

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Bamberg County

Honorable Edgar W. Dickson, Circuit Court Judge

JUAN M. NIMMONS,

RECEIVED

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PETITIONER
S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000829

PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in denying Petitioner's application for post-conviction relief based upon after-discovered evidence where Petitioner met the five-factor test to support the grant of a new trial?

STATEMENT OF THE CASE

Indictment and Trial

On or about March 4, 1999, the Bamberg County grand jury returned indictments against Petitioner Juan Nimmons for murder and armed robbery, related to the death of Nimmons' mother, Zola "Pat" Robinson. App. 729.

On March 8, 1999, Nimmons appeared for trial before the Honorable Gary Clary and a jury. Nimmons was represented by Joshua Koger, and the State was represented by deputy solicitor Grant Gibbons. App. 1.

Robinson's body was discovered by her father on the morning of August 7, 1998, shortly after "about seven o'clock" in the morning. Robinson resided in the trailer behind her father's house, on the same property. App. 118, l. 22 – 124, l. 4. It was undisputed that Nimmons resided with his mother but would often stay out all night feeding his cocaine addiction. App. 106, l. 24 – 107, l. 13; App. 116, ll. 4-20; App. 384, ll. 2-12.

Robinson died from cerebral injury caused by blunt force trauma to the head, having been struck thirteen times. App. 144, l. 20 – 146, l. 25. A bloodied hammer was found in the neighbor's yard, on the other side of the fence from Robinson's trailer. App. 127, l. 19 – 128, l. 5; App. 137, l. 3 – 138, l. 5; App. 192, l. 23 – 193, l. 8. The forensic pathologist said that the wounds were consistent with a hammer. App. 150, l. 22 – 152, l. 25. According to SLED agent Kerry Goodwin, Robinson had no apparent defensive wounds, indicating that she was likely asleep when the attack occurred. App. 172, l. 23 – 173, l. 14. The autopsy revealed that Robinson had a blood alcohol content of .174, and most likely would have lost immediate consciousness from the repeated blunt force trauma. App. 153, l. 13 – 154, l. 21. Though Robinson had cashed her paycheck for \$141.74 on the afternoon of August 6, 1998, no cash was

found in her residence or in the money purse near her body. App. 190, l. 23 – 191, l. 16; App. 230, l. 17 – 232, l. 16; App. 469, ll. 13-22. Robinson’s sister, Beverly Whetstone, said that Robinson regularly kept her money in a little black pouch, in her bra. App. 107, l. 24 – 108, l. 7.

There was no fingerprint or DNA evidence linking Nimmons to the crime. App. 194, l. 9 – 196, l. 10. A neighbor and family friend, Rosa Whetsone, testified that she saw Nimmons wearing the flannel shirt, found bloodied and in the laundry hamper of Robinson’s trailer, when she was out walking with her sister just before 11:00 p.m. on the night of August 6, 1998. App. 177, ll. 3-15; App. 238, l. 10 – 241, l. 12; App. 241, l. 25 – 242, l. 8. While she claimed to be certain that the shirt in the photograph was the same one worn by Nimmons, she initially described the shirt to police as “stripedy” and could not recall the colors in the shirt because it was nighttime. App. 241, ll. 13-24; App. 242, l. 14 – 246, l. 25. For the shirt in the hamper to have been the same shirt seen by Rosa Whetstone, the murder would have necessarily occurred after 11:00 p.m.

Notably, Nimmons’ cousin, Darryl Williams, testified that Nimmons was wearing a gray checkered shirt every time that he saw him on the night of August 6th and morning of August 7th. App. 205, ll. 20-23; App. 207, l. 15 – 208, l. 7. Though unable to say with certainty that it was the same shirt, Williams said that Nimmons left a checkered shirt in his house on the 7th and it was collected by SLED. App. 212, l. 6 – 216, l. 8. Further, Williams said that Nimmons left from in front of Sandra Jordan’s house at approximately 6:30 or 7:00 p.m. on the 6th and Nimmons returned between 7:30 and 9:00 p.m. that night with cash that he used to purchase drugs. App. 200, l. 19 – 203, l. 11; App. 682, ll. 13-19. Robinson’s sister, Beverly Whetstone, saw Robinson alive at 8:30 p.m., leaving a fairly narrow window for Nimmons to have murdered Robinson, cleaned up, and returned with the cash he allegedly stole from her change purse as

theorized by the State. App. 105, l. 5 – 106, l. 2. Beverly Whetstone also saw who she thought to be a woman enter Robinson's trailer at 4:00 a.m. on the night that Robinson was murdered. She was certain that the person she saw was not Nimmons. App. 110, l. 19 – 114, l. 2; App. 117, ll. 4-12.

