

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Jr., Circuit Court Judge

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JUN 20 2016

SC SUPREME COURT

TREY LEVAR GARNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001688

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

The PCR erred in denying Petitioner's application alleging newly discovered evidence of juror misconduct where Petitioner presented admissible evidence and testimony that showed juror Chandra L. Davis had intentionally concealed her belief that she was related by marriage to Joe Brooks, the man Petitioner was convicted of murdering.

STATEMENT

On the afternoon of October 27, 1996, law enforcement responded a shooting at “Joe Brook’s Store,” a rural “one stop” country store and gas station in lower Richland County. App. 66, l. 13 - 71, l. 19. The owner, Joe Brooks, had been fatally shot during an attempted robbery. App. 82, l. 1 - 84, l. 22; App. 94, l. 10 - 95, l. 25. A store employee witnessed the robbery and would testify at trial that a black male with camouflage jacket covering most of his face shot Brooks. App. 128, l. 10 - 130, l. 24.

Michelle Davis, Brooks’ daughter, is the wife of Lower Richland High School Football Coach Wilbert Davis. She told police that she had seen Petitioner and his friend, Jermaine McLemore loitering around her father’s store several times in the week leading up to the attempted robbery, including a time when her father was counting his register. App. 405, l. 3 - 413, l. 12. Police interviewed McLemore. He initially denied any involvement in the robbery. App. 228, l. 2 - 299, l. 21.

In a second interview with law enforcement, McLemore admitted to serving as the “get away driver” while Petitioner and another friend, Dayon Lemon, committed the robbery. McLemore identified Petitioner as the shooter. App. 208, l. 15 - 218, l. 17.

Indictment and Trial

On September 10, 1997, the Richland County Grand Jury indicted Petitioner for one count of murder, one count of attempted armed robbery, and one count of conspiracy to commit armed robbery. App. 779 - 784.

On March 9-12, 1998, Petitioner proceeded to trial before the Honorable J. Derham Cole and a jury. Petitioner was represented by James P. Rogers and the State was represented by then Assistant Solicitor R. Knox McMahan. McLemore and Lemon both testified at trial against

Pétitioner. The jury found Appellant guilty as charged. App. 570, l. 13 - 571, l. 15. Judge Cole sentenced Petitioner to a total term of imprisonment of thirty-five years. App. 581, l. 16 - 582, l. 12.

First PCR Application

On August 20, 2001, Petitioner filed an application for post-conviction relief alleging multiple grounds of ineffective assistance of counsel. App. 584 - 588. The application was amended on January 5, 2004. The State filed a Return on May 13, 2002. App. 589 - 594

On January 21, 2004, an evidentiary hearing was held before the Honorable J. Ernest Kinard, Jr. App. 595 - 632. John S. Simmons represented Petitioner. Assistant Deputy Attorney General Molly R. Crum and Assistant Deputy Attorney General Salley W. Elliott represented the State. Petitioner and defense counsel both testified. The court denied Petitioner's application by a written order issued March 24, 2004.

Motion for a New Trial Based on After-Discovered Evidence

On November 22, 2011, Petitioner filed a motion for a new trial based on after discovered evidence. Through counsel, Tara Shurling, Petitioner alleged that a juror named Chandra L. Davis was the "niece by marriage of the victim's daughter, Michelle Davis." App. 645 - 654.

Four affidavits were included with the motion from (1) Cortez Burgess, (2) Détente Chambers, (3) Ricky Anderson, and (4) Tyshawn Weston, all stating that they knew Chandra Davis in high school and recalled that she had claimed to be related Michelle Davis' husband, Wilbert Davis. App. 648 - 651. Michelle Davis, again, is the daughter of the victim.

Consent Order Converting New Trial Motion into Second Post-Conviction Relief Application

On August 18, 2014, Judge Manning issued a "Consent Order for Previously Filed Motion for a New Trial to be Refiled as a Timely Application for a New Trial Pursuant to S.C. Code Ann. § 17-27-20(a)(4) and 17-27-45(C)". App. 653 - 654.

On September 3, 2014, Petitioner filed a second application for post-conviction relief on the same grounds as the November 22, 2011 new trial motion. App. 655- 662. On November 14, 2014, the State filed a Return and Motion to Dismiss. App. 663 - 670. .

Evidentiary Hearing

An evidentiary hearing was held on April 3, 2015 before the Honorable Brooks P. Goldsmith. Tara Shurling represented Petitioner and Assistant Attorney General J. Clayton Mitchell represented the State.

Prior to taking testimony, the State attempted to have Petitioner's application dismissed on the grounds that the Attorney General's office had not consented to Judge Manning's order converting the new evidence motion into a PCR application. App. 683, l. 19 - 691, l. 8. Judge Goldsmith denied the State's arguments and allowed Petitioner to proceed. App. 98, l. 5 - 699, l. 20.

