STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

G. Edward Welmaker, Circuit Court Judge

DYTAVIS HINTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002625

JOHNSON PETITION FOR WRIT OF CERTIORARI

CARMEN V. GANJEHSANI
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INDEX

ISSUE PRESENTED

Whether the PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to move to quash the arrest warrant for murder against Petitioner where a surviving co-perpetrator cannot be charged with murder when another co-perpetrator is killed by the intended victim of the crime ?

STATEMENT

Indictments

On June 16, 2011, Petitioner Dytavis Hinton was indicted by the York County Grand Jury for (1) attempted murder; (2) first degree burglary; (3) attempted armed robbery; and (4) criminal conspiracy. App. 292-306.

Guilty Plea

On July 12, 2011, Petitioner appeared before the Honorable G. Thomas Cooper, Jr. to plead guilty to (1) attempted murder; (2) first degree burglary; (3) attempted armed robbery; and (4) criminal conspiracy. App. 1-41. Petitioner was represented by Harry A. Dest, and the State was represented by Deputy Solicitor Walter William Thompson, Sr. App. 1.

As a part of the plea agreement, the State agreed to dismiss additional charges against Petitioner of murder and possession of a weapon during the commission of a violent crime. The State recommended a total cap of twenty-five years with a cap of twenty years on the no parole offenses of attempted murder, first degree burglary, and attempted armed robbery. The State recommended that the sentence on conspiracy, which could be a maximum of five years, run either consecutive or concurrent at the court's discretion, which would ultimately put Petitioner at a cap of twenty-five years total. App. 4, ll. 13-25.

The State provided the factual basis for the guilty plea. On September 21, 2010 at about one o'clock in the morning in the City of Rock Hill, an incident occurred at The Money, a local bar and club. Petitioner, along with another man named Demorrio Burris, was initially with a group of individuals who had gone to the McDonald's located near The Money. There had been a band playing at The Money that night whose members were

Matthew Thomas, Scott Thomas, Barry Knox, and Josh McSwain. The band had just finished playing their show at The Money. They had travelled to Rock Hill from Greenville, North Carolina in an RV. The band's members planned on spending the night in their RV in the parking lot of The Money. App. 9, l. 20 – 10, l. 15.

Initially, only two of the band's members, Matthew and Scott Thomas, went back to the RV while the other band members stayed in The Money. A sound person from The Money, Michael Walch, also went back with Matthew and Scott to the RV and were settling down after their gig. App. 10, ll. 16-22.

Petitioner legally purchased a gun approximately fifty days prior to this incident. Petitioner brought this pistol out with him that night and put the pistol in a vehicle in which he was travelling – a vehicle that did not belong to him. Petitioner and Burris left their group of friends at the McDonald's and allegedly went to the band's RV. The State alleged that Petitioner and Burris covered their faces with bandannas and wore baseball caps to hide their identities. Burris had previously retrieved Petitioner's gun from the vehicle and had the gun on him at this point in time. Petitioner and Burris then allegedly knocked on the door of the RV. The band members thought it was the remaining band members trying to get into the RV since the door of the RV was locked. When the band members opened the door, Petitioner and Burris allegedly rushed inside. Burris held the gun to the head of Matthew Thomas and demanded money. Burris and Matthew were walking up the steps of the RV into the RV while Burris had the gun at Matthew's head. App. 10, l. 22 – 11, l. 20.

Scott Thomas was in one of the back rooms of the RV when this occurred. Michael Walch was in an area of the RV where he could observe what was happening.

Burris allegedly fired the gun into the floor of the RV while demanding money. App. 11, ll. 10-25.

Matthew and Michael attempted to give Burris their wallets, but at that point, Scott came out of the back room of the RV and had armed himself with his own pistol that he had a concealed weapons permit to carry. A shootout then ensued. Burris was shot a number of times and died in the stairwell of the RV. Petitioner was also shot twice in the abdomen and in his side. According to the State, Petitioner tried to run out of the RV and made it to the parking lot where he dropped, his bandanna lying under him. App. 12, ll. 6-17. Scott Thomas was also shot by Burris three times but survived. App. 13, ll. 4 – 12.

