

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Jr., Circuit Court Judge

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S.C. Supreme Court

JERMEL ANTHONY ROBINSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-001315

JOHNSON PETITION FOR WRIT OF CERTIORARI

JERMEL A. ROBINSON
Pro se Petitioner

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United States v. Watson, 436 F. 2d 1125, 1130 (4th cir. 1973).

STATEMENT

Petitioner was convicted of lynching, attempted armed robbery, possession of a firearm during the commission of a crime of violence, and possession of a pistol by one less than eighteen years of age at a jury trial held before the Honorable R. Ferrell Cothran, Jr. on April 22, 2009, in Sumter County. He was sentenced to thirty-seven (37) years for lynching, to twenty (20) years for attempted armed robbery, and to five (5) years for each gun charge. David Sullivan, Esquire, was trial counsel. Harry Connor, Esquire, was the assistant solicitor. (App. p.1 – p.508)

Petitioner appealed his conviction and the appeal was affirmed by the Court of Appeals on October 11, 2011. State v. Robinson, Op. No. 2011-UP-435. (App. p.509 – p.531)

Petitioner filed an application for post-conviction relief on April 3, 2012, followed by supporting documents. (App. p.532 – p.564) Respondent filed a return dated July 16, 2012. (App. p.565 – p.570) An evidentiary hearing was held on February 24, 2014, before the Honorable George C. James, Jr. Petitioner was present and was represented by Richard T. Jones, Esquire. Respondent was represented by Daniel F. Gourley, Esquire. Both petitioner and trial counsel testified at the hearing. (App. p.591 – p.638) On April 16, 2014, Judge James issued an order denying and dismissing the application for post-conviction relief. (App. p.639 – p.651)

Petitioner filed motions pursuant to Rules 59 and 60, SCRCP on May 4, 2014, which were denied by order dated May 16, 2014. (App. p.652 – p.667.)

This petition follows.

ARGUMENT

The PCR Court reversibly erred by not granting petitioner's application for post-conviction relief where the court applied incorrect law to petitioner's case or failed to find that counsel's errors resulted in prejudice.

A. Did the PCR Court err in failing to find counsel ineffective for failing to object and require the state to elect between the charges murder and lynching in the first degree, resulting in a Double Jeopardy violation?

The PCR Court reversibly erred by not granting petitioner post-conviction relief in regards to his trial counsel's failure to require the state to elect between the charges murder and lynching in the first degree. A threshold inquiry when reviewing an alleged Double Jeopardy violation is whether the same act is involved in different charges. Count one of the indictment charged petitioner with murder and count six of the same indictment charged him with lynching in the first degree. Petitioner raised the issue at his PCR hearing that his trial counsel was ineffective for failing to object to the indictment on the grounds that both offenses are the same under South Carolina law and both were not necessary. Petitioner stated, before the jury was sworn, his trial counsel should have requested that one of the charges be dismissed. U.S. v. Osteen, 254 F. 3d 521 (2001). Double Jeopardy is prohibited by the Fifth Amendment to the United States Constitution and by Article 1, Section 12 of the South Carolina Constitution.

The Fifth Amendment prohibits placing an accused in jeopardy of life or limb twice for the same offense. The premise of the Double Jeopardy clause is that an accused should not be tried or punished twice for the same offense. 5 Amend. Const. An objection to defects which appear on the face of an indictment must be raised before the jury is sworn; Section 17-19-90.

The United States Supreme Court set forth the following test to determine whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment.

Blackburger v. U.S., 284 U.S. 299, 52 S. ct. 180 (1932). The test is based solely on the elements involved. Even under the “elements” approach, the resolution of the Double Jeopardy issue in some cases will depend upon the facts involved. Multi-count indictments that charge the same offense or same act in more than one count offends the prohibition of Double Jeopardy because the prohibition is violated not only by separate convictions for the same conduct but also by separate criminal charges for the same conduct.

Petitioner’s trial counsel acknowledged in his post-trial motion that the charged offenses were the same in fact and law. This motion was submitted by petitioner as an exhibit at his PCR hearing. (App. p.558-559). Petitioner’s trial counsel was also aware that petitioner and his co-defendant was involved in the same indictment and the murder charge of which petitioner was acquitted, and the lynching in the first degree charge arose out of the same set of facts and circumstances.

A defendant shall not be subject to further fact finding proceedings going to guilt or innocence, which are prohibited following an acquittal. Fifth Amend. Double Jeopardy clause protects a man who has been acquitted from having to run the gauntlet a second time. U.S.C.A. Const. Amend. 5.

Determination of guilt and punishment on one count of a multi-count indictment does not raise a Double Jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of charge just concluded. U.S.C.A. Const. Amends 5, 14.

One of the issues in this case is that lynching in the first degree is not a lesser included offense of murder. Both offenses required the same findings for guilt, and they do not carry different penalties.

The allegedly distinct crimes were the same offense (same act), involved the same conduct and both charges derived from the death of one person. "Death" or the "taking of human life," being essential elements in both charges. Likewise, "malice aforethought" is the equivalent of premeditation or a "premeditated purpose and intent." State v. Smith, 352 S.C. 133, 572 S.E. 2d 473, 475 (Ct. App. 2002).

