

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Jasper County

Honorable J. Derham Cole, Circuit Court Judge

DAVID ERIC HUGUE, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000054

JOHNSON PETITION FOR WRIT OF CERTIORARI

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Aug 12 2025

S.C. SUPREME COURT

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ISSUE PRESENTED

Whether the court erred in denying post-conviction relief where trial counsel failed to cross-examine multiple witnesses, performed only de minimis cross-examinations of many others, and failed to preserve an objection, since counsel's performance was deficient and Petitioner was prejudiced?

STATEMENT

Procedural history

On July 20, 2017, a Jasper County Grand Jury indicted Petitioner, David Hugue, Jr., for murder and possession of a weapon during the commission of a violent crime. App. 517 – 520. Petitioner was tried before the Honorable R. Ferrell Cothran, Jr., and a jury, from October 28 – 31, 2019. App. 1. Diane Dewitt and Caroline Carmody represented Petitioner. Dustin Whetsel and Mary Jones prosecuted the case. App. 2. Petitioner was convicted as indicted, and he was sentenced to serve concurrent terms of thirty years for murder and five years for the weapons offense. App. 403, ll. 7-14; App. 408, l. 25 – 409, l. 5. Post-trial motions were heard on January 27, 2020. App. 414. The court denied Petitioner’s motion for a new trial by order filed February 3, 2020. App. 429 – 430.

After exhausting his direct appeal remedies, on or about March 10, 2022, Petitioner filed an application for post-conviction relief (PCR). App. 431 – 441; App. 442. The State made its return on October 11, 2022. App. 441 – 467. On April 30, 2024, Petitioner served an amended PCR application. App. 468 – 470. A hearing was held on the matter on May 8, 2024, before the Honorable J. Derham Cole. Michael Lifsey represented Petitioner. Cruise Mitchell appeared on behalf of the State. App. 471. On December 23, 2024, the PCR court issued an order of dismissal. App. 510 – 516.

Relevant facts

On February 18, 2017, Lamar “Mont” Heyward (Decedent) was shot and killed outside of a home on Westberry Street in Jasper County. App. 81, l. 12 – 85, l. 2; App. 133, ll. 9-15; App. 94, ll. 1-3. The evidence against Petitioner was entirely circumstantial. Decedent died from a single shot to the abdomen. App. 296, ll. 11-12. He was still alive when police arrived

but was unable to speak. App. 87, ll. 10-13. A cigarette butt was smoldering by Decedent's person. App. 102, ll. 7-13.

Decedent's nephew, Kyle Riley, called 911 and he told the 911 operator he did not know who shot Decedent. App. 134, ll. 1-2; App. 141, ll. 8-9; App. 148, ll. 3-7; App. 149, ll. 10-14. Nevertheless, at trial, Riley claimed Petitioner and Decedent walked out of the home together and two or three minutes later Riley heard a gunshot. Riley claimed he went outside and saw Decedent on the ground and Petitioner running away. App. 138, l. 19 – 143, l. 17. Riley was never tested for gunshot residue. App. 151, ll. 3-6. He claimed to have seen Petitioner with a gun that day. App. 147, ll. 4-24.

Gary Scott was another man of dubious credibility: a convicted forger admittedly evading police the night of the shooting. Scott lived at the Westberry Street address. App. 160, l. 13 – 162, l. 24. Scott suspiciously left the scene immediately after the shooting. App. 168, ll. 2-17. He too was not tested for gunshot residue. App. 173, ll. 23-25. Initially, Scott told police he was not even at the scene. Later, he admitted that was a lie. App. 169, l. 25 – 170, l. 6. Scott was confronted with the fact that his voice could be heard on the 911 call (so the police knew he was there), and he implicated Petitioner—he claimed he saw Petitioner with a gun that day, and he claimed Petitioner and Decedent had a verbal altercation earlier that night. Scott claimed he heard Petitioner come back to the house just prior to the shooting, and he claimed he heard Decedent say: “You thought I was playing. I told you to stay away. Come outside.” According to Scott, he heard the door close and then the gunshot. App. 166, l. 4 – 172, l. 25.

In addition to Scott, another man who was present at the home at the time of the shooting, Brent Walker, also left immediately after the shooting. App. 167, l. 22 – 168, l. 1. According to the police, Walker refused to cooperate with the investigation. App. 200, ll. 4-20.

Petitioner steadfastly maintained under interrogation that he did not kill Decedent. App. 229, l. 2 – 231, l. 9; App. 250, ll. 9-21. He continued to protest his innocence, pleading not guilty at trial. Petitioner's DNA was taken and compared to DNA from the smoldering cigarette butt. Petitioner's DNA did not match the DNA on the cigarette butt and the DNA was not Decedent's either. App. 268, ll. 4-17; App. 272, ll. 5-14. The person whose smoldering cigarette was by Decedent when police arrived was never identified. Petitioner waited in jail prior to trial for three years. A first trial ended in a mistrial. App. 497, ll. 10-13. The jury in this trial deliberated for approximately four-and-a-half hours but Petitioner was convicted. App. 400, l. 11 – 403, l. 4.