The police were called almost immediately. One police officer was working security at the nearby McDonald's and another was just a block or so away, and both immediately came to the incident site. They found Petitioner lying on the ground. The officers claimed that Petitioner told them he was shot by two white males who robbed him and stated the white males left in a white car. App. 13, ll. 12-24.

The police discovered Burris dead on the steps of the RV and an injured Scott Thomas inside. Matthew Thomas described to the officers what had happened and was able to identify Petitioner as the second assailant. Petitioner was then arrested. App. 14, ll. 3-18.

Judge Cooper accepted Petitioner's guilty plea. App. 14, l. 24 – 15, l. 4. The State noted that Petitioner's only prior record were magistrate level convictions for assault and battery in 2006 and public disorderly conduct in 2007. App. 15, ll. 9-14.

Petitioner's plea counsel pointed out to the court that Petitioner had received his GED and had been in Job Corps for nine months learning carpentry skills. Plea counsel

also informed the court that Petitioner's judgment was impaired that night as he had been drinking alcohol and using marijuana. Plea counsel said Petitioner made a foolish and ill-conceived decision to go along with Burris' plan to rob someone in the middle of the parking lot of a public place. Plea counsel additionally pointed out that Petitioner never had possession of the gun during any point of the incident, never brandished the gun at any point in time that night, and never shot the gun that night. App. 30, l. 17 – 31, l. 21.

Plea counsel also hired a forensic psychologist, Dr. Kenneth Marsh, to evaluate Petitioner. Dr. Marsh found Petitioner did not suffer from any mental illnesses and was not the type of person to have impulse control disorders. Dr. Marsh also found that Petitioner was not the type of person to use violence to solve his problems. Dr. March indicated in his report that Petitioner was a person who was not likely to re-offend in a violent manner. According to Dr. March, Petitioner demonstrated a submissive behavior and difficulty expressing disagreement with others. App. 32, l. 14 – 33, l. 16.

Plea counsel presented a letter from Robert Rosefield, a captain in the U.S. Army, who noted in that letter that Petitioner was serving as a sergeant in the Army and that Captain Rosefield served as Petitioner's Company Commander. Captain Rosefield stated in his letter that Petitioner displayed the Army values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage. App. 35, l. 10 – 36, l. 4. Plea counsel also read a letter from Petitioner's older brother who also vouched for Petitioner's character. App. 36, l. 5 – 37, l. 21.

Plea counsel asked the court to consider a minimal sentence with a possible split sentence with probation. App. 37, l. 22 – 38, l. 20. Judge Cooper sentenced Petitioner to twenty years each for (1) attempted murder; (2) first degree burglary; and (3) attempted

armed robbery. Judge Cooper sentenced Petitioner to five years on the conspiracy charge. All sentences were to run concurrently for a total of twenty years. App. 40, ll. 14-23.

A notice of appeal was filed on Petitioner's behalf. The appeal, however, was dismissed for failure to identify issues reviewable on appeal. The Remittitur was issued on August 23, 2011. App. 268.

Application for Post-Conviction Relief and Evidentiary Hearing

On April 24, 2012, Petitioner filed an application for post-conviction relief ("PCR"). App. 43 - 49. The State filed its Return on June 29, 2012. App. 50-55. On December 4, 2012, Petitioner filed an amended PCR application alleging the following:

1. Ineffective assistance of counsel for failure to properly prepare and investigate, specifically, but not limited to the following:

    a. Failure to completely review and discuss discovery with [Petitioner]. Failure to ensure that [Petitioner] had a complete copy of the discovery materials.

    b. Failure to contact and utilize witnesses.

    c. Failure to investigate crime scene and evidentiary reports (firearms/ballistics, latent print, gunshot residue, etc.).

    d. Failure to investigate inconsistencies in witnesses' statements.

    e. Failure to review statements attributed to [Petitioner] with [Petitioner] prior to his plea and/or in preparation of trial.

2. Ineffective assistance of counsel for advising [Petitioner] that he would receive a split or suspended sentenced and informing [Petitioner] to not be concerned with all the charges he was facing, which resulted in an involuntary guilty plea.

3. Ineffective assistance of counsel for not allowing [Petitioner's] family to speak on his behalf at the plea hearing.

4. Ineffective assistance of counsel for failure to file a Motion for Reconsideration.

5. Ineffective assistance of counsel for failure to properly preserve issues for appeal as was admitted in the Rule 203(b), SCACR, Explanation.