U.S. v. Outlaw, (W. VA) 2012. (Defendant's actions in assaulting fellow inmate with two different weapons did not constitute single, continuous offense, and was not multiplicitous in violation of Double Jeopardy clause). An indictment may divide a course of conduct into separate assaults only when the government demonstrates that the actions and intent of the defendant constitute distinct successive criminal episodes, rather than two phases of a single assault. The constitution does not permit a state to prosecute, convict or punish as two crimes conduct that constitutes only one "offence" within the meaning of the Double Jeopardy Clause. **U.S. v. Cole**, 293 F. 3d 153, 158 (2002 4th Cir.) (Double Jeopardy Clause forbids division of a single conspiracy into multiple violations). There is no evidence of a second and distinct act committed by petitioner and his co-defendant. At no time during the incident did petitioner and his co-defendant make any physical contact (no touching, kicking, punching, pushing, grabbing, or etc.) with the victim. Petitioner's conviction for lynching in the first degree was not predicated upon proof of any act, state of mind, or result different from that required to establish murder.

The record reveals no facts which would distinguish the offenses as separate and distinct. Had murder and lynching in the first degree been separate and distinct offenses, petitioner could have been convicted for both crimes. The case law in South Carolina holds that a defendant may be severally indicted and punished for separate offenses without being placed in Double Jeopardy where a single act consists of two "distinct" offenses. **State v. Grueling**, 257 S.C. 515. 186 S.E. 2d 706 (1976).

To find petitioner guilty of murder, the state was not required to prove a single fact in addition to what it had to prove to find him guilty of lynching in the first degree. Whenever a person is subjected to the risk that he will be convicted of a crime under state law, he is “put in jeopardy of life and limb.” The greater the number of possible convictions, the greater the risk that the defendant faces. The defendant is “put in jeopardy” with respect to each charge against him. Therefore, if the prohibition for being twice put in jeopardy for the “same offence” is to have any real meaning, a state cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes.

The creation of multiple crimes serves only to strengthen the prosecution’s hand. It advances no valid state interest that could not just as easily be achieved without bringing multiple charges against the defendant.

470 U.S. 867-68 (quoting from Missouri v. Hunter, 459 U.S. 359, 371-372 (1983)).

(Marshall J. dissenting)

“When multiple charges are brought, the defendant is ‘put in jeopardy’ as to each charge. To retain his freedom, the defendant must obtain an acquittal on all charges; to put the defendant in prison, the prosecution need only obtain a single guilty verdict. The prosecution’s ability to bring multiple charges increases the risk that the defendant will be convicted on one or more of those charges. The very fact that a defendant has been arrested, charged and brought to trial on several charges may suggest to the jury that he must be guilty of at least one of those crimes. Moreover, when the prosecution’s evidence is weak, its ability to bring multiple charges may substantially enhance the possibility that, even though innocent, the defendant may be found guilty on one or more charges as a result of a compromise verdict. The submission of two charges rather than one gives the prosecution ‘the advantage of offering the jury a choice – a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence...’

The proper remedy for this error, was for petitioner's trial counsel to require the state to elect which of the charges it will pursue. State v. Austin, 385 S.E. 2d 830, 299 S.C. 456 (1989). In this case, murder and lynching in the first degree contained no factual or lawful differences for either offense to be considered distinct. The conclusion is inevitable that the lynching in the first degree was the essence of and inseparable from, the murder.

CONCLUSION

Petitioner's conviction for lynching in the first degree should be vacated, or in the alternative, a new trial should be granted.

B. Did the PCR Court err in finding that counsel was not ineffective for failing to object to petitioner's conviction for lynching in the first degree when co-defendant was acquitted of lynching in the first degree at a joint-trial?

The PCR Court reversibly erred by not granting petitioner post-conviction relief in regards to his trial counsel's failure to contest the conviction for lynching in the first degree when co-defendant was not convicted of lynching. Petitioner's trial counsel stated at the PCR hearing that he submitted a post-trial motion in relation to this issue, stating that petitioner should have been acquitted for lynching. (App. p.622, lines 12-16) This violation arose in a joint-trial for a crime that requires the assemblage of two or more people or a united act. Such a violation renders the conviction impossible at law because the legislature has included mob as a necessary element of lynching in the first degree.

A mob is defined as an "assemblage of two or more persons...for the premeditated purpose and with the premeditated intent of committing an act of violence upon the person of another." Section 16-3-230. Due process demands that the prosecution prove beyond a reasonable doubt every element of the offense charged. State v. Brown, 360 S.C. 581, 602 S.E. 2d 392. The solicitor states "lynching is when two or more people get together." (App. p.130, lines 21-23). The judge's instructions to the jury were "the state must prove beyond a reasonable doubt; one, act of violence, two, inflicted by a mob." (App. p.474, lines 1-9).

