ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable George C. James, Circuit Court Judge

SHONTA HELTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-002388

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the PCR court correctly found that petitioner was entitled to a White v. State belated appeal where the state stipulated appellant was denied her right to a direct appeal because of trial counsel's negligence, and trial counsel admitted his mistake in a written PCR exhibit?

2.

Whether the PCR court erred by finding trial counsel's failure to request the proper redaction of petitioner's name, and references to her pursuant to Bruton v. United States from co-defendant Dargan's letters about the murder, and counsel's failure to request a limiting instruction were "harmless," since the letters very prejudicially implicated petitioner in the crime without an opportunity to confront Dargan, and the testimony of the witnesses to petitioner's alleged phone call to Dargan were inconsistent, and regardless did not constitute overwhelming evidence of her guilt as an accessory before the fact of murder?

STATEMENT OF FACTS

Petitioner was indicted at the February 7, 2013 term of the Sumter County Grand Jury for the offense of accessory before the fact of murder. The indictment alleged that petitioner "on or about December 9, 2012, advised or agreed with or urged or hired or in some way aided, counseled, or encouraged the principal felon to commit the felony of murder, but was not present when the crime was committed, in violation of the common law and Section 16-1-40" of the Code of Laws. App. 842.

In this same indictment, co-defendant Gary Dargan was indicted for the decedent's murder and possession of a weapon during the commission of a violent crime. App. 842.

This was a highly unusual case, since the real issue was what Shonta Helton did to procure or aid Dargan in the murder in this case. One witness, Davis, testified Petitioner Helton made an angry drunken phone call to Dargan where Davis claimed petitioner asked Dargan to kill the decedent. Other evidence regarding this same phone call was inconsistent.

The state's theory of the case, as stated by the solicitor, was that petitioner got embarrassed during a party in front of her friends when the decedent, Mario Scott, hit her causing his wig to move . . . "they were laughing. And she got angry and she called Gary Dargan. And said, come kill him, Kill him. And Gary Dargan, the evidence will show, did. The slaying of Mario Scott because he embarrassed Shonte Helton." App. 62, ll. 10-19.

"And that's what the case is all about for Ms. Helton. Did she urge, encourage Gary Dargan to come unload a 45 the ended the life of Mario Scott." App. 66, ll. 9-24. The solicitor maintained that Dargan sent his friend, Robert Mellette, to pick up petitioner, who was following the decedent. Mellette picked up the petitioner, and the solicitor claimed the circumstantial evidence would show that Dargan then drove a van into the area and shot the decedent. App. 71,

l. 23 – 76, l. 76, l. 21. Mellette, as will be seen infra, was named prominently in the Bruton error letters Gary Dargan wrote urging a cover-up, and implicating petitioner Helton in the crime.

Defense counsel Kent agreed that petitioner made a telephone call after the decedent accosted her at a drunken party. Witnesses were inconsistent as to the contents of the call. Counsel told the jurors that the state would ask them to surmise and guess that the murder would not have happened, "but for her conversation . . ." Counsel asked the jurors to pay attention to whether the evidence showed petitioner called Dargan, asked him to kill somebody, and helped in the preparation or "are they going to say she made a phone call, and we don't know exactly what she said." App. 3, l. 7 – 85, l. 15.

The state's first witness was Tajuana Davis. Davis testified that she was at a party at the home of Betty Welch on December 8, 2012. Petitioner was present as was the decedent. At some point during the party the decedent argued with petitioner, and he "snatched her wig a little bit on her head. And we all kind of, you know, laughed a bit about it." App. 98, l. 6 – 109, l. 24.

Davis maintained that petitioner was conversely angry, not amused, and that she called Gary Dargan. Davis claimed she heard petitioner say, "Gary, this N put his hands on me. Come here and kill this N. I am at Betty's house. And then that's when she started walking down the street behind him [the decedent]." App. 98, l. 6 – 109, l. 24.

Betty Ann Welch remembered that on December 8, 2012, she lived in a house with her two children and Mario Scott, the decedent. Welch had known Scott since elementary school, and they were involved in a relationship. App. 157, l. 15 – 158, l. 16. Welch had just gotten hired at the El Cheapo gas station in Sumter, and the party at her house -- "me and all my home girls, and him [the decedent]" -- was to celebrate her upcoming first day on the job. App. 159, ll. 19-24. Petitioner Shonta Helton was one of these "home girls." App. 160, l. 16 – 161, l. 3.