App. 56-57.

On May 13, 2013, Petitioner filed a second amended PCR application alleging the following:

> Ineffective assistance of counsel for failure to move to quash [Petitioner's] arrest warrant for murder (K-617623) under State v. Bonner, 330 N.C. 536, 411 S.E.2d 598 (1992). Ineffective assistance of counsel for allowing the State to present the dismissal of the murder warrant as a part of the plea deal to the court. Plea Transcript p. 4.

App. 59.

An evidentiary hearing was held before the Honorable G. Edward Welmaker on August 15, 2013. App. 61-170. Petitioner was represented by Tricia A. Blanchette, and the State was represented by Assistant Attorney General J. Rutledge Johnson. App. 61. Petitioner's friend Travis Barnette, Petitioner's brother Marcus Thompson, Petitioner's mother Christine Thompson, Petitioner, Ronald Guerette, an expert in crime scene investigations, and Petitioner's plea counsel all testified at the evidentiary hearing. App. 65-166.

Petitioner testified that on the night of the incident, he recalled pulling up to the McDonald's. He left his gun with the clip out in the glove department of the vehicle. He walked over to The Money where he had a few drinks. He walked back outside and saw Burris. Petitioner said Burris was already walking toward the RV and waved for Petitioner to come. Petitioner went over to Burris, and Petitioner said when he reached the RV, Burris was already inside the RV. Petitioner knocked on the door of the RV, and Burris was already there holding Petitioner's gun. Petitioner told Burris to give him back the gun.

Burris told Petitioner that "he [had] this." After that, shots were fired and Petitioner ran. Petitioner ended up in the parking lot of The Money. He had been shot two times. App. 85, l. 15 – 86, l. 10.

Petitioner testified that he never told the officers at the scene that he had been robbed by two individuals who had run off. App. 86, ll. 17-25. Petitioner rather informed the officers that someone thought that Petitioner was trying to rob them and Petitioner pointed the officers to the RV. Petitioner reiterated that he at no time intended to tell the officers that he himself had been robbed. App. 87, ll. 1-6.

Petitioner also explained that he had a bandanna with him that night because he typically wore bandannas as an accessory on his clothing and did not use the bandanna to cover his face that night. App. 87, l. 16 – 88, l. 1. His friend Travis Barnett, brother Marcus Thompson, and his mother Christine Thompson each confirmed at the evidentiary hearing that Petitioner often accessorized his outfits with bandannas, wearing bandannas around either his wrist or in his pocket or around his belt to coordinate with his clothing. App. 66, l. 21 – 67, l. 8; 75, l. 23 – 76, l. 14; 79, l. 23 – 80, l. 20. Petitioner testified that he only used his bandanna that night to stop the bleeding from being shot. App. 88, ll. 2-6.

Petitioner testified that he asked plea counsel why he was being charged with murder in the death of Burris and that plea counsel only told him that he was charged with murder because Petitioner was involved in the incident. App. 91, ll. 17-22; 262 (Petitioner's Ex. No. 6 – Murder Arrest Warrant). He said his plea counsel never answered his questions about why he was charged with murder and whether he could be properly charged with a co-conspirator's murder under South Carolina law. App. 93, l. 21 – 94, l. 5. Petitioner testified that the dismissal of the murder charge was presented to the plea judge as

a part of the plea deal that Petitioner was receiving as a benefit of his plea. App. 94, ll. 6 – 9.

Investigator Guerette, who now was in private practice after years of working for law enforcement, opined that based on the trajectory measurements taken by the police, the only place Petitioner could have been shot was outside the trailer and not inside the trailer. App. 106, l. 9 – 108, l. 20; 131, l. 21 – 132, l. 3; 133, ll. 6-11; 146, ll. 6-9. Investigator Guerette also believed that plea counsel had not investigated the case fully, if even at all. App. 110, ll. 6-7; 128, l. 24 – 129, l. 4; 135, ll. 3 – 22. He testified that fingerprints and blood evidence at the scene had not been analyzed. App. 11, 11. 16-24. Inconsistences in the statements of the Thomas brothers, which did not match the evidence at the crime scene, had not been analyzed. App. 112, ll. 2-6; 116, ll. 17-18. Guests at The Money on the night of the incident were not interviewed. App. 112, ll. 6-12. The medical examiner should have been contacted because there was evidence of an execution-style shooting of Burris. App. 110, l. 14 – 111, l. 11. Guerette would have not advised Petitioner to enter a guilty plea based upon the lack of investigation in the case. App. 129, l. 5-10.