Trial counsel's ineffectiveness resulted in prejudice because petitioner was deprived of a fair trial under statutory law of the state and the sixth and fourteenth amendments of the United States Constitution. An error such as this is prejudicial because there were two defendants charged in the same incident, for a crime that is mutually exclusive or requires the participation of another.

Petitioner believes that it is only rational that if the co-defendant was not convicted of lynching in the first degree, and lynching requires a mob, which is more than one (1) person, there could not be a "lynching." **Commonwealth v. Medeiros**, SJC-10442 (2010). The state argues that the co-defendant's conviction for murder and the petitioner's conviction for lynching in the first degree made the two-man mob. This is lawfully incorrect. The state completely disregarded the fact that murder and lynching in the first degree are separate statutory provisions, and that the co-defendant's conviction for murder cannot sustain the mob element for lynching in the first degree. By law, one person, without the participation of others, can commit murder. However, lynching mandates two or more. Furthermore, there is no case law in the history of South Carolina law where one defendant was convicted of lynching in the first degree and the other acquitted where there was a joint-trial.

CONCLUSION

Petitioner's conviction for lynching in the first degree should be vacated.

C. Did the PCR Court err in finding that no prejudice occurred due to trial counsel's failure to request a limiting instruction on the jury's use of a co-defendant's confession?

The PCR Court reversibly erred by not granting petitioner post-conviction relief in regards to his trial counsel's failure to request a limiting instruction on the use of a co-defendant's confession. The petitioner and his co-defendant were tried jointly. Prior to trial, the judge denied petitioner and his co-defendant's motion for a severance and their request that the confessions not be admitted at their joint-trial. (App. p.7, lines 4-10 and App. p.88, lines 17-21.) The trial judge ruled that the confessions with the references to the petitioner and his co-defendant would be redacted and admissible at trial.

A trial court's instruction to the jury that it may not consider a non-testifying co-defendant's confession against a co-defendant is central to the right of the state to conduct a joint trial. **United States v. Gayekpar**, 678 F. 3d 629, 636 (8th Cir. 2012) and **State v. Jackson**, Opinion No. 5278 (2014). ("Historically; instructing the jury to consider a confession as only evidence against the confessing co-defendant was considered sufficient under the confrontation clause, but in Bruton the United States Supreme Court dispensed with that fiction.") **Bruton v. United States**, 391 U.S. 123, 126, 88 S. ct. 1620, 1622, 20 L. Ed. 2d 476, 479 (1968).

The state agrees that trial counsel's failure to request a limiting instruction on the jury's use of petitioner's co-defendant's confession was ineffective assistance of counsel. The redaction itself was insufficient in regards to the confessions. They served no purpose in disguising petitioner's existence. There were several errors that altogether amounted to prejudice in regards to petitioner. The prosecutor during opening statement of petitioner's trial informed the jury of what gun belonged to petitioner and his co-defendant (App. p.126, lines 4-8 and lines 23-25). The prosecutor informed the jury of the side of the vehicle petitioner and his co-defendant approached (App. p.127, lines 2-6 and lines 18-20). The jury was also informed of what apartment petitioner lived in (apt. L5), that he was with his friend, the color of the bikes they were riding and that they admitted to law enforcement what type of guns they possessed (App. p.128 lines 14-19, and app. p.130 lines 13-16). The references were obviously incriminating and they established the only possible connection in this case... Petitioner and his co-defendant. **Stanford v. Parker**, 266 F. 3d 442 (6th Cir. 2001) Chyenne Rosenberg's testimony of petitioner's close relationship with his co-defendant, along with his testimony about the guns and that the co-defendant lived most of the times at petitioner's apartment, was identical to the references in the co-defendant's redacted confession. Petitioner's co-defendant had been a witness against petitioner in the exact same way.

Such a confession may be admitted in evidence, with an appropriate limiting instruction, only if it is redacted so that it does not incriminate the other defendant on its face either explicitly or by obvious and immediate implication. **Gray v. Maryland**, 523 U.S. 185, 192, 118 S. ct. 1151, 1155, 140 L. Ed. 2d 294, 301 (1998).

Petitioner's trial counsel's failed to object to a state's witness testimony which named petitioner's co-defendant (Jackson) as present and participating, when the co-defendant was not even named in the redacted confession. (App. p.380 lines 1-23). **State v. Johnson**, 390 S.C. 600, 703 S.E. 2d 217 (2010). (Chief Justice Toal dissenting). The result of that error made it clear to the jury that the redacted confession of the co-defendant obviously referred to the existence of the petitioner.

Furthermore, the frequent repetition of the neutral pronoun "the other person" caused the phrase to lose its effectiveness in obscuring the co-defendant's references to petitioner, and made it more likely for the jury to realize the original confession incriminated petitioner. Altogether, the phrase appears more than fifty times throughout the co-defendant's two confessions. **United States v. Williams**, 429 F. 3d 767, 773-74 (8th Cir. 2005) and **United States v. Sandstrom**, 594 F. 3d 634, 649 (8th Cir. 2010). (Finding "the redaction of [the confessing co-defendant's] statement made it obvious that a name had been redacted.")

