

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Anderson County

Honorable Alexander S. Macaulay, Circuit Court Judge

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SAMMY COWAN,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001335

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BRIEF OF PETITIONER

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S.C. SUPREME COURT  
PETITIONER,

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## **ISSUES PRESENTED**

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to have the 911 tape enhanced so that the voice heard shouting could be identified as Kinshaba Simmons, the individual who was fighting with the decedent prior to the shooting, rather than Petitioner as testified to by State's witness Allen R. Johnson?
  
2. Did the PCR judge err in refusing to find trial counsel ineffective in failing to object to the prejudicial improper hearsay testimony of Detective Reeves?

## STATEMENT

On April 19, 2005, the Anderson County Grand Jury indicted Petitioner Cowan for murder and possession of a weapon during the commission of a violent crime, indictment # 2005-GS-04-696. On November 14, 2005, Cowan proceeded to jury trial before the Honorable Lee S. Alford. Nancy Jo Thomason represented Petitioner at trial. Rame L. Campbell prosecuted the case. The jury returned verdicts of guilty as charged. Judge Alford sentenced Cowan for life without parole pursuant to S.C. Code §17-24-45 for the murder charge and 5 years concurrent for the weapon charge. A timely notice of intent to appeal was filed on November 21, 2005, and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Cowan, Op. No. 08-UP-577 (S.C.Ct.app. filed October 14, 2008).

On January 27, 2009, Petitioner filed an application for post-conviction relief. The State filed a return on July 8, 2009. On June 5, 2012, an evidentiary hearing was held before the Honorable Alexander S. Macaulay. C. Rauch Wise represented Petitioner at the PCR hearing. Kaelon May represented the State. In a written order dated April 2, 2015, Judge Macaulay denied relief and dismissed the application. A motion to alter or amend pursuant to Rule 59(e) was filed on April 20, 2015. The State served the return on April 29, 2015. In an order dated May 14, 2015, Judge Macaulay denied the motion to alter or amend. A timely notice of intent to appeal was served on June 12, 2015. The petition for writ of certiorari was filed on January 21, 2016. The return was filed on June 6, 2016. On June 16, 2017, this Court granted certiorari as to Petitioner's questions one and three. This brief of Petitioner follows.

## STATEMENT OF FACTS

On February 6, 2005, Super Bowl Sunday, Fred Penn was fatally shot outside of Club Envy in Anderson, South Carolina. Petitioner Cowan was one of many people who attended the Super Bowl party at Club Envy. (App. p. 96, line 13 – p. 97, lines 1-5; p. 106, lines 12-14; p. 188, line 21 – p. 189, lines 1-10). Allen R. Johnson, a bouncer at the club, testified that there was “standing room” only inside the club on the night of the party. (App. p. 84, lines 7-12). The deceased, Penn, and Kinshaba Simmons, nicknamed “Pissy,” were involved in a heated altercation inside the club resulting in both men being escorted out of the club. (App. p. 84, line 17 – p. 85, lines 1-6). Simmons had been evicted from the club earlier in the evening for causing problems but the owner of the club allowed him to come back in. (App. p. 105, lines 11-25). Johnson the bouncer testified that he escorted Simmons out of the club first, giving him time to leave the premises before escorting Penn out. (App. p. 85, lines 7-19). Neither Simmons nor Penn, however, left the premises and the altercation resumed outside the club. (App. p. 85, line 20 – p. 86, lines 1-20). Johnson became concerned because a crowd was gathering so he called 911. (App. p. 85, line 25 – p. 86, lines 1-2). Johnson testified that Club Envy used a “magic wand” metal detector to search patrons entering the club. (App. p. 82, lines 14-21). Johnson testified that Penn, Simmons and Petitioner were all searched for weapons when they entered the club. (App. p. 86, lines 7-15; p. 106, lines 12-15). Johnson could not and did not testify as to where Simmons went between the time he was evicted from the club and the time the altercation with Penn resumed.