During the party, Welch said the decedent was initially in his room watching television. App. 161, ll. 23-25. "We were drinking and having fun." App. 162, ll. 7-18.

Welch remembered that petitioner allegedly started arguing with another woman, Danielle, "and Mario got into it." Mario, the decedent, apparently told petitioner that she needed to leave the party, and go home. App. 162, l. 19 – 163, l. 3.

Welch said the argument between petitioner and the decedent got "really, really bad. So me and her got into it really, really bad." Welch said she was trying to calm the situation down, "and then I see Mario pushed, like not pushed her, but hit her in the head and made her wig move or whatever. And then it just went on from there." App. 163, l. 22 – 164, l. 11.

Welch said that petitioner "flipped out. She started cussing. He started cussing . . . but she jumps on the phone. Calls Gary." App. 164, ll. 12-25. Welch claimed she heard petitioner say on the phone, "You need to come get this motherfucker. He just put his motherfucking hands on me and to that sort [of thing]." App. 165, ll. 2-14.

Welch said she told the decedent, "It's best you leave. So I walked him to the stop sign." App. 165, ll. 15-21. Welch maintained that she saw petitioner following the decedent down the street. There would be testimony that petitioner grabbed a kitchen knife at some point, but the decedent was never stabbed – he was shot and killed. There was no allegation that petitioner was present when he was shot. App. 166, ll. 9-15.

Welch admitted she had been drinking all day long at the time, and acknowledged that she was "tipsy." The women at the party were all in various stages of intoxication. She also admitted she was worried about the police coming to her house because of all of the noise and yelling. Welch said later that night she saw petitioner at the Club Miami. She recalled that petitioner was acting normal by that time, and "joking" with her as she normally did. Welch said

when she left the Club Miami she saw petitioner standing beside Gary Dargan. This was at about 4:45 a.m. App. 169, l. 11 – 175, l. 5.

Welch said they drove by her house but "I seen all the police outside, and I didn't stop. I was like, take me to your house." App. 175, ll. 16-21. Welch stayed at Tajuana Davis's house the remainder of "the night." She did not know what the police where doing at her house at about five o'clock that morning. App. 176, ll. 5-10.

Welch remembered: "I called one of my best friends and I went to his house. And then I woke up to Tajuana calling me, saying that Mario had gotten killed. It was all on Facebook." App. 176, ll. 11-16.

Danielle Govan also remembered the party that evening. She said there were "petty arguments. Small, simple. You can tell it was coming from people drinking too much." App. 205, ll. 15-17. Danielle testified that Betty Welch was intoxicated at the time, and that many of the other people at the party were also intoxicated. App. 206, l. 12 – 207, l. 13. Danielle opined the decedent was not as intoxicated as Welch. App. 208, ll. 3-4.

Danielle recalled the incident where the decedent pushed petitioner's head. Danielle offered "she [petitioner] just said that she knew he hit her. And she felt very disrespected. Betty came outside to try to defuse the situation. . . . So she told Mario to go ahead and leave." App. 211, ll. 5-14. Danielle said petitioner was on the phone talking at the time, telling someone she had been disrespected and that she had been hit. App. 212, ll. 3-7.

Kenyardo Bolden was also at the party that night. Co-defendant Gary Dargan was the father of her child. App. 227, ll. 15-16. Bolden claimed that petitioner was very rude the entire evening, and she claimed the decedent was trying to get petitioner to "calm down or whatever . . ." App. 230, l. 1-25.

Bolden remembered a physical incident between the decedent and petitioner where "both of them were saying stuff towards each other that was very disrespectful. And he just shifted her wig a little bit or whatever. And everybody started laughing. I guess she got upset. She ran in the house. Grabbed a knife, I guess a kitchen knife. And came running down the steps on her cell phone saying this N hit me or whatever." Bolden said she saw petitioner walking with a knife and a phone in her hands. Bolden said they all followed them outside. App. 231, l. 12 – 233, l. 3.

Bolden recalled the Club Miami later that night. She saw petitioner there. Bolden said she learned the next morning that the decedent had been killed. App. 234, l. 13 – 236, l. 5. Bolden said although she saw petitioner at the Club Miami, she did not see Gary Dargan there. App. 236, ll. 6-9.

On cross-examination, Bolden admitted that petitioner never said a name of the person she alleged had hit her. Bolden said petitioner was loud, she had been drinking, but Bolden was positive that petitioner never named the person who allegedly hit her to the person on the other end of the phone. App. 240, l. 22 – 242, l. 5.

