

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

ANTHONY MAURICE LOUNDS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000494

JOHNSON PETITION FOR WRIT OF CERTIORARI

John H. Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

RECEIVED

OCT 04 2017

S.C. SUPREME COURT

INDEX

INDEX.....i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT7

CONCLUSION10

PETITION TO BE RELIEVED AS COUNSEL.....11

ISSUE PRESENTED

Did the PCR court err in summarily dismissing Petitioner's Rule 60(b), SCRCR, motion for a new hearing based on after discovered evidence and extrinsic fraud where the State did not file a response and where the PCR court did not hold an evidentiary hearing or make specific findings of facts or conclusions of law in the order denying Petitioner's motion?

STATEMENT

Petitioner Anthony Maurice Lounds was convicted of armed robbery and possession of a weapon during the commission of a violent crime during the November 2010 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Petitioner received a sentence of life without parole on the armed robbery conviction and five years on his conviction of possession of a weapon during the commission of a violent crime. App. 1 – 237.

Scott Robinson represented petitioner at trial, and Assistant Solicitors George Campbell and Sloan Ellis appeared on behalf of the State. Petitioner appealed, but his convictions and sentences were affirmed. *See State v. Lounds*, Op. No. 2013-UP-289 (S.C. Ct. App. filed June 26, 2013); *see also* App. 268 – 271. Susan B. Hackett, of the Office of Appellate Defense, represented petitioner on direct appeal.

On August 3, 2013, Petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 272 - 278. The respondent filed a return dated April 8, 2014, requesting that a PCR hearing be held in the case. App. 279 – 283.

A PCR hearing was convened on October 21, 2014, at the Greenville County Courthouse before Judge Letitia H. Verdin. App. 284 – 362. Petitioner was present at the hearing and represented by Mills Ariail, and Assistant Attorney General Karen Ratigan appeared on behalf of the state. On November 8, 2014, Judge Verdin signed an order of dismissal rejecting Petitioner's allegations of ineffective assistance of trial counsel. App. 363 – 372.

Petitioner filed a timely notice of appeal and Deputy Chief Appellate Defender Wanda Carter represented Petitioner in his appeal of the order of dismissal. On September 18, 2015 Petitioner filed a petition for writ of certiorari with this Court. App. 373 – 385. On January 4, 2016, the State filed a Reply to Petitioner's petition for writ of certiorari. App. 386 – 397. Senior

Assistant Deputy Attorney General Karen C. Ratigan represented the State. On October 20, 2016 this Court denied Petitioner's petition for writ of certiorari. App. 398. Remittitur was issued on November 7, 2016. App. 399.

On November 17, 2016 Petitioner filed a *pro se* Rule 60(b), SCRCF, motion for a new trial based on after-discovered evidence and extrinsic fraud. App. 401 – 426. In his motion, Petitioner alleged that trial counsel, Scott Robinson, misrepresented the investigation that he undertook during his representation of Petitioner. *Id.*

Specifically, Petitioner stated that Robinson's repeated references to investigative work done by private investigator and former Greenville County Sheriff's Investigator Paul Silvaggio were factually impossible as Silvaggio stopped working with Robinson in April, 2011 due to a personal dispute during an unrelated criminal case. App. 407 - 408. In support of his allegations, Petitioner attached excerpts of the transcript of his PCR hearing where Robinson claimed Silvaggio assisted with the pre-trial investigation at several critical junctures. App. 401 – 426.

At the PCR hearing, defense counsel – when defending his investigation into Appellant's case – mentioned Silvaggio's involvement no fewer than twelve times. App. 338 – 351. When pressed on a certain aspect of his representation, such as whether he relayed a plea offer to Petitioner, defense counsel invoked Silvaggio's involvement as evidence that his representation was constitutionally adequate:

Q: As part of your general practice, what do you do when you get a plea offer from the state?

A: Take it to the client. That's why I think that either myself or Mr. Silvaggio would have done that.

App. 343, ll. 15-22. With respect to his failure to call certain witnesses, defense counsel assured the Court that:

Q: Did you receive any calls from any family members about these witnesses?

A: That would have been -- I have a pretty good memory as far as what I did last week. But as far as something that happened two or three years, I have no independent, I don't know. I would have followed up on it typically. Either myself or Mr. Silvaggio would have followed up on it. . . .

Q: So no one in his family or Mr. Lounds gave you that information, I guess?

A: If someone had given us this information, Mr. Silvaggio especially, he would have run that person down. If they knew the names, the addresses and the telephone numbers of these people.

App. 344, l. 9 – 349, l. 21.

Silvaggio's letters, also attached to Petitioner's motion, tell a very different story. In a letter to Petitioner, Silvaggio stated that he stopped working with Robinson in April, 2011 because defense counsel demanded that Silvaggio miss a family event for a trial. App. 407. Silvaggio's letter further stated that, after reviewing documents provided by Petitioner:

There is a very good likelihood that I **did not** perform a Defense Investigation as the 'Staff Investigator' and not as a contracted Private Investigator. This being a result of the fact that I did not retire from the Greenville County Sheriff's Office until November 2009 while the [provided documents] are, in a majority, dated prior to my retirement. O would have conflicted the above matters with your Attorney Scott Robinson, therefore, I would not have worked the Defense Investigation.

App. 408. (*verbatim*) (*emphasis original*).

From this correspondence, it is highly unlikely that Silvaggio performed the defense investigation in Petitioner's case. Further, given the apparent acrimony with which Silvaggio severed his business relationship with Robinson, it seems highly unlikely that Robinson would simply forget that Silvaggio was no longer working for him after April, 2011. App. 407 – 408.