Due to the State's admission of the co-defendant's confession and the aforesaid errors that occurred throughout the course of the trial, petitioner's trial counsel was required to request a limiting instruction on the jury's use of a co-defendant's confession. Counsel's failure to do so violated petitioner's right of confrontation under the sixth amendment.

CONCLUSION

Petitioner should be granted a new trial.

D. Did the PCR Court err in finding that appellate counsel was not ineffective for failing to brief any properly reserved issues pertaining to petitioner's confession?

The PCR Court reversibly erred by not granting petitioner post-conviction relief in regards to his appellate counsel's failure to brief any properly preserved issues pertaining to petitioner's confession. During pre-trial, petitioner and his co-defendant's trial counsel sought a severance because petitioner and his co-defendant made confessions to law enforcement that implicated one another. Trial counsel's request was unsuccessful, and the trial judge denied their motions to sever the trial. (App. p.7 lines 4-10).

The severance should have been granted because where the unredacted out-of-court confession of a non-testifying co-defendant clearly implicates a defendant, severance is required to preserve that defendant's sixth amendment right to confront his accuser. Lilly v. Virginia, 119 S. ct. 1887 (1999). The ruling to redact the confessions was futile because the jury clearly saw and heard several references in the confessions that directly pointed to petitioner and his co-defendant. The co-defendant's trial counsel argued during pre-trial that the trial should be severed because petitioner shifted the blame to the co-defendant. (App. p.88, lines 9-25, App. p.92, lines 17-25 and App. p.93 lines 1-4). There was insufficient evidence to convict petitioner or his co-defendant without the confessions. Mainly, petitioner because law enforcement's probable cause to arrest and charge him was due to the confession the co-defendant made to law enforcement implicating himself and petitioner in the crime. Therefore, the motion to sever should have been granted.

Appellate counsel's errors and omissions resulted in prejudice because petitioner's trial counsel properly preserved this issue in the pre-trial and it could have been argued or raised in petitioner's initial brief. The judge's abuse of discretion amounted to an error of law. **State v. Crawley**, 349 SC 459, 562 S.E. 2d 683 (2002). Appellate counsel's failure deprived petitioner of a full and fair review and resulted in a sixth and fourteenth amendment violation.

Also, during pre-trial petitioner and his co-defendant's trial counsel sought suppression of both confessions. The judge denied both motions requesting that the confessions not be admitted at the joint-trial.

The redaction itself was unconstitutional and did not fall within Bruton's protective rule to be admissible at trial. **Bruton v. U.S.**, 391 U.S. 123 (1968). To begin with, petitioner's confession was unreliable because it was given after petitioner twice exercised his right to remain silent and told detectives "this is not the day I want to speak about this," Sergeant Mike Rogers spoke and his statement was that "your only way out of this is giving us a statement." Petitioner then told detectives he would like to consult with a lawyer. Sergeant Mike Rogers then implied the threat to send petitioner to prison, stating "if you hold back now and wait for an attorney, by the time all your paperwork and everything is processed, it will be too late, we will have this thing wrapped up and that's gonna be it for you." Detectives told petitioner his co-defendant had already implicated him in the crime. Petitioner was coerced into giving a confession. The coercion occurred while the tape recorder was turned off. (App. p.30, lines 17-25; App. p.31, lines 1-25; App. p.32, lines 1-25; App. p.33 lines 1-7).

Under Bruton a non-testifying co-defendant's confession that inculpate another defendant is inadmissible at their joint-trial, even if the jury is instructed that the confession can only be used as evidence against the confessor. The confessions should have been suppressed because it was clear to see, even if redacted, they would still be facially incriminating and because it was obvious the jury would have seen and heard several references in the confessions that directly pointed to petitioner and his co-defendant. **Gray v. Maryland**, 523 U.S. 185 (1998). The trial judge's failure to suppress both confessions violated constitutional law and hearsay rules. Appellate counsel's failure to raise an obvious and meritorious claim deprived petitioner of his sixth and fourteenth amendment rights to a full and fair review.

In addition, the trial judge ruled during pre-trial that the confessions with the references to petitioner and his co-defendant, would be redacted and admissible at trial. This issue was properly preserved for appellate review and should have been raised in petitioner's initial brief. (App. p.232, lines 7-22; and App. p.352, lines 15-24).

The admission of petitioner and his co-defendant's confession at trial violated Bruton, hearsay rules and the confrontation clause because they were denied the ability to cross-examine each other. **Bruton v. United States**, 391 U.S. 123 (1968). The redaction itself was futile because the confessions were facially incriminating, and did not fall within Bruton's protective rule. The redaction served no purpose in disguising who was being talked about or referred to. The incriminating references effectively told the jury that petitioner and his co-defendant's confessions named each other.

The jury was provided with copies of the confession and instructed to read along as the state's witness read the confessions from the stand. The jury clearly saw and heard several references in the confessions that directly pointed to petitioner and his co-defendant resulting in a hearsay and confrontation violation. **United States v. Akinkoye**, 185 F. 3d 192 (4th Cir. 1999).

