

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Honorable Kristi F. Curtis, Circuit Court Judge

NAIJUWUAN S. CHISOLM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000965

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Jan 27 2025

S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR court err finding trial counsel was not ineffective for failure to request a *Logan*¹ charge where the state's case was mostly circumstantial and where counsel testified, he failed to request the charge because he liked the "flow" of the trial court's charge?

¹ *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013).

STATEMENT

On July 23, 2015, a Jasper County grand jury indicted petitioner for murder (2015-GS-27-258) and possession of a weapon during a violent crime (2015-GS-27-259). App. 1-4. The state, represented by Mary Jones and Brian Hollen, called the case to trial before the Honorable Perry M. Buckner, III, and a jury on February 21-23, 2017. App. 5-6. Robert Hughes represented petitioner. App. 5-6. The jury found petitioner guilty as indicted. App. 371, ll. 11-18. Judge Buckner sentenced petitioner to consecutive terms of forty years' imprisonment for murder and five years' imprisonment for possession of a weapon. App. 379, l. 22—380, l. 5; 382-383.

Thereafter petitioner filed an application for post-conviction relief (PCR). App. 384-394. On July 21, 2022, an evidentiary hearing was held before the Honorable Kristi F. Curtis. App. 404-437. James Falk represented petitioner and assistant attorney general Lauren Mims represented the state. App. 404.

On May 29, 2024, Judge Curtis signed an order denying PCR. App. 439-447. The court found defense counsel was not deficient for failing to request a *Logan*² charge in petitioner's case where the court found counsel articulated a valid reason "that he liked the flow of Judge Buckner's charge better." App. 445. The court found petitioner was not prejudiced where the state had some direct evidence of petitioner's guilt and therefore it was not reasonably likely the outcome would have been different if counsel had requested a Logan charge. App. 445.

This petition follows.

² *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013).

ARGUMENT

The PCR court erred finding trial counsel was not ineffective for failure to request a Logan³ charge where the state's case was mostly circumstantial and where counsel testified, he failed to request the charge because he liked the "flow" of the trial court's charge.

Relevant facts

On June 9, 2015, Sterling "Slim" Jenkins was sitting on the porch with his girlfriend, Lucretia Jordan, and his friend, Frank "Slick" Carter, eating breakfast. App. 201, l. 17—202, l. 18. Slick left, and Lucretia went inside the apartment. App. 202, l. 19—203, l. 7. While inside, Lucretia heard multiple gunshots. App. 203, ll. 8-16. When Lucretia went outside, she found Slim on the ground. App. 204, ll. 8-16. Lucretia called for help. App. 204, ll. 12-13.

Across from Lucretia's apartment, Barnesha Houston and her boyfriend were sitting on their porch. App. 208, ll. 3-5; 210, ll. 12-14. Barnesha's older sister, Erica Lewis, was standing nearby. App. 210, ll. 18-20. Barnesha's twin sister, Jesneisha, was also outside the apartments. App. 210, ll. 21-22. Barnesha saw a man "peeking" around the corner of the apartment building – the man was looking at Slim. App. 211, ll. 4-24. Barnesha saw the man run onto the porch. App. 217, ll. 19-21. Slim tried to open the door to enter the apartment, but the door would not "budge." App. 217, ll. 22-24. The man shot Slim. App. 237, l. 24. After the shooting, the man ran away. App. 218, ll. 11-13. Barnesha did not see the shooter's face. App. 220, ll. 12-13.

According to Jesneisha, she was walking to her mailbox on June 9, 2015, in the late morning. App. 228, ll. 14-19. She claimed Slim saw petitioner⁴ peeking around the corner and

³ *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013).

⁴ Jesneisha claimed she knew petitioner because they were in school together several years prior to the shooting. App. 220, ll. 10-19.

spoke to him. App. 229, ll. 14-21. Jesneisha alleged petitioner shot, ran to the right, turned around, and shot Slim four more times before running off again. App. 230, ll. 5-12.

