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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County
Honorable Patrick Cleburne Fant, III, Circuit Court Judge
Honorable R. Kirk Griffin, Circuit Court Judge

JERMAINE HARTWELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000867

JOHNSON PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V. STATE

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ISSUE PRESENTED

Whether the PCR court erred by refusing to grant relief and finding that the newly-discovered evidence petitioner presented was not such that would probably change the result of his trial where Kerry Hollins recanted his trial testimony?

STATEMENT

In February of 2007, the Berkeley County grand jury indicted petitioner for four counts of kidnapping, murder, armed robbery, and two counts of burglary first degree. App. 1013-1028. On August 27, 2007, petitioner proceeded to a jury trial before the Honorable Deadra Jefferson. App. 1. Petitioner was tried alongside his co-defendants Marquita Smith and Gary Grant. App. 1. N. Elliott Barnwell represented petitioner and Blair Jennings and Scarlett Wilson represented the state. App. 1. The jury found petitioner guilty as indicted. App. 742, l. 16 – 743, l. 24. Judge Jefferson imposed a total sentence of 30-years concurrent as to each charge. App. 777, ll. 5-19. Petitioner filed a timely notice of appeal, and an *Anders*[1] brief was filed on petitioner's behalf. App. 781-790. The Court of Appeals dismissed his appeal after review. App. 791-92.

On July 6, 2010, petitioner filed his first post-conviction relief (PCR) application. App. 793-820. The state filed a return on October 26, 2010. App. 821-825. An evidentiary hearing was convened before the Honorable Kristi L. Harrington, on July 12, 2011, and on August 15, 2011, Judge Harrington issued an order of dismissal denying and dismissing petitioner's application with prejudice. App. 826-832. Grover "Beau" Seaton, IV, represented petitioner and Matthew J. Friedman represented the state. App. 826. No appeal was taken.

Thereafter, on October 23, 2018, petitioner submitted a second application for PCR containing the instant allegations of newly discovered evidence based on two affidavits from two co-defendants. App. 833-846. On March 8, 2019, the state filed a return and motion to dismiss as untimely and successive. App. 847-853. The Honorable Roger M. Young signed a conditional order of dismissal on March 21, 2019, instructing petitioner that his application would be dismissed with prejudice unless he provided specific reasons why it should not be dismissed. App.

[1] *Anders v. California*, 378 U.S. 738 (1967).

854-860. On April 5, 2019, petitioner, through counsel, filed a reply to the state's motion to dismiss and moved to reconsider the conditional order of dismissal. App. 862-867. On May 19, 2019, Judge Young granted petitioner's motion to reconsider the conditional order of dismissal. App. 868. On December 9, 2020, a hearing was convened on Webex with the Honorable Perry H. Gravely. App. 869-880. On December 30, 2020, Judge Gravely entered an order determining that petitioner had provided the *prima facie* evidence needed to proceed with an evidentiary hearing, and thus, vacated the conditional order of dismissal and denied the state's motion to dismiss. App. 881-885. On September 7, 2021, an evidentiary hearing was held before the Honorable R. Kirk Griffin. App. 886-947. James P. Craig represented petitioner, and Megan Jameson represented the state. App. 886. On February 14, 2022, Judge Griffin entered an order denying and dismissing his application with prejudice. App. 948-965. No appeal was taken.

On September 8, 2022, petitioner filed an application alleging ineffective assistance of counsel because PCR counsel failed to file a notice of appeal. App. 975-981. On December 19, 2024, the state filed a return and partial motion to dismiss. App. 987-995. On January 21, 2025, an evidentiary hearing was held before the Honorable Patrick C. Fant, III. App. 996-1006. Denise Swope represented petitioner, and Kylee Kanealey represented the state. App. 996. On April 30, 2025, Judge Fant entered an order granting petitioner a late appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 1007-1012.

Petitioner now files this petition for writ of certiorari pursuant to *Austin*, regarding Judge Griffin's 2022 denial of his application for PCR.

ARGUMENT

The PCR court erred by refusing to grant relief and finding that the newly-discovered evidence petitioner presented was not such that would probably change the result of his trial where Kerry Hollins recanted his trial testimony.

Relevant facts

Trial

On August 27, 2007, petitioner, Gary Grant, and Marquita Smith proceed to trial. App. 1. Kareem King and Kerry Hollins were also charged as co-defendants for their involvement in the events on August 2, 2006.