Appellate counsel's failure resulted in prejudice because an obvious and meritorious claim that should have been raised on direct appeal was the judge erred or abused his discretion in denying the petitioner's motion to suppress or rule the confessions inadmissible at their joint-trial.

CONCLUSION

Petitioner should be granted a new trial.

E. Did the PCR Court err in finding that counsel was not ineffective for failing to object to the jury charges?

The PCR Court reversibly erred by not granting petitioner post-conviction relief in regards to his trial counsel's failure to object to the jury charge. The Judge instructed the jury "neither defendant can be guilty of murder and lynching in the first degree on the same death." (App. p. 477, lines 2-25)

This error prejudiced the outcome of the trial because it provided the jury with two opportunities to consider or convict petitioner of offenses that require the same findings for guilt. The improper instruction provided petitioner with no option to be found not guilty. **Pauling v. State**, 350 S.C. 278, 565 S.E. 2d 769 (2002). Furthermore, lynching in the first degree is not a lesser-included offense of murder. The Fifth Amendment requirement is that no one shall be twice put in jeopardy of life or limb for the same offense. The charges murder and lynching in the first degree derived from one act and the same course of conduct, supported by the same evidence. **State v. Davis**, 539 S.E. 2d 243 (N.C. 2000). Trial counsel's errors resulted in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

CONCLUSION

Petitioner's conviction for lynching should be vacated.

F. Did the PCR Court err in finding that counsel was not ineffective for failing to present an effective directed verdict motion?

The PCR Court reversibly erred by not granting petitioner post-conviction relief in regards to his trial counsel's failure to present an effective directed verdict motion. After the jury was dismissed to deliberate, petitioner's trial counsel unsuccessfully motioned for a directed verdict, only stating "we feel the state has not met its presumption." (App. p.409, lines 11-19). The directed verdict motion was denied and petitioner's issue was not properly preserved for appellate review. (App. p.523).

Trial counsel's failure to preserve petitioner's issue for appellate review resulted in prejudice. **Drayton v. Evatt**, 430 S.E. 2d 517 (1993). Petitioner's counsel should have specifically stated his grounds for objection when the jury returned its verdict, and requested that petitioner be acquitted of lynching in the first degree on the grounds that the state violated constitutional and statutory requirements, that every fact necessary to constitute that crime be proved beyond a reasonable doubt. The state agrees that trial counsel's motion was not thoroughly stated. Although there was evidence petitioner and his co-defendant assembled with the intent to rob the victim, they possessed no common intent to do him violence. Petitioner's co-defendant shot the victim only after the victim shot petitioner. More importantly, petitioner was charged with attempted armed robbery (two counts) and possession of a handgun (two counts). The intent to rob someone and the intent to inflict bodily harm, injury or do violence to someone is not the same.

The state disregards that there was no evidence in this case, direct nor circumstantial, that petitioner and his co-defendant possessed a common intent to injure or inflict bodily harm upon the victim. There was no evidence, direct nor circumstantial that a struggle took place between petitioner and the victim. The victim drew his own gun and shot petitioner in the chest. (App. p.258, lines 2-3; and App. p.259, line 25). Petitioner immediately dropped his gun and ran for help. At no time during the incident did petitioner and his co-defendant make any physical contact (no touching, kicking, punching, pushing, grabbing, or etc.) with the victim. Pursuant to **State v. Smith**, 352 S.C. 133, 572 S.E. 2d 473, 475 (Ct. App. 2002) and **State v. Barksdale**, 311 S.C. 201, 428 S.E. 2d 498, 500 (Ct. App. 1993), certiorari denied October 21, 1993, the state introduced no direct or circumstantial evidence that petitioner and his co-defendant possessed a common intent to inflict bodily harm upon the victim or intent to do him violence. (App. p.366, lines 19-25; and App. p.367, lines 1-5). In addition, none of the State's witnesses provided testimony that a struggle took place between petitioner and the victim, and the state's witness, Detective Culick provided testimony that petitioner never stated a struggle took place. (App. p.360, lines 1-7; and App. p.379, 16-25). Furthermore, there was no gunshot residue, DNA or blood of the victim found on the petitioner's hands, body, or his clothing that would indicate he made any physical contact with the victim. The state presented no evidence to corroborate their assumption of a struggle or any physical contact between the victim and the defendants. Dr. Ross confirmed that all of the bullets entered the right side of the victim's body and all were fired from the passenger side of the vehicle. (App. p.307, lines 9-21; and App. p.308, lines 6-17).

Petitioner respectfully submits that he was never provided with the opportunity to have the court completely consider a directed verdict due to a lack of argument on the part of his trial counsel. Counsel's errors prejudiced the outcome because petitioner could have been acquitted of lynching or the issue could have been properly preserved for appellate review.

CONCLUSION

Petitioner's conviction for lynching should be vacated.

G. Did the PCR Court err in finding that counsel was not ineffective for failing to object to the unconstitutionality of the lynching in the first degree statue?

The PCR Court reversibly erred by not granting petitioner post-conviction relief in regards to his trial counsel's failure to object to the unconstitutionality of the lynching statue. During the sentencing phase of petitioner's trial, counsel made no objections to petitioner being sentenced to the lynching in the first degree statue. Section 16-3-210 and Gregg v. Georgia, 428 U.S. 153 9 S. ct. 2909 (1976).