The statement Jesneisha gave to police on the day of the shooting was decidedly different. Jesneisha told police Slim and the shooter were sitting on the porch together. App. 240, ll. 18-25. Slim got up and tried to enter his apartment. App. 240, ll. 21-22. The shooter stood up and shot Slim. App. 241, ll. 1-4. The shooter stopped, shot four more times, then took off running. App. 241, ll.1-4. Jesneisha maintained that she was unsure of the gun the shooter used. App. 242, ll. 8-10. However, when Jesneisha spoke to police, she said the gun was “black, small...like a nine.” App. 242, ll. 11-15. Jesneisha revealed that the police told her the gun used was “probably” a nine so she included that in her statement. App. 242, ll. 11-21; 244, ll. 23-25.

At the conclusion of the evidence the trial court stated the lawyers requested one additional charge that dealt with expert testimony and otherwise had no additional request for charge. App. 320, ll. 8-20. The relevant portion of the court’s jury charge was as follows:

Direct evidence, ladies and gentlemen, is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness to an event. Direct evidence is evidence that immediately establishes the main fact to be proved.

Circumstantial evidence, as contrasted with direct evidence, is proof of a chain of facts and circumstances indicating the existence of a fact. Circumstantial evidence is evidence that immediately describes or establishes collateral facts from which the main fact may or may not be inferred. Circumstantial evidence is based on inference and not on personal knowledge or personal observation.

The law makes absolutely no distinction between the weight or the value to be given to either direct evidence or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence.

You, ladies and gentlemen of the jury, should weigh or consider or evaluate all the evidence in this case, both direct and circumstantial. After considering all the evidence in this case, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

On the other hand, after considering, weighing, evaluating all the evidence in this case, both direct and circumstantial, if you are convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant guilty.

App. 355, l. 6—356, l. 9.

At petitioner's evidentiary hearing defense counsel testified that he never considered asking for a *Logan*, circumstantial evidence charge because he preferred the trial court's charge. App. 427, l. 16—428, l. 2. He stated he was not "thrilled" with the language in the *Logan* charge and stated the trial court's charge regarding circumstantial evidence "flows" and the "jury hear[d] what [he] want[ed] them to hear." App. 428, l. 6—429, l. 8.

Discussion

The PCR court erred finding counsel articulated a valid reason for failing to request the trial court properly instruct the jury regarding circumstantial evidence in a case where the majority of the state's evidence was circumstantial.

To establish a claim of ineffective assistance of counsel, petitioner must show: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

The PCR court erred finding that trial counsel was not deficient for failure to object to the court's instruction. The judge failed to charge the current and correct law when he failed to properly instruct the jury about circumstantial evidence.

In *State v. Logan*, this Court reasoned that “[u]nlike direct evidence, evaluation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded—a process not required when evaluating direct evidence.” 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013). The Court went on to state, “requiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant.” *Id.* at 98, 747 at 451-452. In that case this Court held:

[T]rial courts should provide the following language as a circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

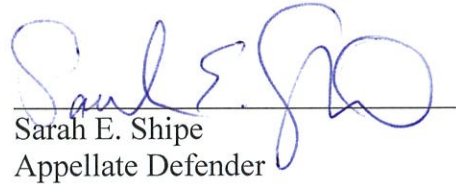
Id. at 99, 747 at 452.

In general, the trial court is required to charge only the current and correct law of South Carolina, *Cohens v. Atkins*, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), and the law to be charged to the jury is determined by the evidence at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). To warrant reversal, a trial court's charge must be both erroneous and

prejudicial. *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). Counsel's failure to object to the absence of the language in *Logan* where the state's case was mostly circumstantial was both erroneous and prejudicial and "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on this issue.


Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2025.

STATE OF SOUTH CAROLINA

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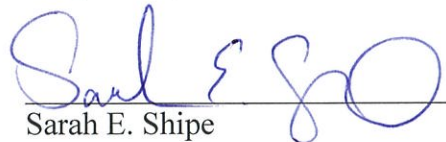
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Naijuwuan S. Chisolm 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 Kristi F. Curtis, which was held on July 21, 2022, 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 Naijuwuan S. Chisolm.

Respectfully Submitted,



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of January, 2025.

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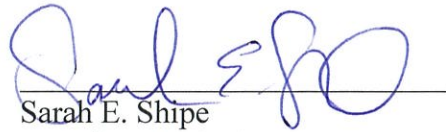
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CERTIFICATE OF COUNSEL

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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This 27th day of January, 2025.