Nimmons did not make himself immediately available to police following Robinson's death, having overheard someone say that he was responsible for it. App. 397, l. 3 – 399, l. 11. When he did meet with police, Nimmons' first statement denied any involvement in his mother's death. App. 305 – 333. In the statement, Nimmons purportedly said that the last time he saw Robinson was on the night of the 6th, after suppertime, when he took approximately \$120 in cash and her car keys after she fell asleep. Nimmons stayed out all night doing drugs and mustering the courage to tell his mother he gave up her car to clear his drug debts. App. 320 – 322. After at least an hour and half alone in a room with the solicitor's investigator, Wayne Martin, Nimmons gave a second statement confessing to Robinson's murder. App. 334 – 361. Nimmons testified that he was threatened with the death penalty and fed information about the circumstances of the crime by the investigator and police. App. 418, l. 20 – 420, l. 19. Following the second written statement, the officers had Nimmons repeat his statement on video. Notably, videography was not utilized to document any prior portion of the interrogation. App. 344, l. 24 – 345, l. 3; App. 351, ll. 15-24. Captain Bell admitted that Nimmons was their only suspect, stating: "Well, he was living there and from what Ms. Nimmons and them told me, that he was the guy." App. 136, ll. 13-21.

At trial, Nimmons testified that he went home at approximately 5:15 p.m. on August 6, 1998. Nimmons said that his mother gave him the keys and \$40 in cash because Nimmons lied and told her that he had a date. In fact, Nimmons knew when he asked her that he was going to

spend the cash on drugs and loan her car out for additional drugs, which is exactly what he did. App. 386, l. 16 – 390, l. 10. Nimmons stayed out all night drinking and using drugs. When his mother's car was not returned in time for her to go to work, Nimmons headed home to confess to her that he had loaned it out for drugs. Nimmons saw the commotion around Robinson's trailer and overheard the allegation that he had killed his mother. Nimmons remained in hiding until he called a family member in Texas who encouraged him to go to the police. App. 390, l. 10 – 410, l. 23.

The jury ultimately returned verdicts of guilty as to both offenses. App. 543 – 544. Judge Clary sentenced Nimmons to life imprisonment without parole for murder and thirty years for armed robbery. App. 548 – 549.

Direct Appeal

Nimmons direct appeal was perfected by the filing of a brief by appellate defender Robert M. Pachak. App. 57. Following a review pursuant to Anders v. California, 386 U.S. 738 (1967), the Supreme Court filed a memorandum opinion dismissing the appeal on June 13, 2002. App. 561. Nimmons filed a *pro se* petition for rehearing. App. 563. On August 7, 2002, the Supreme Court filed an order denying the petition for rehearing, and the remittitur was sent. App. 569; App. 570.

Prior Post-Conviction Relief Actions

Nimmons filed post-conviction relief applications in 2003, 2009, and 2010, none of which resulted in any relief being granted. See App. 589; App.

Current Post-Conviction Relief Action

On July 17, 2012, Nimmons filed an application for post-conviction relief based upon after-discovered evidence. App. 571. The basis for the application was a typed Facebook

messenger conversation from September 27, 2011 between Darryl Williams and Marcella Curry Hooker, in which Williams confessed to killing Zola “Pat” Robinson. App. 575; App. 644. On October 10, 2012, the State filed a return and motion to dismiss. App. 580. A conditional order of dismissal was signed by Judge Early and filed on October 17, 2012. See App. 611, ll. 23-25. On September 2, 2014, Nimmons, through counsel, filed an Amended Opposition to Respondent’s Motion to Dismiss and Conditional Order of Dismissal. App. 588. An evidentiary hearing was ordered. App. 611, l. 25 – 612, l. 2. Orders for funding were signed on May 19, 2015 to fund an investigator and on February 26, 2016 to fund a deposition of Darryl Williams. App. 596; App. 604.