The lynching in the first degree statue is unconstitutional because it has absolutely none of the safeguards and procedures mandated by the United States Supreme Court under Gregg v. Georgia and is thus in violation of the Eight and Fourteenth Amendments of the United States Constitution and because it improperly shifts the burden from the state to the defendant to present mitigating factors as to why he should be granted mercy. The state argues the improper burden shifting (which makes the state unconstitutional), and that mercy is not an issue in this case. Petitioner was sentenced to the old lynching in the first degree statue, which mandated death, prior to the statue's amendment in 2010 by legislature. Pursuant to United States v. Boone, 254 F. 3d 352 (4th cir.), 532 U.S. 1031 (2001) and United States v. Watson, 496 F. 2d 1125, 1130 (4th cir. 1973) statutory safeguards and procedures are to be adhered to and upheld in all cases where the death penalty could be imposed because the enabling statue defines it as a capital crime, [not] only in those cases where the death penalty is actually sought by the government. Likewise, upon indictment for a capital crime, whether or not death penalty is a realistic possibility.

Trial counsel's errors prejudiced petitioner's sentencing because under statute the lynching in the first degree conviction was in violation of the constitution of the United States and the constitution or laws of South Carolina.

CONCLUSION

Petitioner's conviction for lynching should be vacated.

Respectfully Submitted,



Jermel A. Robinson
Petitioner

Pro se

This 25th day of February, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
George C. James, Jr., Circuit Court Judge

JERMEL ANTHONY ROBINSON,

PETITIONER,

v.

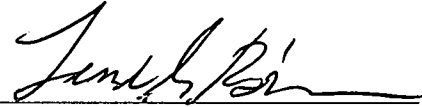
STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2014-001315

CERTIFICATE OF SERVICE

I certify that a true copy of the pro se JOHNSON petition for writ of certiorari have been served on Daniel Gourley, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Daniel E. Shearouse, Clerk of Court, Post Office Box 11330, Columbia, SC 29211 this 25th day of February, 2015.



JERMEL A. ROBINSON, 334393

Petitioner

Lee C.I.

990 Wisacky Highway

Bishopville, SC 29010

SWORN TO BEFORE ME this 25th day
of February, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: 11-5-19

EXHIBIT A

Petitioner is unaware of whether the original transcription will be before the court. Therefore, petitioner is submitting Exhibit A in regards of the addresses (which has been blacked out) relevant to petitioner's issues.

1 such and such apartment, L5. I think the jury's
2 going to know exactly who is being spoken about, so
3 just to kind of echo what Mr. Murphy has already
4 said.

5 *THE COURT:* Okay. And outside of the
6 confrontational clause and redaction, y'all don't
7 have inconsistent defenses? I mean, one is not
8 saying the other one did it?

9 *MR. MURPHY:* We do not have inconsistent
10 defenses.

11 *THE COURT:* All right. Mr. Conner?

12 *MR. CONNER:* Your Honor, the federal and state
13 courts have indicated you can redact statements, and
14 it's my understanding of the law that if it's a --
15 may be able to connect other people to the statement
16 by other evidence.

17 In other words, it might become evidence that
18 he's talking -- that Mr. Robinson is talking about
19 Mr. Jackson or Mr. Jackson is talking about Mr.
20 Robinson because other evidence has come into the
21 case.

22 But if it's -- if there's statements that are
23 offered that have been redacted to take out the names
24 so that facially it doesn't appear to be identifying
25 each other, and I would submit that that meets both

1 they had on masks, but they could tell you that the
2 masked men run there, they pointed the guns at the
3 car, they heard loud talking, and they heard the
4 gunfire, and then they saw the masked men turn and
5 run this way and around this corner.

6 And the police are going to tell you that they
7 trailed Jermel Robinson to this building here, L
8 building, along that path, and they took swabs of the
9 blood they found on the pavement and they sent that
10 to SLED, and they're going to say that the swabs
11 matched the DNA of Jermel Robinson.

12 And also, as a matter of interest, they went to
13 apartment L2 here which happened to be somebody Mr.
14 Robinson knew, but he actually lived in this same
15 building, in apartment L5.

16 They were riding bicycles. And you're going to
17 hear something about that during the course of this
18 trial. They were riding a red bicycle and a silver
19 colored bicycle.

20 And you're going to find from the police that
21 the bicycles were on the opposite side of this fence
22 right here about where this utility pole is in this
23 area. You will see photographs of that.

24 You are also going to find that the police took
25 footprints here from a pair of shoes, and that's been

1 scene investigator.