According to Johnson, as he was on the phone with 911, Petitioner, who had not been involved in any dispute with Penn, ran by with a gun. Johnson testified, “By the time I was on the phone I seen Mr. Cowan run past me and stand towards where they was standing with a gun down

on his left side.” (App. p. 86, lines 22-24). According to Johnson Petitioner was shouting, “[W]e run this ‘sh’ Detroit style. This is south side. I done killed one of your boys and I don’t mind doing it again.” (App. p. 87, lines 14-18). Johnson testified that Petitioner’s nickname is Detroit. (App. p. 87, lines 6-9). An audiotape of the 911 call was admitted in evidence as State’s Exhibit #22 and played for the jury. Johnson testified that after he saw Petitioner with the gun, Petitioner disappeared from view and then Johnson heard gunshots. (App. p. 88, line 20 – p. 89, lines 1-2). Johnson did not see the shooting. (App. p. 89, lines 24 – p. 90, line 1). When cross examined about why the alleged statements attributed to Petitioner could not be heard on the 911 tape, Johnson, in contrast to his earlier testimony, stated, “At the time he said south side I was not on the phone with 911. But you do hear him say we run this, because I was standing there and seen him talking at the time.” (App. p. 99, line 24 – p. 100, line 1). Johnson had a prior conviction for forgery. (App. p. 96, lines 7-9).

At trial Simmons claimed, contrary to the testimony of all of the other State’s witnesses, that Petitioner and Penn were involved in an altercation inside the club and when they went outside he followed. (App. p.172, lines 3-18). Simmons denied fighting with Penn inside the club. (App. p.184, lines 4-6). Simmons admitted that he had been evicted from the club earlier for breaking a beer bottle. (App. p. 183, line 23 – p. 124, lines 1-3). Simmons also admitted fighting with Penn outside the club. (App. p. 172, lines 20-23). Simmons testified, “Detroit and Fred were having some words. And then when I come out the door Fred [Penn] looked at me, and me and him, and we had a couple words. And I throwed some drink on him, and he swung out on me, and me and him got to fighting. And I seen Detroit take off running, and when he came back he just started shooting.” (App. p. 172, lines 20-25).

Simmons admitted that he had been convicted of attempted armed robbery and assault with intent to kill in 1996. (App. p. 169, lines 6-13). Neither the State nor the defense questioned Simmons about a 2004 burglary charge that was reduced to trespassing on April 13, 2005, after the shooting in February of 2005, and after Simmons provided a second statement to law enforcement implicating Petitioner on March 16, 2005, but before the November 14, 2005, trial of Petitioner.

Another State's witness, Joctavious Williams testified that he went outside of the club when he saw security escort Simmons and Penn outside. (App. p. 189, lines 20-25). Williams testified that he followed them outside because Simmons, "Pissy," was his homeboy. (App. p. 190, lines 1-3). Williams testified that Simmons and Penn exchanged blows but then claimed that Petitioner pulled out two pistols and fired a shot. (App. p. 190, lines 8-10). Williams admitted that he was on probation for distribution of crack. (App. p. 187, line 21 – p. 188, lines 1-8). Williams admitted that he agreed to cooperate with the police in this case and gave a statement on May 4, 2005, after he was arrested on a new set of drug charges. (App. p. 197, lines 1-21).

Thomas McDonald, another State's witness at trial, was incarcerated in the Anderson County Detention Center at the same time as Petitioner. (App. p. 207, line 3 – p. 208, lines 1-25). According to McDonald, Petitioner admitted to his involvement in the shooting of Penn. (App. p. 209, lines 1-15). McDonald admitted to having had a drug problem and being involved with the criminal justice system since 1997, with two convictions involving more than 28 grams of marijuana, a 1999 conviction for assault and battery of a high and aggravated nature, resulting in a ten year sentence, and 2001 convictions for receiving stolen goods and possession of a stolen vehicle. (App. p. 212, lines 1- p. 213, lines 1-13). In January 2005, McDonald was charged with another assault and battery of a high and aggravated nature. (App. p. 213, lines 16-22). In April of

2005, McDonald was allowed to resolve the assault and battery of a high and aggravated nature by attending Mental Health Court.

## ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to have the 911 tape enhanced so that the voice heard shouting could be identified as Kinshaba Simmons, the individual who was fighting with the decedent prior to the shooting, rather than Petitioner as testified to by State's witness Allen R. Johnson.

Allen R. Johnson, the bouncer at Club Envy, testified at trial that the deceased, Fred Penn, and Kinshaba Simmons, nicknamed "Pissy," were involved in a heated altercation inside the club resulting in both men being escorted out of the club. (App. p. 84, line 17 – p. 85, lines 1-6). The fight resumed outside and Johnson testified that as he was on the phone with 911, Petitioner, who had not been involved in any dispute with Penn or Simmons, ran by with a gun. Johnson testified, "By the time I was on the phone I seen Mr. Cowan run past me and stand towards where they was standing with a gun down on his left side." (App. p. 86, lines 22-24). According to Johnson Petitioner was shouting, "[W]e run this 'sh' Detroit style. This is south side. I done killed one of your boys and I don't mind doing it again." (App. p. 87, lines 14-18). Johnson testified that Petitioner's nickname is Detroit. (App. p. 87, lines 6-9). An audiotape of the 911 call was admitted in evidence as State's Exhibit #22 and played for the jury.

During the PCR hearing Jimmy W. Powers, a private investigator, testified that the 911 tape introduced at trial was not clear and he could not determine exactly what was being said on the tape. (App. p. 367, lines 5-11). He applied filtering to software to enhance the 911 tape by filtering out background noise to hear the voices better. (App. p. 367, lines 12-17). Powers confirmed that the voice heard on the tape did not reference "Detroit style" as testified at trial by the bouncer, Johnson. (App. p. 368, lines 14-16). Powers testified that the voice in the background simply states, "We run this." (App. p. 367, line 22 – p. 368, line 1). Powers stated that if the statement referencing "Detroit style" had been made, it would have been on the 911 tape. (App. p. 368, lines 2-13).

Importantly, Powers testified that the voice he heard on the 911 tape was the voice of Kinshaba “Pissy” Simmons, not Petitioner. (App. p. 369, lines 15-25).

On cross examination of trial counsel during the PCR hearing the following took place:

Q. And, with regard to the 911 tape, whether – I believe you were asked on Direct whether you had anyone who was familiar with Mr. Simmons’ voice to try to identify it on the 9-1-1 tape. Did you feel a need to obtain someone to do that?

A. It, it never occurred to me to have any analysis done on the 9-1-1 tape.

Q. And I believe Mr. Cowan did not testify; is that correct?

A. That is correct.

(App. p. 394, lines 11-20). When trial counsel was asked if she believed that having the 911 tape enhanced would have helped Petitioner’s defense, counsel replied “I don’t think so.” (App. p. 394, lines 21-24). Testimony identifying the voice on the 911 tape as the voice of Kinshaba Simmons and not Petitioner, however, would have helped the defense. There is a reasonable probability that testimony identifying the voice as Simmons’, as presented at the PCR hearing, would have made a difference in the result of the proceedings.

In the order of dismissal the PCR judge wrote, “This Court finds trial counsel strategically utilized the emergency dispatch recording during her cross-examination of Johnson.” (App. p. 438). While trial counsel cross-examined Johnson about the 911 tape, counsel failed to have the tape enhanced and failed to call a witness to identify the voice as Simmons’ voice and not Petitioner’s. Counsel did not testify that she failed to have the tape enhanced and failed to have the voice heard on the 911 tape identified as part of some trial strategy. Instead, trial counsel testified that it never occurred to her to have any analysis done on the 911 tape. Trial counsel was ineffective.