As will be seen infra, the PCR judge cited to the testimony of Davis, Welch, and Bolden in reasoning why he ruled the Bruton[1] errors in the failure to redact the Gary Dargan letters, and the failure to request a limiting instruction error, were harmless. App. 836.

Gary Dargan letters

The witness involved in the Bruton issue was Marcus Mellette. App. 399, l. 18 – 401, l. 9. Marcus testified he had known co-defendant Gary Dargan for about twenty years. App. 403, ll. 17-21. Marcus was in the detention center with Gary Dargan, but that he heard from Dargan

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[1] Bruton v. United States, 391 U.S. 123 (1968)

again after he, Marcus, was released. App. 408, l. 8 – 411, l. 16. Dargan would call him, and also send him letters about his case. App. 411, l. 17 – 417, l. 20.

Defense counsel Kent later testified at the PCR hearing that he made a big mistake in handling the Bruton issues pertaining to these letters. Although he correctly spotted the issue that the Dargan cover up letters implicated petitioner, and he objected to the references in the letters, his objections were deficient for several reasons. Petitioner was the only woman charged in this case and the references to her were apparent. See State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009). However, she was directly named in other portions of the letters removing any and all doubt, and her name *was not even redacted or replaced with something else* – "another person" for example. Counsel said that "[I] have to say the letters must have been the worst thing for her." App. 807, l. 3 – 815, l. 22.

Kent said he was disappointed with the outcome of the trial, since the discovery basically showed "it really was about six statements against her that were very inconsistent." App. 806, l. 2 – 807, l. 25. Although counsel Kent wanted petitioner tried together with Dargan if there had to be a trial, he admitted his deficiencies regarding the Bruton issues. App. 807, l. 3 – 815, l. 22.

The PCR judge asked Kent if there was a limiting instruction given as to the Dargan letters, and defense counsel Kent answered: "I can almost guarantee you there was not a limiting instruction." App. 809, ll. 10-14. As to the redactions to the Gary Dargan letters, Kent admitted he told the trial judge: "it does not solve my problem. It resolves my objection [to the letters], yes, sir." Kent acknowledged that the Dargan letters urged a cover up, and that references to anything female – petitioner -- were problematic. App. 419, l. 10 – 427, l. 20; app. 809, 18 – 817, l. 8.

At trial, Marcus identified a February 15, 2014, letter to him. In the letter, Dargan asked Marcus to apparently have a witness change his story. He said this witness "can't say he saw Mario [the decedent] *and old girl* on Dingle Street arguing. He can't say he picked *her up off Dingle Street (he picked her up at the curb)*. Two, this is the most important shit. He can't say he seen the van pass by him, drive fast on Dingle and South Sumter." App. 461, l. 12 – 462, l. 17. (emphasis added). Dargan added,

> "He can say (He can say that he was going -- he was calling me asking me what the fuck done happen because he [was] hearing all types of crazy shit about somebody getting killed. *Then once he heard the rumors that I did that behind Shonta because Mario hit her. He got scared because he didn't want to have anything to do with it. And he -- and because he picked her up and he was thinking that that would be fucked up, the police might try to say he had something to do with it . . . Now I don't know what the fuck happened to Mario [the decedent] because all he did was pick Shonta up from by the curb. Bring her to and holler at me. Then drop her off south side at her friend's house. That's all he did.* He don't know shit about the murder or didn't know a murder was going to happen or didn't know anything was going to happen to Mario. *He didn't find out that Mario and Shonta had got into something until the next day* and we started hearing rumors he didn't have shit to do with this."

App. 462, l. 2 – 463, l. 18. (Emphasis added).

Again, during the PCR hearing, defense counsel Kent admitted -- as to the redactions -- that he told the judge "it does not resolve my problem. It resolves my objection, yes, sir." App. 427, ll. 7-20. It was not clear what this was supposed to mean. Defense counsel admitted that the letters were not properly redacted to remover references to petitioner from them, and he admitted that the statement should have been properly redacted. In addition, a limiting instruction should have been given. App. 809, l. 10 – 817, l. 8.

PCR order

In the order of dismissal, the PCR judge found that "trial counsel should have requested a curative instruction [as to the Gary Dargan letters], this failure was harmless because the letters

do not directly or indirectly implicate applicant in the murder in the first place. In addition, any failure to pursue further redaction or a curative charge was harmless." App. 836.