2 Q And how long have you been doing this kind of work?

3 A Approximately 12 years.

4 Q And were you working back on June the 18th, 2007?

5 A Yes, sir, I was.

6 Q And did you become involved in the investigation of
7 this case that happened at Poplar Square Apartment
8 complex?

9 A Yes, sir, I did.

10 Q And did you actually go to the scene that evening?

11 A Yeah, that's correct. Yes.

12 Q And tell us about some of the places you went and
13 what you saw.

14 A I arrived on scene on June 18th of '07 at
15 approximately 0240 hours and was briefed by the patrol
16 officers at the scene. And there was a vehicle in the
17 parking lot and there was a -- in apartment F4 where
18 Mr. Wimberly was at, I went up there, found the parking
19 lot, through the apartment complex over later in the
20 morning into apartment L2 and then later in the day to
21 apartment L5.

22 So it was the basically my -- when I first got there,
23 it was the vehicle, apartment F4, then apartment L2.

24 Q And now, would you come down here and use this
25 diagram and show us where these various different places

1 BY MR. CONNER:

2 Q Now, did you later go to apartment L5?

3 A Yes, sir, I did.

4 Q And did anybody take any pictures there?

5 A Yes, sir. Yes, sir. Detective Culick was taking
6 photos out there.

7 Q Did you have an opportunity to observe anything that
8 she took pictures of?

9 A Yes, sir. I was there with her along with some other
10 task members, all in that same apartment.

11 Q And these two photographs here, I'd ask if you can
12 identify them.

13 A These are photographs that were taken in apartment
14 L5, bathroom.

15 Q And that's the apartment that the defendant Robinson
16 lived in?

17 A Yes, sir.

18 MR. CONNER: Your Honor, we'd offer those into
19 evidence at this time.

20 THE COURT: Okay. That's four, State's four?

21 MR. CONNER: 5A and 5B.

22 THE COURT: Okay. They are in -- any objection,
23 gentlemen?

24 MR. MURPHY: No objection.

25 MR. SULLIVAN: No objection.

1 here is it's just -- it's blood that's on the carpet
2 and -- in front of the couch, and where EMS had to come in
3 and get Mr. Robinson.

4 Q And did you -- did you take swabs of these blood
5 spots?

6 A Yes, sir, I did. And likewise, a swab with a little
7 cotton swab and sent that to SLED to the DNA department
8 for analysis.

9 Q And I show you next exhibit number 5A from apartment
10 L5.

11 A 5A is the picture of apartment L5, this being the L
12 building, entry on the other side. L2 is on this side.
13 L5 is on the other side. And this is the small bathroom
14 and it shows an open door in the vanity.

15 Q Now I show you this, 5B.

16 A It's a little small garbage can that was in the
17 vanity. You open the door, you could see it, part of it,
18 and it has a black knit-type mask.

19 Q And was a swab taken of that and submitted to SLED or
20 was the item submitted?

21 A The item was submitted to SLED. Went to SLED DNA
22 department.

23 Q Now I show you next item six.

24 A Item six would be -- this is the photograph of the
25 cast that I took of the footwear impression, and that

1 Now, is everything you're telling us the truth? Yes,
2 sir. That's questions by Detective Richburg. Where was
3 the clothes that you had on? At the other person's. Did
4 you hide them under something? It was in the other
5 person's room in the apartment. Yes, sir. L5? Yes, sir.

6 Where at again? Last room on the right. Last room
7 on the right. Yeah. And what did -- what did y'all do
8 with -- do to the mask? I just cut it open. And what
9 else? Okay. And you did that? Yes, sir. All right.
10 Detective Holston, this ends the interview. Time now is
11 10:09 am.

12 Next interview, that was taken at 11:41 am,
13 June 18th, 2007. Today is June 18th, 2007. It's
14 approximately 11:41 am. This is an interview with
15 Mr. Teron Hakeen Jackson in reference to a shooting
16 incident at Poplar Square Apartments this morning.

17 Mr. Jackson, if you would, just say your name and
18 spell your complete and total name. Teron Hakeen Jackson,
19 T-E-R-O-N H-A-K-E-E-N J-A-C-K-S-O-N.

20 And Mr. Jackson, you currently in the room now as
21 both myself, Detective Richburg, Detective Robert Richburg
22 and Detective Holston. You've been advised of your
23 constitutional rights in reference to talking with us,
24 haven't you? Yes, sir. And you wish to talk with us
25 freely and voluntarily without an attorney present. Yes,

1 know, sir. Okay. And what kind of car was it? A -- a
2 dark green car with tint windows. Okay. You didn't see
3 what the guy looked like? No, sir.

4 Okay. And what kind of gun was it that you had?
5 Thirty-eight special. Recover, automatic? Revolver.
6 Okay. And how many times did you say you fired? Four.
7 Was somebody else in the passenger's seat of the car? I
8 seen a girl at the moment, but I didn't see her any more.

9 But you got -- I mean, but yeah, I let her out and I
10 heard a shot, so I was -- I was protecting myself and my
11 friend not knowing my friend got shot, too. So we ran
12 around the building. I ran home.

13 The other person ran to one of our friend's house. I
14 changed clothes, came back out around the scene. Where
15 did you run home to? I mean, earlier you said you went to
16 somebody's -- yeah -- apartment and change. Yeah. Which
17 was it? L5. Okay.