Plea counsel testified he did not fully investigate the case because Petitioner allegedly admitted to him that he went into the trailer with Burris to help Burris commit a robbery. App. 150, l. 21 – 153, l. 17. Plea counsel claimed he discussed all of the charges with Petitioner. App. 156, ll. 23-25. With respect to the murder charge, plea counsel testified that he recognized that in the majority of jurisdictions, including North Carolina, the State would be precluded from pursuing a murder charge against Petitioner for the death of his co-conspirator killed by a third party. Plea counsel said he did not believe South Carolina had settled the question and did not know what South Carolina would do. App.

157, l. 1 – 14; 160, l. 9 – 161, l. 3. Plea said he tried to explain this to Petitioner. App. 159, ll. 6 – 15. Plea counsel did not dispute that the solicitor mentioned to the plea judge that the State was dismissing the murder charge as a part of the plea deal. App. 161, ll. 15 – 24.

Order of Dismissal

Judge Welmaker filed his Order of Dismissal denying Petitioner's PCR application on October 16, 2013. App. 267-284. In particular, Judge Welmaker ruled that plea counsel was not ineffective for failing to move to quash the arrest warrant for murder under State v. Bonner, 330 N.C. 536, 411 S.E.2d 598 (1992). Judge Welmaker found that because the charge was dismissed by the State, it no longer mattered that plea counsel did not move to quash this arrest warrant. App. 282-283.

Petitioner filed a Motion for Rehearing or to Alter or Amend pursuant to Rule 59(e), SCRCP on or about October 30, 2013. App. 285-298. Judge Welmaker denied this motion on November 23, 2013. App. 290-291.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred in finding that plea counsel provided effective assistance of counsel where plea counsel failed to move to quash the arrest warrant for murder against Petitioner where a surviving co-perpetrator cannot be charged with murder when another co-perpetrator is killed by the intended victim of the crime.

Petitioner's plea counsel was ineffective in failing to quash the arrest warrant for murder where Petitioner could not have been charged with the murder of his alleged accomplice who was killed by a third party. The State only dismissed this murder charge against Petitioner as a part of the plea agreement. The murder charge should have been quashed independently of any plea agreement. If the murder charge had been quashed separate of any plea agreement, then Petitioner could have made a decision to go to trial on the remaining charges. Petitioner could have also possibly obtained a more favorable plea offer from the State had the murder charge already been dismissed and rendered unavailable to be used as leverage by the State. Therefore, the PCR court erred in finding that plea counsel had not provided ineffective assistance of counsel.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). "Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). As such, courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The United States Supreme Court has held that "[g]uilty pleas are no more foolproof than full trials to the court or jury. . . . Accordingly, we take great precautions against unsound results." Brady v. United States, 397 U.S. 742, 758 (1970). An "unsound result" occurs when a defendant does not knowingly, voluntarily, or intelligently plead guilty. See Boykin v. Alabama, 395 U.S. 238 (1969). Therefore, in the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000); see also Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " (quoting North Carolina v. Alford, 400 U.S. 25, 31(1970)). "The second, or 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. 52 at 59. In other words,

> A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's

> representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial.

Holden v. State, 393 S.C. 565, 572, 713 S.E.2d 611, 615 (2011) (quoting Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009)); see also Hill, 474 U.S. at 59 (footnote omitted).