As will be seen infra, petitioner strongly disagrees with these assertions, and they constituted legal error on direct appeal if they had been properly preserved at trial since there were improper redactions to references to petitioner, no limiting instruction, and independent evidence implicating petitioner in the crime. These errors could not have been harmless if counsel, respectfully, had provided competent representation in this regard.

It was very prejudicial to petitioner not to have these letters properly redacted to remove references to petitioner, since to the jury, they corroborated trial testimony of Davis, Welch, Bolden, and Govan that the PCR court found strongly implicated petitioner in the crime. The same is true of not requesting a limiting instruction. App. 836. Respectfully, the co-defendant letters both indirectly and directly implicated petitioner.

Yet the testimony of the other witnesses besides Davis, the "come kill this N" claim -- at its worst -- was that petitioner was mad about the decedent touching her, and that she allegedly made a vague angry drunken telephone call. App. 108, l. 13 – 109, l. 24. As will be argued infra, the Davis testimony however, standing alone, was prejudicial, and it seemed to be corroborated by the inadmissible references to petitioner in the Dargan letters – that filled in "missing pieces" or impermissibly corroborated other testimony that should have been redacted, and a limiting instruction given. "Impermissible corroboration" does not mean cumulative by its very nature. The impermissible corroboration means evidence having the spurious tendency to seem to corroborate legitimate testimony.

As seen, the Dargan letters implicated petitioner in the crime, and her self-interest in participating in the cover-up, and they were impermissibly critical on petitioner's alleged

whereabouts after the phone call vis-à-vis the decedent. Petitioner did not have the opportunity to confront and cross-examine Dargan about the contents of his letters which implicated her, and led to her conviction. Defense counsel admitted they were the "worst evidence" against petitioner in a conviction he did not expect at the end of her trial. App. 815, ll. 10-22.

From this order, petitioner now seeks a writ of certiorari.

ARGUMENT

1.

The PCR court correctly found that petitioner was entitled to a White v. State belated appeal where the state stipulated appellant was denied her right to a direct appeal because of trial counsel's negligence

The PCR court properly ruled that the state consented to petitioner's right to a belated direct appeal under White v. State, 263 S.C. 10, 108 S.E.2d 35 (1974). App. 839. Defense counsel admitted in writing to petitioner: "I am completely mistaken for not filing your appeal in a timely manner and will handle this accordingly. App. 831.

The Assistant Attorney General acknowledged petitioner was entitled to a belated direct appeal. App. 826, l. 14 – 828, l. 4. Petitioner therefore should be granted her White v. State belated appeal in the brief filed simultaneous with this certiorari petition.

2.

The PCR court erred by finding trial counsel's failure to request the proper redaction of petitioner's name, and references to her, from the co-defendant's letters about the murder, and counsel's failure to request a limiting instruction regarding the proper use of the letters was "harmless," since the letters had no other purpose as it pertained to petitioner than to implicate her in the murder without an opportunity to confront the co-defendant

The state's theory of the case was that petitioner Shonta Helton was mad at the decedent for pushing her wig at a drunken party. The state alleged the angry petitioner called Gary Dargan and asked him to kill the decedent. The testimony of Davis was the most prejudicial in that she alleged petitioner said she wanted Gary Dargan to kill the decedent.[2]

The solicitor made much of the Dargan to Mellette letters in his closing arguments. The solicitor even used the word "corroborated" several times regarding the letters and the "facts" of this case. App. 647, l. 2 – 654, l. 13. The solicitor argued that Gary Dargan killed the decedent because petitioner was angry at the decedent because of the incident at the party. The Dargan letters to Marcus would lead a reasonable juror to think that they corroborated the state's case as was argued by the solicitor in his closing argument. The letters, as seen above, reference the fact that Dargan killed the decedent "because Mario hit her." The letters reference petitioner Shonta Helton being picked up "by the curb. Bring her to and holler at me. Then drop her on the south side at her friend's house." App. 462, l. 20 – 463, l. 10. As seen, the letters refer to petitioner as the "old girl," "her," and even directly by her name – "Shonta Helton."

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[2] Petitioner has also argued this issue in her White v. State brief in the event this Court finds the issue preserved. The PCR judge spotted the potential problem of the direct appeal issues being argued simultaneous with the PCR issues, and this argument in the alternative on her belated direct appeal, respectfully, should best protect petitioner procedurally on these Bruton issues on all fronts.

