

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable R. Knox McMahon, Circuit Court Judge

 ORIGINAL

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AUG - 5 2016

SC SUPREME COURT

HEYWARD R. TRUESDALE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000064

JOHNSON PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

Trial counsel was ineffective for failing to ask the trial judge to recuse himself
when the judge disclosed his relationship with the victim's family.3

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL8

ISSUE PRESENTED

Whether trial counsel was ineffective for failing to ask the trial judge to recuse himself when the judge disclosed his relationship with the victim's family?

STATEMENT

On December 8, 2011, a Lancaster County grand jury indicted petitioner for murder, armed robbery, and a weapons charge. App. 706 – 714. On May 13, 2013, petitioner was tried before the Honorable Ernest Kinard. App. 1. Doug Barfield represented the State. App. 1. William Frick represented petitioner. App. 1. The jury convicted petitioner. App. 618, l. 24 – 619, l. 11. Judge Kinard sentenced petitioner to concurrent thirty year terms of imprisonment. App. 626, l. 17 – 627, l. 14. Petitioner's appeal was dismissed by the Court of Appeals pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Truesdale, 2014-UP-372 (S.C. Ct. App. Nov. 5, 2014).

On December 10, 2014, petitioner filed a PCR application. App. 629. On August 13, 2015, a hearing was held before the Honorable R. Knox McMahon. R. 641. Nathan Sheldon represented petitioner. App. 641. Justin Hunter represented the State. App. 641. On December 17, 2015, Judge McMahon denied petitioner's application. App. 695. This petition follows.

ARGUMENT

Trial counsel was ineffective for failing to ask the trial judge to recuse himself when the judge disclosed his relationship with the victim's family.

It was undisputed that the State's murder case against petitioner depended upon the principle of accomplice liability. App. 61, l. 23 – 62, l. 11. Petitioner's co-defendant, Jarel Davis ("Davis"), who was charged with the victim's murder, pled guilty to manslaughter and received a thirty year sentence. App. 503, l. 1 – 504, l. 10. Davis testified against petitioner and claimed that petitioner suggested killing the victim because he would recognize petitioner. App. 519, l. 24 – 520, l. 13. Davis freely admitted he was the one who shot the victim. App. 520, l. 9 – 521, l. 8. Davis stated that the only reason he stopped shooting was because "the gun ran out of bullets." App. 521, ll. 7 – 8.

Another co-defendant, Shaun McCrorey ("McCrorey"), testified against petitioner in exchange for a negotiated fifteen year sentence. App. 331, l. 8 – 336, l. 23. McCrorey did not see the shooting, but testified that he heard shots come from behind him and then saw petitioner and Davis jump into a car. App. 344, l. 5 – 345, l. 2. Also in the car was petitioner's sister, Prayon Truesdale. App. 345, ll. 22 – 24. App. 470, ll. 4 – 5.

Petitioner's sister also testified for the State in exchange for an agreement not to prosecute her. App. 479, ll. 11 – 24. She claimed petitioner developed a plan to rob the victim. App. 478, ll. 3 – 25. She testified that she was standing beside her car talking to someone when she heard gunfire come from the direction of the victim's house. App. 483, l. 13 – 484, l. 6. She did not see anyone get shot. App. 484, ll. 10 – 11.

Before the trial began, Judge Kinard placed on the record his relationship with the victim's brother. App. 6, l. 11 – 7, l. 18. Judge Kinard attended Clemson with the victim's

brother. App. 6, l. 11 – 7, l. 18. The victim's brother's wife was "a good friend" of Judge Kinard's wife. App. 6, l. 11 – 7, l. 18. The judge had been to Clemson games with the victim's brother. App. 6, l. 11 – 7, l. 18. Judge Kinard denied talking to the victim's family about the case. App. 6, l. 11 – 7, l. 18.

Judge Kinard told petitioner that he could "object to my presiding if you would like to but that's up to you." App. 6, l. 11 – 7, l. 18. Trial counsel stated that he had discussed the matter "briefly" with petitioner. App. 7, ll. 19 – 22. He indicated they did not need any more time to discuss the issue. App. 7, ll. 19 – 22. Trial counsel told the judge, "I think we are fine and we are prepared to go forward." App. 7, ll. 19 – 22. Judge Kinard asked petitioner if that was correct. App. 7, l. 23. Petitioner responded, "That's correct." App. 7, l. 24.

At sentencing, Judge Kinard commented unfavorably on petitioner's decision not to testify. App. 626, ll. 7 – 627, l. 14. The trial judge told petitioner that "with 34 witnesses testifying and **not one grain of evidence in your favor** other than the arguments by inference **you got no chance**, and then you elect not to testify, of course, it solidifies that." App. 626, ll. 17 – 22 (emphasis added). After sentencing petitioner to thirty years' imprisonment, Judge Kinard stated, "What I don't understand, [the victim] would have given all of the money to the community, he didn't have to be killed, he would have bought radios or anything." App. 627, ll. 16 – 18.

