ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to York County

John C. Hayes, III, Circuit Court Judge

JALEEL VAUGHN PAGE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001189

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether trial counsel erred by failing to object to Detective Robbins' testimony that the results of her investigation were corroborated by the statement of a non-testifying codefendant, McKnight, because this inadmissible testimony was highly prejudicial and compounded the Confrontation Clause violation at trial?

STATEMENT OF THE CASE

On December 9, 2004, the York County Grand Jury indicted Petitioner for attempted armed robbery, criminal conspiracy, possession of a weapon during commission of a violent crime, and possession of a pistol by a person under twenty-one. App. 335 – 348. On May 23, 2005, Petitioner's case proceeded to a jury trial before the Honorable Mark H. Westbrook and a jury. App. 1. Derrick Chiarenza represented Petitioner. Thomas Pope and Willy Thompson represented the State. App. 1.

Petitioner was convicted of all charges. App. 708. Judge Westbrook imposed a concurrent thirty-year sentence. App. 719, line 22 – App. 721, line 1. Petitioner appealed, but his conviction and sentence were affirmed. See State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). He was represented by Eleanor Duffy Cleary on appeal.

Petitioner then filed a petition for writ of certiorari in the South Carolina Supreme Court. App. 744, lines 4 – 5. This Court denied his petition and issued the remittitur on November 5, 2010. App. 744, lines 6 - 7.

On July 1, 2011, Petitioner filed a PCR application. App. 723 – 733. On October 14, 2011, Respondent filed its return requesting that an evidentiary hearing be held. App. 734 – 739. A PCR hearing was held on August 16, 2012 in York County before the Honorable John C. Hayes, III. App. 740. Petitioner was represented by Brian Murphy. J. Rutledge Johnson represented the State. App. 740.

Judge Hayes issued an order of dismissal on April 21, 2014. App. 815 – 823. On May 2, 2014, Petitioner filed a motion to reconsider the order pursuant to Rule 59(e), SCRCP. App. 824 – 828. On May 14, 2014, Judge Hayes issued an order denying Petitioner's motion to reconsider. App. 829 – 830. Petitioner appealed the judge's order.

On December 8, 2014, Petitioner filed a petition for writ of certiorari. On August 19, 2015, all five Justices of this Court granted the writ of certiorari. This brief of Petitioner follows.

STATEMENT OF FACTS

Prior to trial, defense counsel moved for a severance. App. 8 – 13. Counsel argued that codefendant McKnight's statement could not be redacted adequately. App. 8 – 13. McKnight's statement implicated himself, Petitioner, Lamont McCollum, and A.J. Williams in the shooting of Willie Cunningham. App. 302, line 20 – App. 305, line 21. McCollum pled guilty prior to trial and Williams was offered a plea deal in exchange for his testimony against Petitioner and McKnight. Petitioner and McKnight were the only defendants on trial. App. 15, lines 2 – 11.

Defense counsel argued that introducing McKnight's statement would violate Petitioner's Sixth Amendment right to confront witnesses because McKnight might not testify and, therefore, could not be cross-examined. App. 8 – 13. Judge Westbrook denied the severance motion but ordered that McKnight's statement be redacted to remove Petitioner's name. App. 13, lines 4 – 10. The State substituted Petitioner's name with "another guy" and "the other guy." App. 302, line 20 – App. 305, line 21; App. 430, line 20 – 431, line 15. Both defendants exercised their right to remain silent and did not testify.

Facts at Trial

Willie Cunningham was shot and killed on March 16, 2003, at his home in York County. Katrina Howard, Lamont McCollum's girlfriend, gave Petitioner and McCollum a ride from Gastonia, North Carolina to York, South Carolina that morning. App. 243 – 245. She drove them to "[Garvin] Lofton's house and to the projects." App. 245, line 23. She drove to the store to get a drink and when she returned to the apartments, Petitioner, McCollum, and "a bunch of other boys" went across the street. App. 248, line 3 – App. 249, line 5. Howard started the car to go see where McCollum was going. App. 249, lines 10 – 11. By the time she drove to the street, the group was already on the porch of the victim's trailer. App. 249, lines 12 – 13.

Howard heard an argument and saw the victim grab McCollum. App. 250, lines 1 – 5. Howard claimed Petitioner then pulled out a gun and shot the victim. App. 250, lines 1 – 5. McCollum, Petitioner, and a "whole bunch of boys were on the porch." App. 250, lines 7 – 8. After the shooting, McCollum and Petitioner got into the car and Howard dropped them off "somewhere together." App. 253, lines 9 – 19.

On cross-examination, Howard admitted to waiting "a year and four months" before coming forward and speaking with police about what happened. App. 256, lines 20 – 21. She spoke with Detective Sara Robbins by phone and later gave a written statement. App. 256 – 259. She said that there were a total of "eleven boys" on the porch and that McCollum did not have a gun. App. 259, lines 11 – 12.