The State filed no response to Petitioner's motion. On November 30, 2016, Judge Verdin summarily denied Petitioner's motion in a Form 4 order without granting a hearing. App. 427 - 428. The only reason stated in the order was, "Court denies the Rule 60(b) motion made by Anthony Maurice Lounds." *Id.* This petition follows.

ARGUMENT

Did the PCR court err in summarily dismissing Petitioner's Rule 60(b), SCRPC, motion for a new hearing based on after discovered evidence and extrinsic fraud where the State did not file a response and where the PCR court did not hold an evidentiary hearing or make specific findings of facts or conclusions of law in the order denying Petitioner's motion?

Immediately after receiving the remittitur in his PCR appeal, Petitioner filed, pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, a motion for a new hearing arguing that defense counsel's testimony at the PCR hearing constituted a fraud upon the court. App. 401 – 426. Contrary to his multiple averments at the evidentiary hearing, defense counsel could not have relied upon private investigator Paul Silvaggio to assist in the investigation of Appellant's case. App. 338 – 351.

Silvaggio stopped working for defense counsel in April, 2011 following a personal dispute. App. 407 – 408. The termination of their business relationship occurred several months before Appellant's July, 2011 trial. *Id.* Moreover, Silvaggio was unable to work on cases where the Greenville County Sheriff's Department was the investigating agency because he only retired from that agency in November, 2009. *Id.* The robbery Appellant was convicted of occurred in September, 2009. App. 429 – 432.

The PCR court summarily denied Petitioner's Rule 60(b), SCRPC, motion without the State filing a response. App. 427 – 428. The ordering denying the motion did not contain any specific findings or fact or conclusions of law explaining the denial. *Id.*

The South Carolina Rules of Civil Procedure apply to post-conviction relief proceedings. S.C. Code Ann. § 17-27-80. To wit, Rule 60(b), SCRPC, states in relevant part that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);**
- (3) fraud, misrepresentation, or other misconduct of an adverse party;**
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b), SCRCPC (*emphasis added*).

In order for a party to be entitled to relief based on fraud under Rule 60(b)(3), SCRCPC, the moving party must demonstrate extrinsic fraud. *Raby Constr., LLP v. Orr*, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2004); *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) (“A judgment may be set aside on the ground of fraud only if the fraud is ‘extrinsic’ and not ‘intrinsic.’”). Fraud is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. *Id.* (citing *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv., Comm'n of S.C.*, 294 S.C. 9, 362 S.E.2d 176 (1987); *Mr. G. v. Mrs. G.*, 320 S.C. 305, 465 S.E.2d 101 (Ct.App.1995)).

“Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” *Chewing v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing *Hilton Head*, 294 S.C. at 11, 362 S.E.2d at 177). On the other hand, intrinsic fraud is fraud presented and considered at the trial. *Hagy*, 339 S.C. at 431-32, 529 S.E.2d at 718 (citing *Evans v. Gunter*, 366 S.E.2d 44, 294 S.C. 525 (Ct.App.1988)). Intrinsic fraud misleads a court in determining issues and induces the court to find for the party

perpetrating the fraud. *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610 (citing *Hilton Head*, 294 S.C. at 11, 362 S.E.2d at 177).

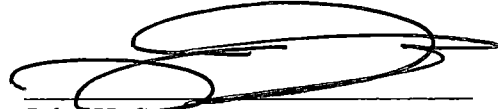
Petitioner moved for relief from the order of dismissal based on defense counsel's apparently fraudulent statements at the PCR hearing that he used private investigator Paul Silavaggio to assist in investigating Petitioner's case. App. 401 - 426. In reality, Silvaggio stopped working for defense counsel months before Petitioner's trial and would have likely never been able to work on Petitioner's case because of his conflict of interest with the Greenville County Sheriff's department. App. 407 – 408. This constituted a *prima facie* showing of extrinsic fraud.

Summarily rejecting a filing or motion based solely on the pleadings is a “drastic procedure.” *Falk v. State*, 341 S.C. 281, 533 S.E.2d 260 Under Rule 12(c), SCRPC, **When considering the State's motion for summary dismissal of a motion** for post-conviction relief where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the defendant. *Robertson v. State* 418 S.C. 505, 795 S.E.2d 29 (2016).

Petitioner's allegations in the Rule 60(b), SCRPC, motion – if true – would constitute *prima facie* evidence entitling Petitioner to a new hearing on the matter based on defense counsel's fraudulent testimony at the PCR hearing regarding the involvement of the private investigator. App. 401 - 426. Under these circumstances, the PCR court erred in summarily denying Petitioner's motion. App. 427 – 428.

CONCLUSION

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

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

RECEIVED

OCT 04 2017

S.C. SUPREME COURT

ANTHONY MAURICE LOUNDS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

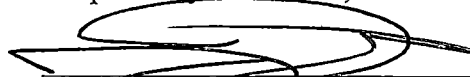
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Anthony Maurice Lounds 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 Letitia H. Verdin, which was held on October 21, 2014, 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 Anthony Maurice Lounds.

Respectfully Submitted,



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of October, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari 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."



John H. Strom
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 4th day of October, 2017.

RECEIVED

OCT 04 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT 04 2017

S.C. SUPREME COURT

Certiorari to Greenville County

Honorable Letitia H. Verdin, Circuit Court Judge

ANTHONY MAURICE LOUNDS,

PETITIONER


V.

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 DeShawn H. Mitchell, 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 Anthony Maurice Lounds, #227456, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 4th day of October, 2017.



John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of October, 2017.

Laurin Stevens (L.S)
Notary Public for South Carolina
My Commission Expires: 7/5/2027;