The overwhelming majority of states in this country hold that "for a defendant to be held guilty of murder, it is necessary that the act of killing be that of the defendant, and for the act to be his, it is necessary that it be committed by him or by someone acting in concert with him." Erwin S. Barbre, Annotation, *Criminal Liability Where Act of Killing Is Done By One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 A.L.R.3d 239, § 2 at 242 (1974); see also Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 7.5, at 217 (1986) ("[I]t is now generally accepted that there is no felony-murder liability when one of the felons is shot and killed by the victim, a police officer, or a bystander."); see, e.g., Wilson v. State, 188 Ark. 846, 850-52, 68 S.W.2d 100, 101-02 (1934) (adopting agency theory, but holding it does not apply where felon uses victim as a "shield"); People v. Antick, 15 Cal.3d 79, 87, 539 P.2d 43, 48 (1975), *superseded by constitutional amendment on another point*, People v. Castro, 38 Cal.3d 301, 211 Cal.Rptr. 719, 696 P.2d 111 (1985); People v. Washington, 62 Cal.2d 777, 781-82, 44 Cal.Rptr. 442, 445-46, 402 P.2d 130, 133-34 (1965) (Traynor, C.J.) ("[t]o invoke the felony-murder doctrine when the killing is not committed by the defendant or by his accomplice could lead to absurd results"); Alvarez, Jr. v. Dist. Ct., 186 Colo. 37, 525 P.2d 1131 (1974) (no felony murder liability under statute where robbery victim is mistakenly killed by police officer); Weick v. State, 420 A.2d 159, 162-63 (Del.Supr.1980) (no felony murder liability under statute when accomplice is killed by robbery victim); State v. Crane, 247 Ga. 779, 780, 279

S.E.2d 695, 696 (1981) (no felony murder under statute when accomplice is killed by burglarized homeowner); People v. Morris, 1 Ill.App.3d 566, 570, 274 N.E.2d 898, 901 (1971), and People v. Hudson, 6 Ill.App.3d 1062, 1064-65, 287 N.E.2d 41, 43 (1972) (no felony murder liability when accomplice killed by felony victim); Commonwealth v. Moore, 121 Ky. 97, 100-02, 88 S.W. 1085, 1086-87 (1905) (no felony murder liability when robbery victim kills bystander while opposing robbery; contrary result "would be carrying the rule of criminal responsibility for the acts of others beyond all reason"); State v. Garner, 238 La. 563, 586-87, 115 So.2d 855, 864 (1959) (no felony murder liability when bar patron accidentally kills bystander while defending bartender against felonious assault); Commonwealth v. Balliro, 349 Mass. 505, 515, 209 N.E.2d 308, 314 (1965) (felon cannot be held liable for death of any person killed by someone resisting commission of the felony); People v. Austin, 370 Mich. 12, 32-33, 120 N.W.2d 766, 775 (1963) (no felony murder liability when accomplice killed by robbery victim); Sheriff Clark County v. Hicks, 89 Nev. 78, 82, 506 P.2d 766, 768 (1973) (no felony murder liability when victim of attempted murder kills accomplice; "[t]he killing in such an instance is done, not in the perpetration of, or an attempt to perpetrate, a crime, but rather in an attempt to thwart the felony"); State v. Canola, 73 N.J. 206, 226, 374 A.2d 20, 30 (1977) (no felony murder liability when robbery victim kills accomplice); State v. Bonner, 330 N.C. 536, 411 S.E.2d 598 (1992) (holding under common-law theory of felony murder, co-felons may not be charged with first-degree murder as a result of the death of their accomplices at the hands of adversaries to crime); Commonwealth ex rel. Smith v. Myers, 438 Pa. 218, 223-37, 261 A.2d 550, 555-560 (1970) (overruling prior case law, adopts agency theory to deny felony murder liability when police officer kills another police officer during attempt to arrest

robbers); Commonwealth v. Redline, 391 Pa. 486, 508-09, 137 A.2d 472, 482-83 (1958) (overruling prior case law, adopts agency theory to deny felony murder liability when victim kills accomplice); State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App.1988) (no felony murder liability when larceny victim kills accomplice); State v. Hansen, 734 P.2d 421, 427 (Utah 1986) (felony murder statute limited to death of a person "other than a party"; no felony murder when accomplice killed by opponent of felony); Wooden v. Commonwealth, 222 Va. 758, 761-65, 284 S.E.2d 811, 814-16 (1981) (no felony murder liability when robbery victim shoots accomplice); Davis v. Fox, 229 W. Va. 662, 735 S.E.2d 259 (2012) (holding where co-perpetrator is killed by the intended victim of a burglary during the commission of a crime, the surviving co-perpetrator cannot be charged with felony murder).