These letters should have been redacted to remove these obvious references to petitioner where she had no opportunity to confront and cross-examine co-defendant Dargan. Petitioner's right to confrontation was obviously violated by the lack of redactions, and the lack of a limiting instruction in this case. See Bruton v. United States, 391 U.S. 123 (1968). This Court has recently emphasized a defendant's right to confrontation in cases such as this one. See State v. McDonald, 419 S.C. 133, 771 S.E.2d 840 (2015), State v. Henson, 407 S.C. 154, 162, 754 S.E.2d 508, 512 (2014).

In State v. McDonald, this Court found the Bruton error harmless because McDonald confessed to the crimes. While there was other evidence implicating McDonald in the crime, McDonald's confession was the dominant factor in this Court finding the Bruton error harmless.

Here, there was not any confession from petitioner Helton. Further, the Gary Dargan letters did constitute highly prejudicial corroboration of trial testimony in violation of petitioner's right to confrontation. Further, it would not have been difficult to remove the prejudicial references to petitioner from the Dargan letters.

Moreover, defense counsel Kent, to his credit, admitted he made a mistake in not requesting proper redactions, and a limiting instruction about the use of the Dargan letters where petitioner was on trial with him. App. 809, l. 18 – 815, l. 22.

In this case, petitioner's name was not redacted, nor were references to her in the Dargan letters, both of which were very prejudicial, other evidence linked the statements' application to petitioner, and there was no proper limiting instruction given. See State v. McDonald, 400 S.C. 272, 276, 734 S.E.2d 167, 169 (2012), citing State v. Page, 378 S.C. 467, 663 S.E.2d 357 (2008).[3] This Court in State v. McDonald, 412 S.C. 133, 142, 771 S.E.2d 840, 844 (2015)

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[3] This Court affirmed as modified based on different reasons.

rejected the state's argument that no Confrontation Clause violation occurred based on the court's limiting instruction. This Court found that in some cases or contexts a limiting or curative instruction is not sufficient. McDonald was such a case given the references "to he" as McDonald be obviously one of the three male defendants on trial. Here, there was no limiting instruction, and the references to petitioner as "her," "old girl," and then directly by her name, Shonta Helton made it obvious Dargan was implicating petitioner in the crime, he needed for her to be part of the cover-up, and his disappointment in her for not being complicit in the cover up given what he had done for her. See State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009).

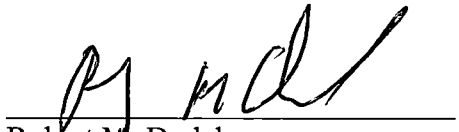
The failure to give a limiting instruction in this case, where petitioner's name and references to "her" were not redacted from the Dargan letters, and other evidence was introduced against her, respectfully would have been reversible error on direct appeal if defense counsel had properly objected, and preserved the issue. However, defense counsel did not properly object, and he frankly admitted at the PCR hearing that he was in error in not seeking the proper redactions, and in not seeking a limiting instruction that Dargan's letters could not be used as evidence of petitioner's guilt.

Most respectfully, the PCR legally erred in its analysis of these Bruton errors. The Dargan letters impermissibly corroborated the state's case in their references to petitioner about the murder, where there was no request to properly redact them, and no request for a limiting instruction. However, the testimony of the women at the party did not make the Bruton errors -- and lack of a limiting instruction -- harmless given the inconsistencies in their testimony. The testimony of Davis, Welch, Bolden, and Govan concerned the initial fight and phone call. That testimony – even if it had been consistent – would not have made counsel's legal errors here "harmless."

The letters "corroborated" evidence as to petitioner's alleged whereabouts after the phone call which was critical to the state's accessory before the fact of murder argument. The letters spoke of Dingle Street, and petitioner being there. The letters referenced the need for a cover up and cooperation and petitioner. They also expressed disappointment in petitioner in other places in the letters. Counsel's errors regarding the Bruton issue – most respectfully to the PCR court -- were not "harmless" in this highly unusual case. Again, counsel later said at the PCR hearing that these improperly redacted letters were the "worse thing for her" given the lack of other evidence to convict her as an accessory after the fact of murder. These highly prejudicial Confrontation Clause errors entitle petitioner to a new and fair trial.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued so that this Court can allow full briefing on these issues. Petitioner should also be granted her White v. State belated appeal.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable George C. James, Circuit Court Judge

SHONTA HELTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Shonta Helton, #326415, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 14th day of July, 2017.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of July, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.