The PCR judge additionally wrote, “”Trial counsel was not provided any potential witnesses that could have identified Simmons’ voice on the recording. Applicant failed to produce testimony

from any witness on the identification. Therefore, this Court finds the allegation rests on hearsay and speculation.” (App. p. 439). The order ignores the testimony from both Investigator Powers and from Petitioner identifying the voice on the tape as Simmons rather than Petitioner. (App. p. p. 369, lines 15-25; p. 406, lines 3-9). As noted in Petitioner’s Rule 59(e) motion, “The Post Conviction Relief Court erred in concluding that Applicant failed to produce testimony from any witness on the identification of the voice of Kinshaba Simmons when the investigator for the Applicant testified on page 9 of the post-conviction relief hearing testified that he could identify Kinshaba Simmons voice on the tape.” (App. pp. 445-446).

The PCR judge also wrote, “The enhanced evidence would not have diminished the eyewitness identification testimony of Applicant’s involvement in the murder.” (App. p. 439). The PCR judge erred. As noted in Petitioner’s Rule 59(e) motion, “The Post Conviction Relief Court erred in concluding ‘the enhanced evidence would not have diminished the eye witness identification testimony of Applicant’s involvement of the victim’s murder’ when the enhanced tape clearly shows that the testimony of one or more of the eye witnesses was not correct.” (App. p. 446). The enhanced tape without mention of “Detroit style” and identification of the voice on the 911 tape as Simmons’ and not Petitioner’s would have diminished the testimony of the bouncer, Johnson. Johnson did not see the shooting. (App. p. 89, lines 24 – p. 90, line 1).

Additionally, testimony that the voice heard on the 911 tape was the voice of Simmons and not Petitioner would have diminished the testimony of witnesses who testified that Petitioner was the shooter. The eyewitnesses who identified Petitioner as the shooter were Simmons, Joctavious Williams, Simmons’ homeboy (App. p. 190, lines 1-3) who admitted that he agreed to cooperate with the police in this case and gave a statement on May 4, 2005, after he was arrested on a new set of drug charges. (App. p. 197, lines 1-21) and a jail house snitch named Thomas McDonald who

was allowed to resolve his pending assault and battery of a high and aggravated nature charge by attending Mental Health Court. (App. p. 215, lines 3-25). The evidence presented by the State was not overwhelming. Trial counsel admitted that there were many inconsistencies in the witness's testimony. (App. p. 378, lines 9-14)

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.

The findings by the PCR judge are not supported by the record. Trial counsel was ineffective for failing to have the 911 tape enhanced so that the jury could conclusively determine that there was no mention of “Detroit style” on the tape, as testified by the bouncer, Johnson. Additionally, counsel was ineffective for failing to have the 911 tape enhanced so that the voice heard shouting could be identified as Kinshaba Simmons, the individual who was fighting with the

defendent prior to the shooting, rather than Petitioner as testified to by State's witness Johnson. Petitioner was prejudiced by the deficient performance. The lack of a reference to "Detroit style" on the tape and the identification of the voice on the 911 tape as Simmons support a defense theory that Simmons was the shooter. There is a reasonable probability that the enhancement and the voice identification would have made a difference in the result of the proceedings, especially in light of the motives of many of the State's witnesses to name Petitioner as the shooter.

2. The PCR judge erred in refusing to find trial counsel ineffective in failing to object to the prejudicial improper hearsay testimony of Detective Reeves.

During trial the following line of questioning took place between the prosecutor and

Detective Reeves:

Q: And during your conversations with any witness that you interviewed or the sheriff's department interviewed was any other suspect's name listed other than Mr. Cowan as the shooter?

A. No, sir.

Q. Did anybody state that Mr. Simmons was the shooter?

B. A. No, sir.

(App. p. 242, lines 16-22). Trial counsel failed to object. During the PCR hearing trial counsel agreed that this testimony of Detective Reeves constituted negative hearsay. (App. p. 380, line 1 – p. 381, lines 1-7).