A.J. Williams testified that he, Petitioner, McCollum, and McKnight were all "hanging out" at Hall Street Apartments in York County the morning of the shooting. App. 315, lines 10 – 18. McCollum and Petitioner showed him some guns. App. 316, line 25. They were "talking about making a lick before they go back home." App. 319, lines 13 – 15. They allegedly talked about robbing Rashad Sampson, the victim's nephew, because he wore nice clothes and jewelry. App. 319, lines 20 – 22. Williams stated that McCollum told him and McKnight that if they acted as "the lookout men," they would get a cut of whatever was taken from Sampson's house. App. 324, lines 5 – 8. The plan was for Williams and McKnight to knock on the trailer if someone came during the robbery. App. 324, lines 10 – 12.

According to Williams, all four of them walked to Sampson's house and he and McKnight stood on the side of the trailer dribbling a basketball. App. 325, lines 2 – 5. Petitioner and McCollum walked onto the porch. App. 325, line 8. When the victim answered the door, McCollum asked if Sampson was home. App. 328, lines 3 – 9. When the victim told him Sampson

was not there, McCollum pulled out a gun. App. 328, lines 3 – 9. The victim tried to grab the gun from his hands, but McCollum shot him two times in the chest. App. 328, lines 3 – 9. Petitioner and McCollum "ran to the left side of the trailer and [Williams] and Terrance ran back to [Williams'] trailer." App. 328, lines 17 – 18. Nine months later, Williams was caught on audio tape describing the shooting to an inmate at the detention center who was wearing a wire. App. 331, lines 6 – 17. Williams implicated Petitioner, McCollum, and McKnight in the shooting and admitted to being at the scene.

On cross-examination, Williams admitted to giving three inconsistent statements about the shooting to law enforcement. App. 331 – 332. He explained that he "didn't want to put [himself] in the middle of the situation [and] was trying to back away from the situation as much as possible." App. 346, lines 15 – 18.

Detective Sara Robbins' Testimony

Detective Sara Robbins of the York Police Department was the lead investigator in the case. She testified that she received a call in reference to a shooting at Meadowbrook Trailer Park and responded to the scene. App. 407, lines 10 – 12. She first talked to Sampson, the victim's nephew, to get a statement and test him for gunshot residue. App. 410, lines 4 – 22. She began her investigation by interviewing neighbors, canvassing the crime scene, and talking to the victim's family members and co-workers. App. 411, lines 6 – 13.

Detective Robbins explained that the investigation continued for nine and a half months before an arrest was made. App. 411, line 14 – App. 421, line 5. In December of 2003, she received a phone call from Kenyatta Sherrer, an inmate at the York County detention center. Sherrer told police that he had conversations with Williams at the detention center about the

shooting.[1] App. 417, line 13 – App. 418, line 4. Because of Sherrer's phone call, York police equipped him with a recording device to record everything Williams told him about the shooting. App. 418, lines 13 – 18. Officers interviewed Williams in December of 2003 and again in January of 2004. App. 418, lines 19 – 25. Based on these interviews, York police issued arrest warrants for Petitioner, McCollum, and McKnight. App. 411, line 14 – App. 421, line 5. McKnight gave law enforcement a statement after his arrest.

Over defense counsel's objection, Detective Robbins read McKnight's redacted statement to the jury. App. 429 – 431. On cross-examination, Petitioner's counsel asked Detective Robbins whether she had interviewed potential witnesses from the trailer park as part of her investigation. App. 435, lines 6 – 25. She stated that she interviewed a number of witnesses but was unable to corroborate Williams' statement with the information from those witnesses. App. 440, lines 1 – 3. Defense counsel, again, asked the detective if she was able to go back to the trailer park to attempt to get witnesses to corroborate Williams' statement regarding Petitioner's alleged involvement. App. 439, lines 20 – 25. Detective Robbins responded that law enforcement was unable to corroborate Williams' statement until getting McKnight's statement. App. 440, lines 1 – 3. Defense counsel for Petitioner did not object to or move to strike the detective's response. He did not move for a mistrial.

The State's Motion to Admit McKnight's Unredacted Statement

After Petitioner's counsel cross-examined Detective Robbins, the Solicitor moved to admit McKnight's complete, unredacted statement into evidence. App. 469 – 471. The Solicitor argued that defense counsel opened the door by questioning Detective Robbins' investigation. App. 469 –

[1] Williams was in jail for different charges.