Hearing Testimony of Jim Truit

Richland County Clerk of Court Administrator Jim Truit testified that all juror records are destroyed three years after trial. App. 700, l. 10 - 702, l. 9. Further, records of all checks sent to jurors are destroyed after ten years. *Id.* Based on these practices, Truit concluded that the last records pertaining to juror Chandra Davis would have been destroyed in 2008. *Id.* Counsel Shurling then informed the court that she had been unable to locate Chandra Davis as there were no records of her service. App. 702, l. 8 - 703, l. 9.

Hearing Testimony of Wilbert Davis

Michelle Davis' husband, Wilbert Davis, testified that, at the time of his father-in-law's murder, he was a football coach at Lower Richland High School. App. 704, l. 3 - 705, l. 22. Davis denied having a niece named Chandra L. Davis and stated that his oldest niece was - at the time of

the hearing - only fifteen years old. App. 706, l. 4 - 707, l. 15. Coach Davis further denied knowing of any second or third cousins with the name Chandra Davis. *Id.*

Hearing Testimony of Michelle Davis

Michelle Davis testified that she was unaware of anyone in her husband's family with the name Chandra Davis. App. 712, ll. 2-25.

Hearing Testimony of Jermaine Nixon

Jermaine Nixon testified that he attended Lower Richland High School from 1992 until 1996 and that he remembered a fellow student there named Chandra Davis. App. 714, l. 21 - 715, l. 19. Nixon had completed one of the affidavits relied upon by Petitioner in his second post-conviction relief application. App. 715, ll. 2-23.

At the evidentiary hearing, he claimed that the alleged family connection was a well known rumor around the high school, "[i]t just was around school that she's related to him, Coach Davis, like people saying -- or saying she was related to him. Like I didn't never hear it from her personally." App. 715, l. 20 - 716, l. 2.

Hearing Testimony of Tyshawn Weston

Weston stated that he had attended both middle school and high school with Chandra Davis and interacted with her regularly during those years. App. 724, l. 2 - 725, l. 22. Weston recalled that Chandra Davis had told him that Coach Davis was her uncle. *Id.* Weston's testimony drew repeated hearsay objections from the State, which the court sustained. *Id.* Weston testified that he was not a friend of Petitioner's and that he was not paid or pressured into writing the affidavit. *Id.*

Hearing Testimony of Trey Garner

Petitioner testified that Danita Sumter is his girlfriend and that she had helped him gather information on whether the rumors that Chandra Davis was related by marriage to Joe Brooks were

true. App. 732, l. 3 - 733, l. 20. Petitioner recalled with frustration that Sumter had been unable to locate Chandra Davis. App. 734, l. 4 - 735, l. 23. He then explained that Sumter had retained Counsel Shurling to continue to investigate.

Hearing Testimony of Danita Sumter

At counsel's prompting, Sumter stated that she had procured the affidavits relied on when filing the new evidence motion (and second PCR application). App. 744, l. 24 - 747, l. 21. Sumter denied offering the affiants any money in exchange for the affidavits and explained that she had selected - at Counsel Shurling's recommendation - people who were not friends of Petitioner. *Id.*

Order of Dismissal

Judge Goldsmith denied Petitioner's application by written order issued on June 18, 2015. App. 769 - 778. The court ruled that the testimony of Nixon and Watson regarding Chandra Davis having claimed to have been related to Wilbert Davis was inadmissible hearsay. The court also ruled that all of the affidavits submitted by Petitioner constituted inadmissible hearsay.

Ultimately, the court determined that Petitioner had failed to "present any admissible or credible evidence that juror Chandra Davis was related to the victim." *Id.* This appeal follows.

ARGUMENT

The PCR erred in denying Petitioner's application alleging newly discovered evidence of juror misconduct where Petitioner presented admissible evidence that showed juror Chandra L. Davis had intentionally concealed her belief that she was related by marriage to Joe Brooks, the man Petitioner was convicted of murdering.

At Petitioner's evidentiary hearing, Jermaine Nixon and Tyshawn Watson both testified that juror Chandra L. Davis, whom they went to high school with, would routinely tell people that she was related to then Lower Richland High School Football Coach Wilbert Davis. App. 648 - 651; App. 715, l. 20 - 716, l. 2; App. 724, l. 2 - 725, l. 22. In addition, Petitioner submitted affidavits from other individuals in the community who recalled that Chandra L. Davis adamantly believed, even bragged at times, that she was related to Coach Davis, who was widely respected as a coach and former all-star high school football player. App. 648 - 651.

Coach Davis' wife, Michelle Davis, was the daughter of Joe Brooks, the man Petitioner was on trial for killing during an attempted robbery. In denying Petitioner's PCR application, the court ruled that the testimony from Nixon and Watson, as well as all the affidavits submitted by Petitioner, were inadmissible hearsay and would not be considered. App. 772 - 777.

This was an error. The affidavits and testimony were admissible pursuant to the family history exemption to the rule against hearsay. Rule 803(19), SCRE.

