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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable Roger M. Young, Circuit Court Judge

JOEY DEAN COLEMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000311

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

INDEX

ISSUE PRESENTED

Did the PCR court err in finding counsel was effective when she failed to contest the chain of custody on the DNA evidence that was "126 quintillion times more likely" that petitioner touched the beverage container shown in the video being placed on the counter by the perpetrator when the defense centered on the mistaken identification of the eyewitness?

STATEMENT

On November 15, 2018, an unknown perpetrator entered the Snappy Foods store in Yemassee and threatened the two store clerks with a handgun in an armed robbery. App. 153, ll. 4 – 17; 395 – 406. Petitioner was targeted as a suspect in the robbery based upon his resemblance to a photograph pulled from the security camera that captured the robbery on video. App. 220, ll. 10 – 25. An eyewitness, Karen Wilcox, picked Petitioner out as the perpetrator in a photographic lineup and identified him during trial. App. 197, ll. 1 – 6; 225, ll. 2 – 25.

Wilcox did not know petitioner and spent only a few minutes in the presence of the suspect before the robbery. App. 204, ll. 1 – 14. Wilcox described the suspect as having a "teardrop" tattoo on his face. App. 204, ll. 15 – 22. Petitioner does not have a teardrop tattoo. She also admitted vision problems, including blurry vision and improper eyewear during trial. App. 211, ll. 5 – 19. No weapon or cash connected to the robbery were found on petitioner when he was arrested. App. 234, l. 8 – 235, l. 7. The victims of the armed robbery were not able to identify petitioner as the perpetrator. App. 179, ll. 6 – 23.

To bolster the case against petitioner, the state relied heavily on a DNA mixture analysis performed on a canned beverage left at the counter of the store by the armed robber. The state's DNA expert, Timothy French of the Beaufort County Sherriff's Department, tested the two cans that the perpetrator carried to the store's counter during the robbery. App. 252, ll. 14 – 17; 253, l. 24 – 254, l. 4. French obtained a DNA mixture from both cans, and petitioner's DNA was found to be part of the mixture on one of those cans. App. 256, ll. 3 – 15.

The state hammered the DNA mixture hit during closing statements to the jury:

> You heard Mr. French say that there was a mixture of DNA profiles on the Miller High Life bottle. But what did he say next? He compared that mixture against Joey Coleman and found that it was 126 quintillion times more likely that Joey Coleman was one

> of those people in the mixture than a coincidence. That's a number so extreme I had to ask him what it meant. 18 zeros he said is one quintillion. That's a billion squared. A billion billions is one quintillion. This is 126 times that. So yes, Joey Coleman's DNA is on that bottle.

App. 293, ll. 7 – 16. The problem with this DNA connection was the failure of the state to establish the chain of custody both for the cans themselves and the sample taken from petitioner for comparison. Trial counsel failed to challenge the chain of custody during trial. App. 372, ll. 11 - 18.

Petitioner was charged with armed robbery, two counts of kidnapping, possession of a weapon during a violent crime, and two counts of assault and battery of the first degree. App. 395 – 406. At trial petitioner was represented by Diane DeWitt while Reed Evans appeared on behalf of the state. App. 2. Petitioner was convicted at trial before the Honorable Carmen T. Mullen and a jury from February 3 - 5, 2020. App. 1; 123; 283. Judge Mullen sentenced petitioner to thirty years for the armed robbery, thirty years for each count of kidnapping, ten years on each count of first-degree assault and battery, and five years on the weapon charge, all charges to run concurrently. App. 336. On direct appeal, Appellate Defender Lara Mary Caudy filed a brief pursuant to Anders v. California, 386 U.S. 378 (1967) challenging the reliability of the Wilcox identification. The Court of Appeals affirmed the conviction in an unpublished opinion. *See* State v. Coleman, No. 2020-000231 (S.C. Ct. App. Dec. 8, 2021).

Petitioner filed for post-conviction relief alleging ineffective assistance of counsel. App. 339. An amended petition was filed alleging, in part, ineffective assistance of counsel related to the chain of custody on the DNA analysis. App. 351 – 355. An evidentiary hearing was held on November 27, 2023, before the Honorable Roger Young. App. 357. Petitioner was represented by Chelsey Marto and Bryan Hall appeared on behalf of the state. App. 357. Judge Young heard

testimony from both petitioner and his trial counsel and issued an order denying relief. App. 386 - 394.

This petitioner for certiorari follows.

ARGUMENT

The PCR court erred in finding counsel was effective when she failed to contest the chain of custody on the DNA evidence that was "126 quintillion times more likely" that petitioner touched the beverage container shown in the video being placed on the counter by the perpetrator when the defense centered on the mistaken identification of the eyewitness.

How the matter was raised during trial.

The perpetrator of the armed robbery left two beverage containers on the counter during the commission of the crime. Officer Michael Strauss collected both containers into evidence, a lemonade bottle, and a bottle of beer. App. 159, ll. 4 – 24. Strauss took the containers to Beaufort County for a DNA analysis where "[t]hey have an intake person who gives us a custody sheet for it." App. 160, ll. 10 – 17. No intake person from Beaufort County was ever identified or testified regarding receiving the containers. While Timothy French testified as an expert regarding his DNA testing on the containers, he did not identify himself as the individual who intakes evidence for such analysis and had to rely on the chain of custody forms to identify such information. App. 254, l. 22 – 255, l. 4.