In the order of dismissal the PCR judge wrote, "This Court finds applicant failed to meet his burden to prove trial counsel was ineffective for not objecting to Detective Reeves' alleged improper hearsay testimony. Applicant failed to prove the testimony was improper. *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994)(citing *United States v. Love*, 767 F.2d 1052 (1985)

(“An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.”). (App. p. 439). The PCR judge erred. As noted in Petitioner’s Rule 59(e) motion, “The Post Conviction Relief Court erred in determining that Detective Reeves’ statement was admissible because it was offered for limited purposes explaining why a government investigation was undertaken. The error being the statement was not admitted for that purpose but for the purpose of showing that no other witness identified Kinshaba Simmons as being the shooter and was therefore hearsay and inadmissible. This being in violation of the right of confrontation under the state and federal constitutions.” (App. p. 446).

Detective Reeves’ testimony constitutes improper, prejudicial negative hearsay. See State v. Hamlette, 60 N.C. App. 306, 319-320, 299 S.E.2d 769, 777 (1983); Smith v. Korn Industries, Inc., 274 S.C. 182, 262 S.E.2d 27 (1980). The testimony is the equivalent of Detective Reeves testifying that unnamed and non-testifying witnesses said that Simmons was not the shooter and Petitioner was the shooter. Such hearsay violates the confrontation clause of Article I, §14 of the Constitution of the State of South Carolina and the Sixth amendment to the Constitution of the United States of America. The testimony violates Crawford v. Washington, 541 U.S. 36 (2004) as the testimony is clearly testimonial.

The record does not support the PCR judge’s finding that Detective Reeves’ testimony was not hearsay because it was offered for the limited purpose of explaining why a government investigation was undertaken. Detective Reeves’ testimony is different from the officers’ testimony in Brown. In Brown the officers testified that they received information and complaints while in the neighborhood and were familiar with the neighborhood before establishing surveillance. The officers’ testimony in Brown explained why the officers began their surveillance. In contrast, Detective Reeves’ testimony was not offered to explain why an investigation was


undertaken but rather to show that no other witness identified Kinshaba Simmons as the shooter. The testimony constitutes improper negative hearsay.

Trial counsel admitted that she did not have a strategic reason for not objecting to Detective Reeves' testimony because she testified, "And again, I'm second-guessing this seven years later. I didn't have these thoughts at the time of the trial and I don't want you to think that I did because I didn't." (App. p. 399, lines 19-22). Although trial counsel testified that an objection could have helped or hurt Petitioner by allowing the prosecution to go into more specifics (App. p. 392, lines 1-13), it is unclear what specifics the prosecution could have raised that would not be considered hearsay. Detective Reeves could have testified that he interviewed other witnesses but he could not testify about what those witnesses said or did not say. Trial counsel was ineffective in failing to object when Detective Reeves testified that no other witnesses identified Simmons as the shooter. The testimony constituted improper negative hearsay which violates the Confrontation Clause.

Petitioner was prejudiced by the improper hearsay. As discussed in issue one, the State failed to present overwhelming evidence of guilt. Additionally, as discussed in issue one, Simmons' voice was identified on the 911 tape during the PCR hearing, making Detective Reeves' improper testimony that no other witness identified Simmons as the shooter highly prejudicial. 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, this Court should reverse Petitioner's convictions and sentences and remand for a new trial.

  
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Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

Honorable Alexander S. Macaulay, Circuit Court Judge

SAMMY COWAN,

PETITIONER,

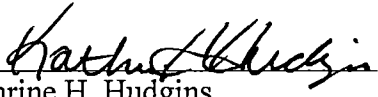
V.

STATE OF SOUTH CAROLINA,

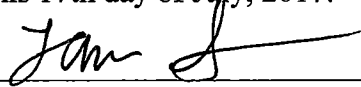
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Lindsey McCallister Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Sammy K. Cowan, #214656, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 17th day of July, 2017.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of July, 2017.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027