In State v. Canola, cited above, the defendant was convicted of felony murder when the robbery victim shot and killed one of defendant's co-felons. The court noted:

> Conventional formulations of the felony murder rule would not seem to encompass liability in this case. As stated by Blackstone about the time of the American Revolution, the rule was: "[I]f one intends to do another felony, and undesignedly kills a man, this also is murder." ... A recent study of the early formulations of the felony murder rule by such authorities as Lord Coke, Foster and Blackstone and of later ones by Judge Stephen and Justice Holmes concluded that they were concerned solely with situations where the felon or a confederate did the actual killing. ... [I]t has been observed that the English courts never applied the felony murder rule to hold a felon guilty of the death of his co-felon at the hands of the intended victim.

Id. at 208-09, 374 A.2d at 21 (citations omitted). The court further noted:

> It is clearly the majority view throughout the country that, at least in theory, the doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise. ... This rule is sometimes rationalized on the "agency" theory of felony murder.
>
> A contrary view, which would attach liability under the felony murder rule for *any* death proximately resulting from the unlawful activity-even the death

> of a co-felon-notwithstanding the killing was by one resisting the crime, does not seem to have the present allegiance of any court.

Id. at 211-12, 374 A.2d at 23 (emphasis in original, footnote and citations omitted). In construing its felony murder statute, the court then concluded:

> [I]t appears to us regressive to extend the application of the felony murder rule beyond its classic common-law limitation to acts by the felon and his accomplices, to lethal acts of third persons not in furtherance of the felonious scheme.

Id. at 226, 374 A.2d at 30.

In declining to adopt the felony murder rule with respect to the death of a co-felon, the Virginia Supreme Court reasoned that while when "a person maliciously engages in criminal activity, such as robbery, and homicide of the victim results, the malice inherent in the robbery provides the malice prerequisite to a finding that the homicide was murder," when the robbery victim is the person pulling the trigger there is no malice underlying that act which can be imputed to the co-perpetrator. Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811, 814 (1981).

South Carolina's murder statute defines murder as "the killing of any person with malice aforethought, either express or implied." S.C. CODE ANN. § 16-3-10. Plea counsel had no reason to believe that South Carolina would not fall in line with the majority of states and hold that where a co-felon is killed by the intended victim of a burglary or robbery during the commission of a crime, the surviving co-felon cannot be charged with murder where there would be no malice aforethought of the surviving co-felon with respect to the killing of his co-felon.

Plea counsel was therefore ineffective for failing to move to quash the murder arrest warrant issued against Petitioner. The PCR court believed plea counsel's failure to quash

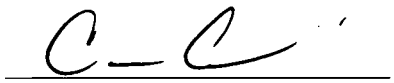
the murder arrest warrant was of no consequence since the State ultimately dismissed this charge. The State, however, only dismissed this charge as a result of the negotiated plea agreement where Petitioner agreed to plead guilty to attempted murder, first degree burglary, attempted armed robbery, and conspiracy in exchange for the dismissal of the murder charge. Had plea counsel moved to quash the murder arrest warrant, Petitioner would not have been facing a trial on this charge and Petitioner may have decided to proceed to trial on the remaining charges. In addition, Petitioner may have been able to have obtained a more favorable plea offer from the State if the murder charge was no longer a bargaining chip that could be used by the State.

Petitioner is accordingly entitled to the grant of post-conviction relief where his plea counsel should have sought a dismissal of the pending murder charge against him where a co-felon cannot be guilty of murder when an intended burglary or robbery victim shoots and kills his accomplice. Petitioner is entitled to the vacation of his guilty plea and a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Dytavis Hinton respectfully request this Court to grant his Petition for Writ of Certiorari with the ultimate relief of a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

DYTAVIS HINTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002625

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dytavis Hinton states:

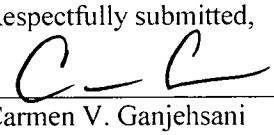
1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 15, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.

3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Dytavis Hinton.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of August, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County
G. Edward Welmaker, Circuit Court Judge

DYTAVIS HINTON,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002625

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Dytavis Hinton, #346826, at Lee Correctional Institution this 19th day of August, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of August, 2014.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.