471. He explained that because her credibility as an investigator had been called into question, Detective Robbins should be allowed to go into the information McKnight gave her concerning Petitioner's involvement. App. 469 – 471. Defense counsel argued that he did not cross-examine the detective on the statement itself, but rather, on the evidence that had been presented in trial thus far. App. 472, lines 14 – 18. He explained that "inadmissible evidence doesn't suddenly become admissible evidence simply because [he is] cross-examining a witness as to evidence that's been presented." App. 480, lines 5 – 9.

The trial judge agreed with the Solicitor and admitted McKnight's **full, unredacted** statement into evidence. The judge noted that since the detective's response was "unchallenged and uncontested," the State has the right to address it. App. 499, lines 5 – 9. He agreed to give the jury an instruction to consider the evidence only in terms of Detective Robbins' credibility and how she conducted her investigation, not as evidence against Petitioner. App. 498, lines 8 – 15.

PCR Hearing

During the PCR hearing, trial counsel admitted that he failed to make an objection and to move for a mistrial after Detective Robbins' response to his questions about corroborating Williams' statement. App. 766, line 25, App. 767, line 3. Counsel stated that if he had to try the case again, he would make the objection. He acknowledged the fact that once McKnight's unredacted statement was read to the jury, there was no doubt in their minds that McKnight was talking about Petitioner. App. 777, lines 6 – 14. Petitioner did not testify during the PCR hearing.

Judge Hayes left the record open for additional testimony. App. 785, lines 3 – 19. On May 13, 2013, Petitioner's PCR proceedings were concluded. App. 787 – 810.

Order of Dismissal

Judge Hayes dismissed Petitioner's application. App. 815 – 823. The PCR judge ruled that "the Court of Appeals has already ruled upon this issue and therefore it is not properly before this Court." App. 822. The judge cited to the Court of Appeals decision that the trial court erred in admitting the unredacted statement into evidence but any error that resulted from admission of the statement was harmless. App. 822; State v. Page, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). The judge agreed that trial counsel "opened the door" to having McKnight's statement admitted. App. 823. However, in light of the Court's ruling on appeal that admitting McKnight's unredacted statement was harmless error, Petitioner failed to prove that he was prejudiced by the introduction of the statement. App. 823.

Motion to Reconsider pursuant to Rule 59(e)

On May 2, 2014, Petitioner filed a motion to reconsider the order pursuant to Rule 59(e), SCRCP. App. 824 – 828. Citing the order of dismissal, Petitioner argued that "the prejudice that was introduced into the Petitioner's trial was not the unredacted statement from McKnight . . . [but] the introduction of Detective Robbins' testimony." App. 824. Petitioner explained that "[the] Court of Appeals relied on testimony already in evidence, and unchallenged by Petitioner's trial counsel." App. 824. The Court "made no ruling that Detective Robbins' testimony was harmless." App. 824. According to Petitioner, the Court "did not analyze or consider the err[or] made by Trial counsel not to object or otherwise move for a mistrial after Detective Robbins' testimony." App. 825. The Court "specifically relied on [her] testimony that was unchallenged in concluding that the err[or] of allowing the [unredacted statement] was harmless." App. 825.

Again, the PCR judge cited to the Court of Appeals' opinion. He explained that "regardless of whether or not trial counsel was ineffective regarding the avenue by . . . which the unredacted

statement entered the trial, the Court of Appeals has held the admission of the statement to have been harmless." App. 830. The judge stated that "any error by trial counsel regarding the admission [of] the statement, did not work to the prejudice of [Petitioner] as the Court of Appeals has found the impact of the statement to have been harmless." App. 830.

ARGUMENT

Trial counsel erred by failing to object to Detective Robbins' testimony that the results of her investigation were corroborated by the statement of a non-testifying codefendant, McKnight, because this inadmissible testimony was highly prejudicial and compounded the Confrontation Clause violation at trial.

On direct appeal, the South Carolina Court of Appeals found that the trial judge erred in admitting McKnight's statement "to rehabilitate [Detective Robbins'] investigative techniques." Page, 378 S.C. at 483, 663 S.E.2d at 360. However, the Court found that the error was harmless and McKnight's statement was "merely cumulative" to the detective's inadmissible testimony that she was able to corroborate A.J. Williams' statement through McKnight's statement. Id. at 485, 663 S.E.2d at 361. Petitioner's counsel failed to object to and move to strike the detective's inadmissible testimony. Id. Because counsel failed to object to the detective's inadmissible testimony, the testimony was in evidence and considered by the Court of Appeals when it found harmless error.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, 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; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. Id. Under this prong, "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must show that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

The Confrontation Clause of the Sixth Amendment guarantees an accused in a criminal case the right to confront and cross-examine witnesses against him. U.S. Const. amend. VI; State v. Henson, 407 S.C. 154, 161, 754 S.E.2d 508, 512 (2014). This constitutional right applies to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; Pointer v. Texas, 380 U.S. 400, 403 – 04, 85 S.Ct. 1065, 1067 – 68 (1965).