Defense counsel was assigned this case after Petitioner's first trial. She told the PCR court she met with Petitioner two or three times prior to his murder trial. App. 486, l. 14 – 488, l. 6; App. 498, l. 11 – 499, l. 2. During the presentation of the State's case, counsel failed entirely to cross-examine State's witnesses Stephen Kenyon and Russell Wells. App. 76, ll. 10-11; App. 85, ll. 14-15. The majority of the cross-examinations that she did perform were brief and only comprised a couple of pages of transcript per witness. For instance, her cross-examination of Officer Bailey comprised only two pages of transcript; her cross-examination of Detective Croft comprised only a page; her cross-examination of key witness Gary Scott only comprised four pages. Her cross-examination of Derrick Heyward comprised about a page; her cross-examination of Officer Wright was about two pages; her cross-examination of Sarah Zapata was only a page, as was her cross-examination of Megan Fletcher. Her cross-examination of Angelina Phillips was half a page; her cross-examination of Suzanne Cromer was two pages. Her cross-examinations of Jennfier Dalmida, Investigator Hightower, Justin Rose, and Garrett Cooper were only about a page or less. *See* App. 94, l. 7 – 96, l. 12; App. 118, l. 12 – 119, l. 6;

App. 171, l. 24 – 175, l. 17; App. 182, l. 12 – 183, l. 16; App. 257, l. 8 – 259, l. 7; App. 272, ll. 5-25; App. 279, ll. 8-23; App. 296, l. 23 – 297, l. 6; App. 287, l. 3 – 288, l. 11; App. 322, l. 25 – 324, l. 8; App. 333, l. 25 – 334, l. 10; App. 336, ll. 13-21; App. 338, ll. 10-15.

Counsel made an objection at the bench during the State’s closing to unfair conduct by the prosecutor, but she did not preserve her objection by placing it on the record. App. 374, ll. 12-15. At the PCR hearing she stated the prosecutor’s repeated replaying of video of Petitioner putting his hands in and out of his pockets (he replayed it about six times) was unfair, so she objected, but the judge overruled the objection because the video was in evidence. Counsel stated the argument was unfair because “you could tell” it was “really cold that night.” App. 494, l. 8 – 495, l. 21.

The PCR court concluded Petitioner established no deficiency and no prejudice with respect to counsel’s inadequate cross-examination of witnesses. “Applicant has failed to specifically articulate which witnesses Counsel did not properly cross-examine nor how further cross-examination of any witness would have led to a different outcome at trial.” App. 515. The PCR court further concluded Petitioner did not demonstrate prejudice with regard to counsel’s failure to preserve objections for appeal. App. 515.

This petition for writ of certiorari follows.

ARGUMENT

The court erred in denying post-conviction relief where trial counsel failed to cross-examine multiple witnesses, performed only de minimis cross-examinations of many others, and failed to preserve an objection, since counsel's performance was deficient and Petitioner was prejudiced.

The Sixth Amendment provides an accused the right to be confronted with the witnesses against him. U.S. Const. amend. VI. The Confrontation Clause guarantees an opportunity for effective cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Cross-examination assures reliability because the factfinder can observe the witness's demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused. *Id.* Cross-examination of adverse witnesses is a fundamental safeguard essential to a fair trial. *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

A prosecutor's closing argument "must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." *Von Dohlen v. State*, 360 S.C. 598, 609–10, 602 S.E.2d 738, 744 (2004). "Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004).

"For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented, and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58

(2011) (internal citations omitted). “An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review.” *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). “[A]n issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel.” *McHam v. State*, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687. “To show prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Trial counsel’s performance was deficient when she failed to cross-examine several witnesses entirely and performed only de minimis cross-examinations of many others. Her failure to adequately cross-examine the witnesses in Petitioner’s trial left the jury with little to evaluate in terms of the accuracy of the State’s evidence and the credibility of the State’s witnesses. Her performance was deficient because Petitioner was entitled to cross-examination

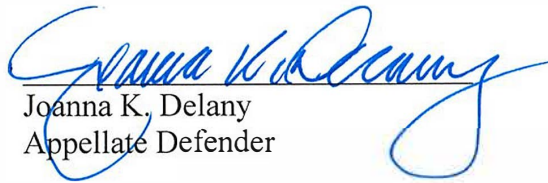
of adverse witnesses as a fundamental safeguard essential to his right to a fair trial. *E.g., Pointer v. Texas*, 380 U.S. at 405.

Counsel also failed to provide constitutionally effective assistance of counsel when she failed to preserve her objection, which was made at an unrecorded bench conference during the State's closing argument. Counsel correctly argued to the trial judge at the bench that it was totally unfair of the solicitor to continuously replay video of Petitioner rubbing his hands in his pockets and argue Petitioner was wiping gunshot residue off his hands. This was not a reasonable inference from the evidence since it was extremely cold at the time. Counsel was deficient for not placing the objection on the record. *Von Dohlen v. State*, 360 S.C. at 609–10, 602 S.E.2d at 744; *York v. Conway Ford, Inc.*, 325 S.C. at 173, 480 S.E.2d at 728. Petitioner was denied due process by the improper argument. *Randall v. State*, 356 S.C. at 642, 591 S.E.2d at 610.

This was a highly circumstantial case which was reliant on the testimony of witnesses with serious credibility problems. Absent counsel's deficiencies, there was a reasonable probability the jury would have had a reasonable doubt about Petitioner's guilt. The court erred in denying post-conviction relief. Petitioner has shown error and prejudice. *Strickland*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2025.

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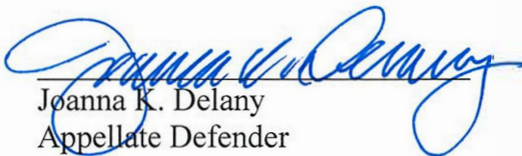
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Eric Hugue 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 J. Derham Cole, which was held on May 8, 2024, 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 David Eric Hugue.

Respectfully Submitted,



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of August, 2025.

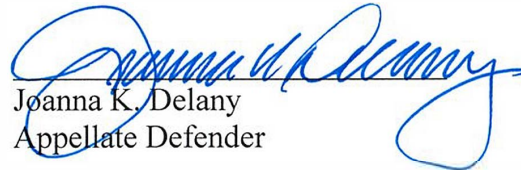
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CERTIFICATE OF COUNSEL

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 12th day of August, 2025.