On September 30, 2016, an evidentiary hearing was held before the Honorable Edgar W. Dickson. Nimmons was represented by Janek Kazmierski, and the State was represented by assistant attorney general Julie Coleman. App. 605. Nimmons presented one witness, Darryl Williams, whom he questioned about the following Facebook messenger conversation:

Williams: he did what he say

Hooker: he asked how is everyone and said you testified against him for the state and asked for money

Williams: i had to there was going to lock my ass up to if i did not i told the true

Hooker: i told him sometimes we have to do what we have to do to get by

Williams: i no
it hurt me to do it but i did
i did kill pat

Hooker: boy take it with you

Williams: my bad cuz my computer acting up
i holla at u later got 2 do some work im at work no

App. 606; App. 644. Williams claimed that he was not involved in Robinson's murder and that he made a typographical error in his on-line conversation when he wrote "I did kill pat." He averred that he meant to write "i did 'not' kill pat" and did not realize that he had made the mistake until SLED approached him with a print out of the conversation a year later. App. 619, l. 3 – 631, l. 19; App. 633, l. 6 – 637, l. 19; App. 638, l. 21 – 640, l. 6. Nimmons also admitted into evidence a copy of the Facebook messenger conversation; Williams' deposition taken on October 16, 2015; and Williams' voluntary statement given during a SLED investigation on October 16, 2012. App. 644; App. 646; App. 697.

Following the hearing, counsel each submitted a memorandum for the court's consideration. App. 698; App. 712. On March 24, 2017, Judge Dickson filed an Order of Dismissal. App. 718. He found, as an initial matter, that Darryl Williams' testimony was credible and that the newly discovered evidence was "incredible and improbable" under the totality of the circumstances. App. 725. He further found that Nimmons failed to meet two prongs of the Hayden test because "the evidence would not change the result if a new trial was had and the evidence is merely cumulative or impeaching." App. 726 – 728. He accordingly denied and dismissed Nimmons' PCR application with prejudice. App. 728.

ARGUMENT

The PCR court erred in denying Petitioner’s application for post-conviction relief based upon after-discovered evidence where Petitioner met the five-factor test to support the grant of a new trial.

Nimmons filed for post-conviction relief after being informed that his cousin, Darryl Williams, confessed in a Facebook messenger conversation that he was the one who killed Nimmons’ mother, Zola “Pat” Robinson. The Uniform Post-Conviction Procedure Act provides an avenue for defendants to address newly discovered evidence, including as a person who may institute proceedings: “Any person who has been convicted of, or sentenced for, a crime and who claims: . . . [t]hat there exist evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4); see also S.C. Code Ann. § 17-27-45(C) (requiring application contending that there is evidence of material facts not previously presented and heard to be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence).

“Traditionally, in South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” Jamison, 410 S.C 456, 467, 765 S.E.2d 123, 128 (2014); see also State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct. App. 2011); State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999). These same factors also apply in post-conviction relief proceedings where the applicant was convicted following a trial. See Jamison, 410 S.C at 469-70, 765 S.E.2d at 129-30;

Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

In the PCR court's order, Judge Dickson found that Nimmons satisfied the second, third, and fourth factors – the evidence was discovered since the trial, could not have been discovered before trial, and was material to the issue of guilt or innocence. Nevertheless, Judge Dickson denied relief after finding that the new evidence was “incredible and improbable under the totality of the circumstances” and finding that Nimmons failed to satisfy the first and fifth factors required to warrant a new trial – that the evidence would probably change the result of a new trial and was not merely cumulative or impeaching. App. 725 – 728.

The newly discovered evidence was credible.

