

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. Supreme Court

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Certiorari to Horry County

G. Thomas Cooper, Jr., Circuit Court Judge

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TELLY D. MANNING,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000888

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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### ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective in cross examining witness Derrick Bowens, when on direct examination the witness testified that after hearing a gunshot he saw Petitioner and a co-defendant came back to the car where the witness was sitting, but on cross examination trial counsel asked the witness about his statement to police that Petitioner and a co-defendant **ran** from the car where the decedent was found fatally shot?

## STATEMENT

In May of 2002, the Horry County Grand Jury indicted Petitioner Manning for murder, indictment #2002-GS-26-2043. On November 13, 2006, Petitioner and co-defendant Roshad Baker proceeded to jury trial before the Honorable Steven H. John. Randall K. Mullins represented Petitioner at trial. Johnny Gardner represented the co-defendant. George H. DeBusk prosecuted the case. The jury returned verdicts of guilty for both defendants. Judge John sentenced each to thirty (30) years. A timely notice of intent to appeal was filed and the direct appeal perfected. On September 3, 2009, the South Carolina Court of Appeals dismissed the appeal.

On September 3, 2010, petitioner filed an application for post conviction relief. The State filed a return on September 13, 2011. On February 2, 2015, an evidentiary hearing was held before the Honorable G. Thomas Cooper, Jr. Steven W. Fowler represented Petitioner at the PCR hearing. Joshua L. Thomas represented the State. In a written order signed March 17, 2015, Judge Cooper denied relief and dismissed the application. A timely notice of intent to appeal was served on April 16, 2015. This petition for writ of certiorari follows.

## ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in cross examining witness Derrick Bowens, when on direct examination the witness testified that after hearing a gunshot he saw Petitioner and a co-defendant come back to the car where the witness was sitting, but on cross examination trial counsel asked the witness about his statement to police that Petitioner and a co-defendant **ran** from the car where the decedent was found fatally shot.

The jury convicted Petitioner and co-defendant Roshad Baker of the fatal shooting of Troy Riggins. Riggins was shot seven times while sitting in his Lincoln. (App. p. 213, lines 12-16). Agent Vello Paavel with the South Carolina Law Enforcement Division testified as an expert in the field of firearms and opined that of the six bullets recovered from Riggins at the autopsy, three were consistent with being fired from a 9 mm Luger and three were consistent with being fired from a .38 caliber or a 357 magnum caliber. (App. p. 270, lines 1-20). No weapons were submitted for testing.

The State called Ernest Smith as a witness at trial. According to Smith, on December 21, 2000, his cousins, Petitioner, Roshad and Dormaine Baker and Derrick Bowens drove to Smith's house in Tabor City, North Carolina in a black Nissan Maxima. (App. pp. 119-122). The four told Smith they were going to the Outlet Mall and asked him to join them. (App. p. 122, lines 2-5). Instead, Smith drove his cousins to Longs, South Carolina, where Smith wanted to buy drugs. (App. p. 122, lines 6-25). When Smith was unable to find his drug dealer, the men went to an arcade where Roshad Baker spoke with a man about buying drugs. (App. p. 123, line 11 – p. 124, lines 1-10). The five men got back in the black Maxima and they followed a Lincoln into a parking lot. (App. p. 124, line 10 – p. 125, lines 1-13). According to Smith, Roshad Baker got in the front seat of the Lincoln and Petitioner got in the backseat. (App. p. 127, lines 4-10). Smith testified that he thought both Roshad Baker and Petitioner had guns stuck in the front of their pants. (App. p. 127, line 11 – p. 128, lines 1-8).

The State called another cousin in the car that night, Derrick Bowens, as a witness at trial. Bowens testified that on December 21, 2000, he and his cousins, Petitioner and Roshad and Dormaine Baker were going to Myrtle Beach to shop at the outlet stores. (App. p. 81, lines 2-25). On the way they stopped in Tabor City, North Carolina and picked up another cousin, Ernest Smith. (App. p. 83, line 18 – p. 84, lines 1-18). Bowens testified that they went to a pool hall where a kid on a bicycle talked to Smith and then they left. (App. p. 85, lines 6-10). A short time later Smith flagged down a gray Lincoln and the Lincoln stopped. (App. p. 85, lines 12-22). According to Bowens, Petitioner and Roshad Baker got in the Lincoln. (App. p. 85, lines 23-24). The driver of the Lincoln drove Petitioner and Roshad Baker to a little store. Smith, Bowens and Dormaine Baker followed in the Maxima. (App. p. 86, line 9 – p. 87, lines 1-19). According to Bowens, Petitioner and Roshad went to the Lincoln to buy drugs. (App. p. 88, lines 6-10). Bowens testified that he heard a gun shot and then Petitioner and Roshad Baker came back to the Maxima. (App. p. 88, lines 13-19). Bowens claimed the mood was tense when Petitioner and Roshad returned to the car. (App. p. 89, lines 5-7). The cousins returned to North Carolina without visiting the outlet stores. Bowens did not see Petitioner or Roshad Baker with a gun. (App. p. 89, lines 17-25). All of the cousins were charged in connection with the shooting.