During trial, several witnesses testified that someone named "Manny," was involved with the robbery and eventual killing of Dexter Perry. Specifically, Chris Nelson,[2] testified that after he learned that Perry was shot, Perry said, "Manny did it." App. 249, ll. 12-20. Over defense objection, Nelson again testified that Perry said Manny did it and that Manny was the person who held Perry at gunpoint. App. 250, ll. 12-24. He identified petitioner in the courtroom and testified he was Manny. App. 251, ll. 7-20. Odoner Cobbs testified that Perry said Manny hit him twice and Cobbs described Manny as a light-skinned thinner man who pistol whipped Perry. App. 177, ll. 1-6; 188, ll. 21-25; 191, ll. 4-8. However, Cobbs testified that Manny was not in the courtroom. App. 189, ll. 9-13. Joe Husser also heard Perry say, "Manny did it," but he did not know who Manny was. App. 312, l. 15 – 313, l. 15. Husser was shown a photographic lineup the next day and picked petitioner who he identified as Manny. App. 321, l. 12 – 324, l. 15. He also testified

[2] Nelson also testified that he ran to get help but returned with a .38 revolver that he fired three times at a person he did not recognize walking into the house. App. 243, l. 8 – 244, l. 7.; App. 244, ll. 15-25; App. 245, ll. 2-24. However, on cross-examination, Nelson clarified that petitioner was not the person walking into the house that he shot at. App. 269, ll. 7-24.

that Manny was the person holding Perry at gunpoint. App. 325, ll. 3-7; 350, ll. 6-10.[3] Mark Mason confirmed that Husser was shown a photo lineup and that Husser picked petitioner's photo with no doubt. App. 526, l. 2 – 529, l. 12. Mason also testified that Husser said petitioner was one of the individuals in the house holding onto Perry and that petitioner was armed. App. 529, ll. 8-12.

Similarly, Amber Cobbs testified that she heard Perry call out that Manny did it, but she did not know who Manny was. App. 361, ll. 13-15. She reiterated that Perry told them that Manny was responsible for this. App. 367, ll. 3-8. Deputy J.D. McElvogue testified that he was able to have a conversation with Perry who said that Manny did it. App. 372, ll. 2-5. Finally, Gerald Dale Merrithew testified that he was aware of Perry's declaration that Manny was involved and confirmed that Manny was later identified as petitioner by Husser. App. 538, ll. 6-15.

Hollins then testified concerning the events as follows.[4] He knew petitioner as his nickname, Manny. App. 400, ll. 14-22. He explained that a "lick," was a robbery and that Smith contacted him concerning a lick where she provided Perry as a target. App. 403, l. 10 – 404, l. 23. He testified that Manny had a 9mm handgun and Smith was providing the information as to where Perry was. App. 406, l. 6 – 407, l. 10. He testified that their plan was to rob Perry. App. 411, ll. 20-24. On cross-examination, he explained that he did not write the statement he gave, he just signed it. App. 421, ll. 18-25. He testified that he was not there, so he did not know who did what but that the plan was to rob. App. 423, l. 18 – 424, l. 24. On cross-examination by petitioner's trial counsel, Hollins testified that he discussed the robbery with Hartwell. App. 430, ll. 11-15.

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[3] Husser also identified Kerry Hollins at the individual who pistol whipped him. App. 339, l. 17 – 340, l. 9.

[4] The state also provided testimony from Merrithew who read into evidence a statement given by co-defendant Smith detailing the plan to rob Perry. App. 545, l. 7 – 548, l. 17.

He testified that Perry had sold petitioner bad product and petitioner wanted Perry to make it right, however, that did not mean robbing him. App. 430, l. 18 – 431, l. 11. He testified that Smith planned the robbery. App. 432, ll. 16-25. On re-direct examination, Hollins testified that he saw petitioner load his weapons. App. 441, ll. 16-21. He also agreed that no one forced petitioner to get out of the car, to go and rob Perry, or to load his gun. App. 443, ll. 2-13.

In his closing argument, petitioner's trial counsel argued that there had to be an agreement and participation for hand of one hand of all to apply. App. 649, ll. 5-15. He argued that petitioner had a bad drug transaction with Perry and wanted to discuss that with him. App. 649, ll. 23-25. His theory was that petitioner was merely present. App. 650, ll. 3-8.

Evidentiary hearing

During petitioner's evidentiary hearing, petitioner provided testimony as to what happened on the evening that Perry was killed. App. 891, l. 22 – 901, l. 14. Specifically, he testified that he was shot in the chest and later found out that Chris Nelson shot him. App. 897, ll. 17-25. He described the shooting that he heard in the trailer. App. 898, ll. 15-20. He testified that he was outside the whole time. App. 898, l. 25 – 899, l. 4. He stated that he did have a firearm, but he did not know what happened inside the trailer until after. App. 899, ll. 5-14. He specifically testified that he did not have an intent to kidnap, rob, or murder Perry and that there was not a plan for petitioner, King, and Grant to do so. App. 900, ll. 5-10. He explained that the reason he was there was because he had been sold bad drugs in the past by Perry, and Perry was going to give him his money back or "good" drugs. App. 901, ll. 4-9. Petitioner reiterated that he did not have intent to rob Perry. App. 901, ll. 10-14.