While this Court gives great deference to the trial court's credibility findings, an adverse credibility finding is not dispositive to the grant or denial of a new trial. State v. Mercer, 381 S.C. 149, 166-70, 672 S.E.2d 556, 565-67 (2009). “[A] mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt.” State v. Mercer, 381 S.C. at 170, 672 S.E.2d at 567. In the present case, the PCR court found:

Williams testified at Applicant's trial in 1999, gave a statement to SLED, was deposed by PCR counsel, and testified at the evidentiary hearing. All of this testimony was consistent. Williams never changed his story and consistently recalled the same facts from the day of the murder. Therefore, this Court finds that Williams was a credible and reliable witness. Furthermore, because Williams consistently and directly disputed the newly discovered evidence presented at the evidentiary hearing, this Court finds that the newly discovered evidence is not credible. Williams made it clear in his testimony that the words he typed were in error and that he did not kill Pat. The newly discovered evidence offered by Applicant is incredible and improbable under the circumstances, lending this newly discovered evidence to carry little weight.

App. 725 – 726.

Williams' claim that his on-line message was a typographical error that he did not realize that he made at the time is highly suspicious. As an initial matter, it is difficult to fathom for what purpose Williams would have written "I did not kill Pat," as he claimed he intended, at that point in the conversation with Hooker. See App. 644. There was no need for Williams to deny killing her, as he had never been implicated in Robinson's death prior to his written admission. Further, while the PCR judge found that Williams was consistent in all of his testimony and his dispute of the newly discovered evidence, it is far from difficult to remain consistent in saying that your confession to murder was a typographical error. Consistency in a lame and improbable excuse does not equate to credibility. Williams' claim that he was so distracted by the students in the residence hall that he did not realize he made the error is simply incredulous. See App. 624, ll. 15-20; App. 635, l. 12 – 636, l. 6.

Additionally, Williams' testimony at trial did not directly inculcate Nimmons in Robinson's death, perhaps allowing him to rationalize his testimony as "true" even if it was not "the whole truth." See App. 644. Williams testified that Nimmons had on the same gray plaid shirt throughout the night, which was collected by SLED at Williams' house such that it could not be the bloodied shirt collected from the hamper in Robinson's trailer. App. 177, ll. 3-15; App. 205, ll. 20-23; App. 207, l. 15 – 208, l. 7; App. 212, l. 6 – 216, l. 8. Williams testimony at that pre-PCR deposition did differ somewhat from his trial testimony. In his deposition, Williams said that Nimmons had cash at 6:00 p.m., which would have been inconsistent with the State's theory that Nimmons killed his mother when she refused to give him money given that Robinson's sister was in Robinson's trailer speaking with her at 8:30 p.m. App. 682, ll. 13-19; App. 105, l. 5 – 106, l. 2. When considered in this context, Williams' confession that he did kill

Pat makes much more sense. That was certainly how it was taken by Hooker, who responded “boy take it with you.” App. 644.

During the SLED investigation that occurred following the on-line conversation, Williams underwent a polygraph examination in November 2012. App. 644; App. 692. Williams admitted that he failed the polygraph test, but claimed that it was because he was nervous and scared. App. 692. The report further stated that the examiner believed that Williams used counter measures in an attempt to defeat the polygraph. App. 692. Williams denied any such tactics and said that he told the truth. App. 693.

During his deposition, Williams denied any romantic involvement, but admitted that he was friends with Sandra Jordan at the time of Robinson’s death and that the two used drugs together. App. 680, l. 8 – 681, l. 3. Williams claimed to be unaware that Jordan failed a polygraph examination one week after Robinson’s death. Jordan answered deceptively when asked “Last August 7th, did you go into Zola Robinson's trailer?; Did you enter Zola Robinson's trailer after she was dead? Are you withholding any information about the beating death of Zola Robinson?” App. 681, ll. 4-13. Nonetheless, Williams said that Jordan had nothing to do with Robinson’s death and denied that the two were covering for each other. App. 681, ll. 13-23. However, Williams said that he did not know if Jordan could have been the woman seen going into Robinson’s trailer on the night she did. App. 681, l. l. 24 – 682, l. 12.