At the PCR hearing, petitioner stated that he only met with trial counsel once or twice to discuss his murder case. App. 647, ll. 21 – 23. Petitioner wanted Judge Kinard recused from the case. App. 652, ll. 10 – 12. Petitioner testified that trial counsel should have asked for Judge Kinard to recuse himself because of his close relationship with the victim's family. App. 653, ll. 6 – 14. Petitioner testified that the outcome of his case would have been different had the judge

recused himself. App. 653, ll. 15 – 18. Trial counsel testified that the judge did not state that he would automatically recuse himself, but that he would consider it. App. 662, ll. 4 – 14. Trial counsel believed that he would get a good result from Judge Kinard, even if he lost the case. App. 662, ll. 4 – 14.

Trial counsel's deficient performance in failing to ask the trial judge to recuse himself prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). The commentary to Canon 1 of the Judicial Code of Conduct states that "Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to [the] responsibility [of upholding the integrity and independence of the judiciary]. SCACR 501, Canon 1. Canon 2 states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." SCACR 501, Canon 2. Canon 3(C)(1) requires a judge to diligently discharge his administrative responsibilities without bias or prejudice. SCACR 501, Canon 3.

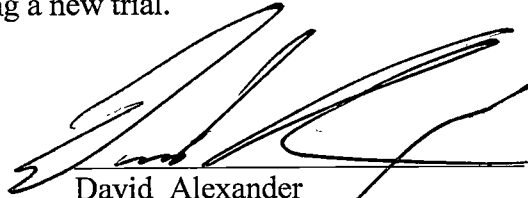
"Under Canon 3(C), a judge should disqualify himself if his impartiality might reasonably be questioned." Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993) (involving *ex parte* communications). "It is well settled judges should recuse themselves where questions of impartiality or impropriety are raised." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 623 (Ct. App. 2002). "To compel recusal, the alleged bias of the judge must be personal, as distinguished from judicial, in nature." Christensen v. Mikell, 324 S.C. 70, 74, 476 S.E.2d 692, 694 (1996).

Petitioner can show a personal, rather than judicial, bias. The trial judge gave a lengthy recitation of his close relationship with the victim's family. Judge Kinard gave trial counsel the opportunity to object, but trial counsel declined. Had trial counsel objected, the canons of judicial conduct would have required Judge Kinard to recuse himself.

Petitioner can also meet the prejudice prong of Strickland. Judge Kinard's comments at sentencing demonstrate that he took an unfavorable view of petitioner's exercise of constitutional right not to testify. The trial judge also commented in a sympathetic manner on the victim's character. Under these circumstances, trial counsel failed to ensure petitioner received a trial before a neutral arbiter. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and ordering a new trial.

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lancaster County

Honorable R. Knox McMahon, Circuit Court Judge

HEYWARD R. TRUESDALE,

PETITIONER,

V.

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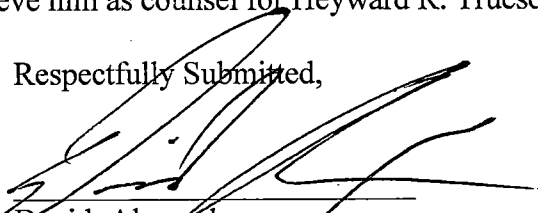
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Heyward R. Truesdale states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge R. Knox McMahon, which was held on August 13, 2015, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Heyward R. Truesdale.

Respectfully Submitted,

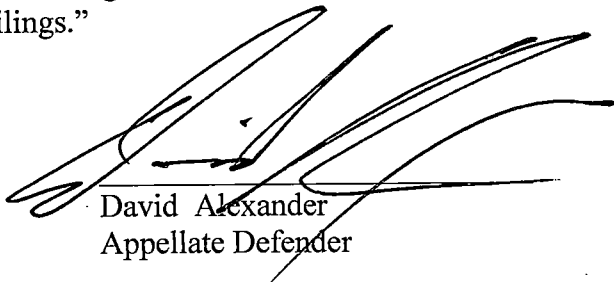


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of August, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



David Alexander
Appellate Defender

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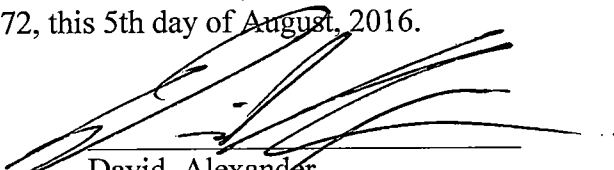
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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Johanna Valenzuela, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Heyward R. Truesdale, #313568, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 5th day of August, 2016.


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of August, 2016.

 (L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.