Kerry Hollins then testified that he recalled the events of the night Perry was killed. App. 923, ll. 13-18. He knew that bad drugs had been sold to petitioner, and he knew where Perry was,

so he called petitioner. App. 924, ll. 6-12. Hollins testified that he was told to meet them at the trailer in Lansing, and when he arrived, he heard gunshots. App. 924, ll. 13-24. Petitioner had been shot in the chest and the hand. App. 925, ll. 2-3. He never went in the trailer. App. 925, ll. 11-16. He further testified that there was never a plan for himself, petitioner, Grant, and King to rob Perry. App. 925, ll. 17-21. He agreed that he testified at petitioner's trial differently than he testified during the evidentiary hearing because he was young at the time of petitioner's trial and had been pressured by the detective. App. 926, ll. 10-19. The detective told him he had better cooperate or he would be put in jail for the rest of his life. App. 927, ll. 3-6. On cross-examination, he agreed that his projected release date was March 2023. App. 927, l. 21 – 928, l. 2. He testified he did not have a weapon on the night of the incident. App. 928, ll. 24-25. As to his statement given on August 4, 2006, he testified that the detective wrote the statement for him, however, he did sign the statement. App. 929, ll. 11-19.

Trial counsel Barnwell then testified that he was appointed for petitioner. App. 932, ll. 3-7. He testified that petitioner did not mention any other witnesses or another individual to investigate. App. 932, ll. 10-13. Trial counsel explained that his review of Hollins's testimony was that petitioner wanted to get straight on bad drugs and did not participate in the armed robbery but testified on cross-examination that petitioner had a pistol and was involved in the robbery. App. 933, ll. 1-8. He also testified that in his review of Hollins's testimony he agreed that petitioner was Manny and Manny participated in the robbery, murder, and kidnapping. App. 935, ll. 14-19. He agreed that Chris Nelson testified over his objection that Perry had stated that "Manny did it." App. 936, ll. 2-17. He agreed that the testimony reflected that Joe Husser identified petitioner as Manny. App. 936, l. 22 – 937, l. 8. He also agreed that Odoner Cobbs identified Manny as one of the individuals in the house. App. 937, ll. 12-13. Thus, trial counsel

agreed that multiple people heard Perry say "Manny," and one witness identified petitioner as Manny from a photographic lineup. App. 937, l. 24 – 938, l. 1.

PCR court's ruling

In its order of dismissal, the PCR court noted that it reviewed the testimony presented, observed the witnesses, passed upon their credibility, and weighed their testimony. App. 961. The PCR court noted that to support his newly-discovered evidence claim, petitioner submitted an affidavit from his former co-defendant Kerry Hollins and offered his testimony during the evidentiary hearing. App. 962. However, the PCR court found that Hollins's testimony was not credible. App. 962. As to Hollins, the PCR court noted that he recanted his prior trial testimony implicating petitioner, but that recanted testimony was unreliable and "less than credible." App. 963. The PCR court determined that Hollins was nearing the end of his active prison sentence and had an "incentive to now assist his once co-defendant." App. 963. In addition, the PCR court explained that the trial transcript showed substantial evidence admitted during trial that contradicted Hollins's later testimony. App. 963. Particularly, the PCR court further explained

> [m]ultiple witnesses identified [petitioner] as being inside the trailer where the crimes were committed and multiple witnesses heard the [deceased] state as a dying declaration that 'Manny did it.' Therefore, because the trial testimony directly contradicts Hollins' testimony offered at the PCR hearing, this Court finds [petitioner' has failed to prove that the newly-discovered evidence is such as would probably change the result if a new trial was had.

App. 963-64. The PCR court continued that Hollins's testimony was entirely insufficient to support petitioner's request for relief as newly-discovered evidence of recantation. App. 964. The PCR court specifically found that petitioner could not meet the first prong as there was no reasonable probability that the recantation would have changed the result of the trial because it

was "so unreliable and uncredible." App. 964. The PCR court thus denied petitioner's application and dismissed with prejudice. App. 965.

Discussion

The PCR court erred by determining that petitioner was not entitled to relief based upon the newly-discovered evidence of Hollins's recantation of his trial testimony because the result of petitioner's trial had Hollins testified at trial as he did during petitioner's PCR hearing would probably change. Therefore, this Court should grant certiorari.