18 Changed clothes. Changed clothes, I hide the gun, I
19 came back out. Where did you hide the gun? In the
20 kitchen, in the kitchen under -- under -- under -- um --
21 some boxes. So we came back out and we went to the
22 hospital.

23 And we came -- I took the gun and I took it to my
24 grandmother's house on 11 Frazier. I hide the gun under
25 my passenger seat of my car. What type of car you got? A

1 apartment at Poplar Square L5.

2 Q Did you take them?

3 A Yes, sir, I did.

4 MR. CONNER: Your Honor, we'd offer these into
5 evidence at this time. Be number 33A, B, C and D.

6 THE COURT: What says the defense?

7 MR. SULLIVAN: No objection.

8 MR. MURPHY: No objection.

9 THE COURT: They are in without objection.

10 (Whereupon, State's Exhibits 33A, 33B, 33C, 33D
11 were admitted into evidence.)

12 BY MR. CONNER:

13 Q Now, would you tell us about the photographs.

14 A Yes, sir. These are pictures from inside the
15 apartment that morning. After I left the hospital, I
16 stated I went to the crime scene. While out there, we
17 were directed to apartment L5.

18 Inside of L5 we found a trash can that was located up
19 under the bathroom sink. There is a trash can on the
20 outside beside the sink, and then there was also a trash
21 can underneath the sink.

22 And so when you open the cabinet door and look
23 inside, there was this what appeared to be cloth that
24 could have been used as a mask that was cut. So this was
25 photographed and collected and turned into evidence.

1 you were shot because you were actually shot on the
2 sixth -- I mean -- the 18th of June.

3 So if you could just in your words tell me what

4 happened that night. The mic couldn't pick it up.

5 Stated, okay, you got to talk up a little bit or move
6 closer, okay. Yeah. It was my -- it was me and my
7 friend, we was like hanging out.

8 Well, you know, we saw some boy whatever, and then
9 they told -- they just looked at him and like that's a
10 chance for us that we don't want to miss whatever. We
11 went back to the house and got the things that we were
12 going to use to get him through -- we were going to do, so
13 we went back around.

14 Okay. And you and the other person saw somebody pull
15 through. Is that at Poplar Square? Yeah. Where you
16 live, Poplar Square Apartments? Yes, ma'am. Okay. And
17 where do you live out there? L5. You live at L5? And
18 does the other person live out there? Yeah. The other
19 person stays there some time off and on. Most of the time
20 the other person is at my house.

21 Okay. So you and the other person saw some people
22 pull through and they said they didn't want to let this
23 chance go by. Yeah. That was his answer. Question. Go
24 by? What did they mean by that?

25 Jermel answered, the other person got the idea like,

1 ~~sadder for the Wimberlys. The -- let's start at the~~
2 bottom line. These guys, they were out for no good.
3 They planned the thing. They scoped it out as they
4 said in some of these statements, somewhere in there
5 you'll have the statement in the jury room if you
6 want to read it.

7 But they -- they were scoping it out. In other
8 words, they were checking them out, had their
9 materials, their masks, and their dark clothes and
10 everything at that -- at Robinson's apartment, L5,
11 and they -- they were riding around on their bicycles
12 checking out the thing, and they see this guy come in
13 and they thought he had money for whatever reason.

14 They had seen him out there picking up this
15 young lady. And so they developed the idea, let's
16 rob him, let's get him. In fact, it says in there,
17 get what we could, money, jewelry, whatever, anything
18 that could help. That was the way they looked at it.

19 They were up to no good. They talked about it.
20 They schemed it. And they rushed the car. One of
21 them had a 38 and he admits that's the caliber of gun
22 he had. And that's the caliber guns we got here.

23 The 38 in fact was collected out of the
24 automobile. This is the 38, I believe, State's
25 Exhibit number 12, because it's lighter. This is it.

Subsequent to Petitioner's PCR hearing, Petitioner by way and through his PCR attorney filed a motion to alter or amend Judgment Pursuant to Rule 59(e) SCRCP. The State's Order of Dismissal did not include nor address the Petitioner's claim that trial counsel was ineffective for failing to object to a double Jeopardy violation. The Petitioner fairly raised this claim in his PCR-application and addendum, provided testimony at the hearing in regards to this claim and submitted exhibits in support of this claim at the hearing.

The PCR Court dismissed Petitioner's claim without making findings of fact on the specific claim raised. McCray v. State, 305 S.C. 329, 408 S.E. 2d 241(1991). The PCR Court is required to "make specific findings of fact, and state expressly its conclusion of law, relating to each issue presented." S.C. Code Ann. 17-27-80(1976).

Due to the State's failure to address the Petitioner's claim, Petitioner was entitled to file an amended application in which the order shall address all claims properly raised at the hearing. Pruitt v. State, 310 S.C. 254, 423 S.E. 2d 127(1992). Because the Petitioner did make a Rule 59(e) motion asking the PCR Judge to make specific findings of fact and conclusions of law on his claims the issue should be preserved for appellate review. Marlar v. State, 375 S.C. 407, 653 S.E. 2d 266(2007).

CC: File
Daniel E. Shearouse, Clerk of Court

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