(A) Juror Misconduct Warranting a New Trial.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a fair trial by an impartial jury. U.S. Const. amend. VI; U.S. Const. amend. XIV. A new trial is warranted on the basis of juror misconduct when "it is shown that (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

This two part test recognizes that belated discovered evidence of juror misconduct is not “properly considered ‘newly discovered evidence’; rather it is a separate basis for a new trial.” *Id.* citing *State v. Sheppard*, 155 Vt. 73, 582 A.2d 116, 118 (1990) (noting evidence of juror misconduct is not newly discovered evidence as it has no bearing on the issue of innocence or guilt).

The test also reflects that trial judges and attorneys cannot fulfill their duty to eliminate biased jurors without accurate information. *Id.* Thus, the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed information during *voir dire*. *State v. Kelly*, 331 S.C. 132, 145-46, 502 S.E.2d 99, 106-07 (1998). The second is whether the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges. *Woods*, 345 S.C. at 589, 550 S.E.2d at 284.

Here, Petitioner alleged that juror Chandra L. Davis **intentionally concealed the fact that she believed she was related to Joe Brooks by marriage**. At Petitioner's trial, no juror responded when asked whether they were related to Joe Brooks or Michelle Davis. App. 9, l. 10 - 19, l. 12. Clearly, a belief by a juror that she is related to the murder victim would be grounds for exercising peremptory strike or challenge for cause and any concealment of that belief would constitute serious misconduct.

That Coach Davis and Michelle Davis did not believe Chandra Davis was related to them is not material to the juror misconduct inquiry. Nixon and Watson both testified that **Chandra Davis believed she was related to Joe Brooks**. Her belief, whether it was erroneous or not, is the source of her potential bias. Moreover, even if Chandra Davis knew that she was, in actuality, not related to Brooks or Michelle Davis; the fact that she had a held herself out as a relative and concealed that she did so, would have been grounds for striking her.

(B) Admissibility of hearsay testimony and affidavits regarding juror Chandra Davis' claim that she was related to Joe Brooks and Michelle Davis under the Rule 803(19), SCRE, family history exception.

The PCR court erred in finding the testimony and the affidavits regarding Chandra Davis' belief that she was related to Joe Brooks were inadmissible hearsay. App. 772 - 777. While this evidence was hearsay, it was admissible under Rule 803(19),SCRE:

Reputation Concerning Personal or Family History. Reputation among members of a person's family by blood, adoption, or marriage, or **among a person's associates, or in the community**, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, **relationship by blood**, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Nixon, Watson, and the affiants who were not present at the hearing, all stated that they knew Chandra L. Davis from having gone to high school, and in some cases middle school, with her. App. 648 - 651; App. 715, l. 20 - 716, l. 2; App. 724, l. 2 - 725, l. 22. These individuals qualify as Chandra Davis' "associates" within the meaning of Rule 803(19). *United States v. Jean-Baptiste*, 166 F.3d 102, 110 (2d Cir. 1999) (Rule 803(19) plainly contemplates that members of a family or associates of the family may testify with regard to the common understanding as to the birth of a family member). In addition, they were all from the same rural community.

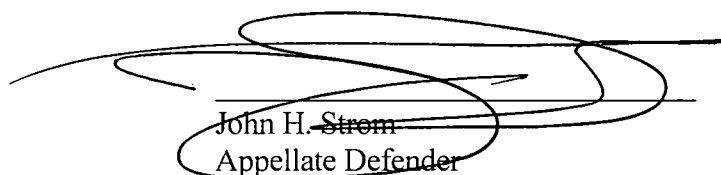
Under Rule 803(19), these individuals' statements and testimony that Chandra L. Davis claimed to be related to Joe Brooks were admissible. *Cf. Porter v. Quarantillo*, 722 F.3d 94 (2d Cir. 2013) (statement by plaintiff's mother that she moved to United States when she was one or two years old did not relate to her birth, adoption, legitimacy, ancestry, marriage, divorce, or relationship by blood, adoption, or marriage, and was not a similar fact of personal family history, and thus did not come within family history exception to the hearsay rule).

Accordingly, it was an error for the PCR court to rule their testimony and statements inadmissible hearsay. Rule 803(19), SCRE.

CONCLUSION

Based on the foregoing reason, Petitioner Danny Trey Levar Garner respectfully requests that this Court remand his PCR application to allow him the opportunity to take testimony and present evidence on the limited issue of whether the hearsay testimony and affidavits regarding juror Chandra Davis' claim that she was related to Joe Brooks and Michelle Davis were admissible under the Rule 803(19), SCRE, family history exception.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of June, 2016.

STATE OF SOUTH CAROLINA

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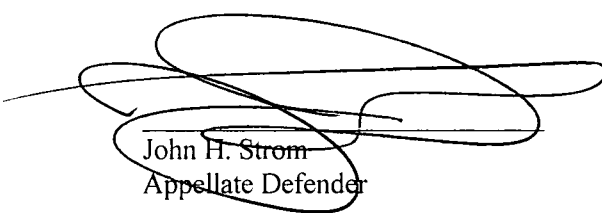
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001688

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Julie Cole,an, Esquire and Trey Levar Garner, #248321, at Lee Correctional Institution this 20th day of June, 2016.


John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of June, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina

My Commission Expires: March 1, 2026