Under the Uniform Post-Conviction Procedure Act, a person may institute a PCR action when "there exists evidence of material facts, not previously presented or heard, that requires vacation of the vacation or sentence in the interest of justice." S.C. Code. Ann. § 17-27-20(A)(4).

Generally, in South Carolina "to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have ben discovered before trial; (4) is material to the issue of guilt or innocence; (5) is not merely cumulative or impeaching." *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (citing *McCoy v. State*, 401 S.C. 363, 368 n.1, 737 S.E.2 623, 625 n.1 (2013) and quoting *Clark v. State*, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993) (internal quotations omitted). "The standard test governing newly discovered evidence is properly applied when relief is sought bason on evidence discovered post-trial that is material to the accused's guilt ot innocence." *McCoy*, 401 S.C. at 371, 737 S.E.2d at 627.

"The credibility of newly-discovered evidence is for the trial court to determine." *State v. Harris*, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011) (citing *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)). Moreover, "recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as a ground for a new trial."

Id. "Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion." *Id.* (citing *Porter*, 269 S.C. at 621, 239 S.E.2d at 643).

The PCR court erred by determining that there was no reasonable probability that Hollins's recantation of his trial testimony would change the result at a new trial. App. 964. Importantly, in Hollins's testimony at petitioner's evidentiary hearing he explained that there was never a plan to rob Perry which recanted his trial testimony to the contrary. App. 925, ll. 17-21. At trial, Hollins's testimony that the plan was to rob Perry and that petitioner was not forced to rob Perry was important evidence that linked petitioner to the events of August 2, 2006. App. 411, ll. 2-24. Without Hollins's testimony establishing that petitioner knew and was involved with the plan, the state's case against petitioner would be significantly weakened and the result would probably change if a new trial was had. *See Jamison*, 410 S.C. at 467, 765 S.E.2d at 128; *see also* S.C. Code Ann. 16-3-10 ("Murder is the killing of any person with malice aforethought, either express or implied."); *id.* § 16-11-311(A) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling . . ..).

Further, the PCR court relies on the other identifications from several trial witnesses that Perry was heard saying "Manny did it," and that petitioner was "Manny," however, the PCR court failed to consider that Hollins's testimony was the only evidence linking petitioner to the plan. App. 962-64. Hollins recanting his testimony would only strengthen petitioner's theory that he was merely present and that he did not participate in the plan or enter an agreement to rob Perry. App. 649, l. 5 – 650, 1. 8. In addition, Hollins testified both at trial and during the evidentiary hearing that law enforcement wrote his statement for him and pointed to inaccuracies in his

statements. App. 421, ll. 20-25; 926, ll. 10-19. Thus, the PCR court erred by finding that petitioner could not meet the first prong. App. 964.[5]

Finally, although the credibility of newly-discovered evidence is for the trial court to determine, *Harris*, 391 S.C. at 545, 706 S.E.2d at 529, the PCR court predominately relied on the fact that Hollins was nearing his projected release date of April 2025 to determine that his recantation was unreliable and not credible, App. 963. While Hollins was nearing the end of his sentence at the time of the PCR court's 2022 order of dismissal, he signed the affidavit roughly four years earlier on September 14, 2018. App. 841-43. In addition, as discussed, while other witnesses testified that Manny did it and that Manny was inside of the trailer, that evidence did not contradict with Hollins's recantation of his trial testimony that there was not a plan to rob Perry. App. 963; App. 925, ll. 17-21; App. 443, ll. 2-13. Accordingly, the PCR court erred by refusing to grant relief to petitioner based on his newly-discovered evidence.

[5] Although the PCR court did not address the remaining prongs, petitioner can establish that he was entitled to relief based on the newly-discovered evidence. App. 962. Specifically, Hollins's recantation was discovered several years after trial and was first presented as an affidavit with petitioner's PCR application, it could not have been discovered before trial, whether there was a plan to rob Perry was directly material to petitioner's guilt or innocence, and Hollins's recantation is not merely cumulative or impeaching. *See Jamison*, 410 S.C. at 467, 765 S.E.2d at 128.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Molly M. Keegan
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of April, 2026.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jermaine Hartwell 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 R. Kirk Griffin, which was held on September 7, 2021, 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 Jermaine Hartwell.

Respectfully Submitted,

Molly M. Keegan
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of April, 2026.

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Apr 17 2026

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

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."

Molly M. Keegan
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ATTORNEY FOR PETITIONER

This 17th day of April, 2026.