." State v. Bright, 323 S.C. 221, 226, 473 S.E.2d 851, 853 (Ct. App. 1986)(It was error to admit evidence in an arson case that the defendant made prior insurance claims on two previous fire losses and that the insurance claims had been paid).

Further, in State v. Moultrie, 283 S.C. 352, 322 S.E.2d 663 (1984), the Court held that it was not error for the trial court to refuse his request to subpoena four Columbia physicians regarding his insanity claim. Our Supreme Court noted the Columbia physicians stopped treating the defendant four-months prior to the offense and seven-months prior to trial. The trial

judge properly ruled that their testimony would have no probative value about the defendant's condition at the time the offense occurred given that it was too remote at four-months in age.

The alleged threat in this case occurred at least four-years prior to the fatal shooting. Petitioner's defense was self-defense, and it was certainly a viable self-defense claim. It was extraordinarily prejudicial to introduce evidence from petitioner's former employer that petitioner allegedly made a threat against the decedent four-years earlier.

Petitioner respectfully submits that there is a reasonable probability that he would have prevailed on direct appeal had he been able to raise this remoteness threat issue, which he could not because trial counsel simply did not renew her motion *in-limine* at the time this testimony was offered before the jury. See Washington v. State, 440 S.C. 550, 891 S.E.2d 668 (Ct. App. 2023)(Trial counsel performed deficiently by failing to contemporaneously object to solicitor's statement during closing argument concerning petitioner's "pattern of robbing old folks, intimidating old folks, kidnapping old folks, holding them up[,]). Strickland v. Washington, 466 U.S. 668, 685 (1984).

CONCLUSION

By reason of the foregoing argument, this Court should issue a writ of certiorari allowing full briefing on this issue.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of June, 2024.

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Cory Nettles Allen states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Debra R. McCaslin, which was held on June 13, 2023, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He 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 him as counsel for Cory Nettles Allen.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of June, 2024.

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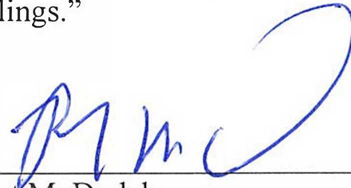
S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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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This 6th day of June, 2024.