A more substantial break in the chain occurred with the allegedly "known" swabs of petitioner's DNA taken from his mouth. The "jail nurse" who performed the swabbing, Tonia Coates, was not presented for testimony. App. 227, l. 6 – 228, l. 25. This sample was taken to SLED by mistake, and later retrieved by Dawn Crawford and taken the Beaufort County lab for analysis by Mr. French. App. 265, l. 16 – 267, l. 22. At least two employees of SLED handled the evidence and were not presented during trial, Jackie Davis and Bethany Davidson. App. 267, l. 15 – 268, l. 2.

How the matter was addressed at PCR.

In response to the allegation that trial counsel was ineffective for failing to contest the admission of the DNA evidence due to problems with the chain of custody, trial counsel asserted that she did not have concerns about any breaks:

> No, because I think there's additional testimony -- if you read the transcript instead of just picking and choosing parts, if you read the entire testimony on the chain of custody, it's in the record.

The PCR court ruled that the chain of custody was established by the trial testimony and that trial counsel was credible that there was no basis to attempt to suppress the DNA evidence due to defects in the chain of custody. App. 392.

How the PCR court erred.

"[T]his Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (*quoting* State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007)). "Where multiple people have handled the analyzed substance, 'the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture.'" State v. Pulley, 423 S.C. 371, 377, 815 S.E.2d 461, 464 (2018) (*quoting* State v Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205).

Here, contrary to the finding of the PCR court, the unidentified "intake person" at the Beaufort County lab along with the identified but non-testifying nurse and employees of SLED create an imperfect chain of custody on fungible evidence that mandates suppression. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). Here, there is a break

in the chain of custody for both the beverage containers and the petitioner's DNA swab, the unidentified intake person at the Beaufort County lab. As such, under Carter, the existence of the missing link mandated suppression.

Moreover, there are at least three links in the chain of custody of petitioner's DNA swab, the nurse and the two employees at SLED, who failed to testify regarding the procedures and precautions used in connection with his sample. The state failed, as far as practical, to establish the chain of custody. When the state offers fungible evidence that has been the subject of testing, "the identity of each person handling the evidence" must be established and the "manner of handling" must be reasonably demonstrated. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). While the state identified the witnesses, no effort was made to establish the manner of handling the material while the DNA swab was taken by the nurse or in the possession of SLED.

The PCR court erred in finding trial counsel was effective when she elected not to challenge the admission of the DNA evidence due to breaks in the chain of custody. In addition, the PCR court's finding that there were no breaks in the chain are not supported by the record.

Prejudice.

Petitioner's conviction hinged largely on the eyewitness identification by Wilcox, who admitted not knowing petitioner and being in the suspect's presence for only a short amount of time. She also admitted issues with her vision and eyewear. As trial counsel testified at the PCR hearing, Wilcox was simply not a good witness. App. 374, ll. 2 – 18. The DNA evidence bolstered Wilcox's identification by placing petitioner's DNA, as part of a mixture of a number of unknown person's DNA, on a beer container left on the counter during the armed robbery. As noted by the solicitor during his closing argument: "it was 126 quintillion times more likely that

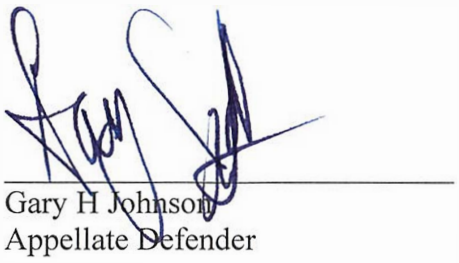
Joey Coleman was one of those people in the mixture than a coincidence. That's a number so extreme I had to ask him what it meant. 18 zeros he said is one quintillion. That's a billion squared. A billion billions is one quintillion. This is 126 times that. So yes, Joey Coleman's DNA is on that bottle." App. 293, ll. 7 – 16. The improper bolstering and vouching of the out of court identification with the DNA evidence, without proper objection or challenge by trial counsel regarding the broken chain of custody in a case entirely dependent upon such identification, was prejudicial.

To establish prejudice, petitioner must demonstrate "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). As the Supreme Court of the United States explained in Strickland v. Washington, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id., 466 U.S. 668, at 695 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016).

Here, as in Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), there is no physical evidence that connects petitioner with the crimes charged other than the DNA mixture on the beer bottle, and his conviction was based upon testimony infected with the ineffective assistance of counsel. As this Court noted in Smalls, "for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice—as we found it did in *Rosemond* and *Harris*—the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of *certiorari* to allow full briefing on this issue.



Gary H Johnson
Appellate Defender

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joey Dean Coleman states:

1. He is 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 Roger M. Young, which was held on November 27, 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 Joey Dean Coleman.

Respectfully Submitted,

Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of August, 2024.

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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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