During cross examination trial counsel asked Bowens:

Q: All right, now immediately after you heard that shot did you see Telly Manning [Petitioner] get out of the car?

A: No, Sir.

Q: You did not?

A: No, Sir.

Q: Did you see him run back to the car?

A: No, sir.

Q: All right, wasn't that your testimony on direct that you saw him run back to the car?

A: No

(App. p. 95, lines 2-11). Trial counsel then impeached Bowens with his prior statement to police that he saw "Rashad and Kojak [Petitioner] running back to the car." (App. p. 96, lines 7-12). Bowens stated that he did not remember telling police that he saw them run back to the car and he did not remember them running back to the car. (App. p. 97, lines 7-21). Any statement that Petitioner and Roshad ran from the Lincoln after Bowens heard a gunshot was clearly damaging. It is unclear why trial counsel would have brought out this damaging statement especially, when his testimony on direct simply indicated that Petitioner and Roshad came back to the Maxima.

During the PCR hearing Petitioner testified that it was a mistake for his attorney to bring up the prior damaging statement Derrick Bowens made to the police. (App. p. 416, line 24 – p. 417, lines 1-4). Petitioner testified, "I think he proceeded relentlessly in bringing out that testimony because he said that I was running back to the car, which he brought the statement back up saying that Derrick said I was running back to the car, but – which he was saying that I walked back to the car. In a crime, if you are running, then they are going to think that, you know, you committed a crime." (App. p. 416, lines 17-23). If trial counsel had not raised the issue in regard to the prior statement, the jury would never have heard that Derrick Bowens initially told the police that he saw Petitioner run back to the car.

In the order of dismissal the PCR judge, "Trial counsel's strategy was to show these witnesses lacked credibility. To the extent Bowens' and Smith's statements were inconsistent with their trial testimony, trial counsel brought those inconsistencies out on cross-examination." (App. p. 476). Bowens' trial testimony, however, was helpful to Petitioner so it was not a valid trial strategy to attempt to discredit the helpful direct testimony with the damaging statement.

The PCR judge further wrote in the order of dismissal:

Furthermore, the record shows trial counsel and counsel for the co-defendant thoroughly cross-examined Bowens and Smith on their prior statements, their criminal records, and their plea deals with the State. Applicant has not demonstrated how trial counsel could have further cross-examined these witnesses or how further cross-examination would have changed the outcome of his trial. (Citations omitted).

(App. p. 477). The PCR judge erred. Trial counsel was ineffective in bringing out Bowens' prior damaging statement on cross examination. Petitioner was prejudiced by the deficient performance.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 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, 104 S.Ct. 2052). 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, 104 S.Ct. 2052. "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, 104 S.Ct. 2052). 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, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

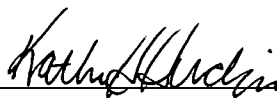
Trial counsel's cross-examination of Bowens, bringing out the prior damaging statement that Bowens saw Petitioner **run** from the Lincoln where Riggins was shot, was unreasonable under prevailing professional norms and constitutes deficient performance. Petitioner was prejudiced by

the deficient performance. The State capitalized on the prior statement in closing argument. (App. p. 316, line 23 – p. 317, lines 1-3). There is a reasonable probability that, but for counsel’s deficient performance, the result of the proceedings would have been different.

**CONCLUSION**

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO Horry COUNTY  
G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

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TELLY D. MANNING,

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PETITION TO BE RELIEVED AS COUNSEL

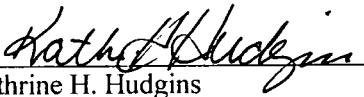
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Counsel for Telly D. Manning states:

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 February 2, 2015. 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 Telly D. Manning.

Respectfully submitted,

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 30th day of October, 2015

STATE OF SOUTH CAROLINA  
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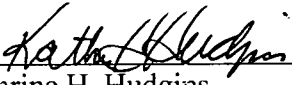
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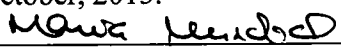
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Telly D. Manning, #304949, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 30th day of October, 2015.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day  
of October, 2015.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.