In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), the U.S. Supreme Court held that in a joint trial, the admission of a nontestifying codefendant's confession that incriminates another defendant violates the other defendant's right of confrontation. However, such a confession may be admitted into evidence only if it is redacted so that it does not incriminate the other defendant on its face, or by obvious and immediate implication, and if the judge gives a limiting instruction. Gray v. Maryland, 523 U.S. 185, 192, 118 S.Ct. 1151, 1155 (1998); see also Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 1709 (1987) (holding that admission of a nontestifying codefendant's confession did not violate the defendant's right of confrontation where the trial judge instructed the jury to not use the confession against the defendant, and the confession

was redacted to eliminate the defendant's name and any reference to her existence); State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009) (holding that nontestifying codefendant's statement to police violated the defendant's rights under the Confrontation Clause where the redacted statement substituted the defendant's name for "she," the defendant was the only female defendant on trial, and the codefendant did not testify and was not subject to cross-examination).

An investigator's testimony about a nontestifying codefendant's confession can also violate a defendant's right of confrontation. In State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010) the South Carolina Supreme Court held that the defendant's Sixth Amendment right of confrontation was violated when an investigator testified that he arrested defendant based on the codefendant's statement. In that case, the codefendant's confession had been redacted to eliminate any reference to the defendant. Id. at 606, 703 S.E.2d at 220. Because it was clear that a name had been deleted from the codefendant's statement, the trial judge charged the jury about the omission. Id. In addition to the obvious omitted name, the investigator testified that the defendant's arrest was based in part on the codefendant's confession, which effectively told the jury that the confession named the defendant. Id. This Court held that this testimony violated the defendant's Sixth Amendment right of confrontation, which could not be mitigated by a limiting jury instruction. Id. at 607, 703 S.E.2d at 220. See State v. Jackson, 410 S.C. 584, 765 S.E.2d 841 (Ct. App. 2014) (Citing Johnson, the Court found the investigator's testimony that after getting the codefendant's confession, law enforcement issued arrest warrants for the defendant "possibly warrant[ed] reversal under Bruton." However, the issue was not preserved for the Court's review.); see also Gray v. Maryland, 523 U.S. 188-89, 193, 118 S.Ct. 1151, 1153, 1155 (1998) (finding that the detective's testimony that he arrested defendant based on the codefendant's confession "blatantly" linked the defendant to the deleted name in the confession read at trial).

Here, Petitioner's counsel was ineffective. Counsel did not object to Detective Robbins' testimony that she was able to corroborate A.J. William's statement with McKnight's statement implicating Petitioner. Counsel did not move to strike the detective's testimony or move for a mistrial. Because counsel failed to object to or move to strike the detective's statement, the statement was in evidence and considered by the Court of Appeals when finding that the judge's error in admitting McKnight's statement was harmless.

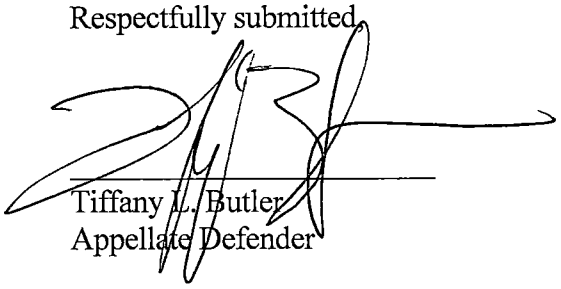
Further, because counsel did not object to Detective Robbins' testimony, the issue of whether such testimony was inadmissible as violating Petitioner's right of confrontation was not preserved for appeal. The Court of Appeals noted that "[t]his testimony was not objected to at the time" and "[a] contemporaneous objection is required to preserve issues for direct appellate review." State v. Page, 378 S.C. 476, 485, 663 S.E.2d 357, 361 (2008) (citing Webb v. CSX Transp., Inc., 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005). Although admitting McKnight's statement violated Petitioner's right of confrontation under Bruton, the Court considered the statement to be cumulative to other evidence presented at trial and considered Detective Robbins' unchallenged testimony part of that evidence. Because the unredacted statement was cumulative, the Court of Appeals found its admission to be harmless.

If the detective's testimony had been objected to and, therefore, preserved for appellate review, the Court of Appeals would have considered this testimony along with McKnight's statement when evaluating whether this violation of Petitioner's Sixth Amendment right of confrontation was harmless. There is a reasonable probability the Court would have found Detective Robbins' testimony and McKnight's statement not harmless **and** would have reversed Petitioner's conviction.

CONCLUSION

For the reasons argued above, Petitioner Jaleel Page respectfully requests this Court to vacate his convictions and sentences and remand to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of October, 2015

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STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2014-001189

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Jaleel Page #309433, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 19th day of October, 2015.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of October, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.