In light of all of this, while this Court must give deference to the PCR court’s credibility findings, it is simply inaccurate to find that the newly discovered evidence would “carry little weight.” While that would certainly be the argument of the solicitor at a new trial, there are a variety of reasons that the defense would argue that Williams’ electronic message was true. Williams’ denial of its truth is merely evidence that Williams regretted his admission once an

investigation began and he realized that Nimmons' prior conviction might not be enough to avoid any consequence for killing Robinson.

The evidence would probably change the result if a new trial was had.

The PCR court erred in finding that the newly discovered evidence would not change the result of a new trial. The PCR court's findings related to that factor centered on the standard for third party guilt. Judge Dickson determined that the new evidence "cast a bare suspicion on Williams." App. 726 – 727. Under South Carolina law:

Evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534-35 (1941) (quoting 16 C.J., Criminal Law § 1085, p. 560 (1918) and 20 Am.Jur., Evidence § 265, p. 254 (1939)). In Gregory, the Court explained: "An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty." 198 S.C. at 98, 16 S.E.2d at 535.

In this case, the new evidence that would have been utilized as evidence of third party guilt was Darryl Williams' written admission that he killed Pat. There is no leap in logic or conjecture required to determine that Williams' meant just what he wrote. Rather, it is Williams' testimony at the deposition and in the PCR hearing that suggests logic be suspended and his story about distractions and unnoticed typographical errors be believed. While both sides would be

free upon a new trial to argue the weight that should be given to Darryl's testimony, this evidence raises a reasonable inference as to the accused's innocence if believed. See State v. Cope, 385 S.C. 274, 293, 684 S.E.2d 177, 187 (Ct. App. 2009), aff'd, 405 S.C. 317, 748 S.E.2d 194 (2013) ("Evidence of third-party guilt may include: (1) facts that are inconsistent with the defendant's guilt; and (2) evidence raising a reasonable inference as to the accused's innocence."). Williams' unwillingness to admit that he killed Pat under oath does not undermine the believability of his statement made to a close family member, years after the crime. It is no more reasonable to assume that Williams made a typographical error than it is to assume that the weight of what he had done finally took its toll and prompted his confession but that Williams changed his mind when confronted with a reality of a prison sentence. If Williams was the type of person who would watch his innocent cousin be sent prison for the murder of his own mother, knowing full well that Nimmons had no involvement, then Williams is the type of person who would recant what was a truthful confession. As discussed more fully *supra*, the State's case against Nimmons was not overwhelming, as they lacked any physical evidence to connect him to the crime and there were an array of inconsistencies in circumstantial evidence presented. Consequently, the PCR court erred in finding that the newly discovered evidence would not change the result of a new trial. It would have provided reasonable doubt as to Nimmons' guilt.


The evidence is not merely impeaching.

The PCR court erred in finding the newly discovered evidence was merely impeaching because it did not counteract all of the evidence against Nimmons and "would only be used to call into question the veracity of Williams' testimony that he did not kill the victim." App. 727 – 728. Notably, Williams never testified at the trial that he did not kill Robinson, as no such question was posed to him. Rather, Williams testified regarding his interactions with Nimmons

on August 6 -7, 1998 and Williams' return of Robinson's car on the morning of the 7th. App. 196 – 223. The PCR court noted that evidence is “impeaching” if “it is outside the evidence already given and impeaches that evidence by attacking the character, the motives, the integrity, or the veracity of those who gave the evidence.” App. 727. For example, in State v. Wells, 249 S.C. 249, 263-64, 153 S.E.2d 904, 911-12 (1967), the purported new evidence was found merely cumulative or impeaching because the affiant's testimony was consistent with the witness testimony already provided by two other witnesses, which countered the testimony given by the complaining witness. In State v. Caskey, 273 S.C. 325, 329-30, 256 S.E.2d 737, 739 (1979), the new evidence regarding the solicitor's promise of immunity or leniency to a witness in return for testimony against the defendant was found merely impeaching of the witness' credibility and not material to appellant's guilt or innocence. In this case, the evidence of Williams' confession to Robinson's murder is more than impeaching, though ultimately its admission at a new trial may come through impeachment if Williams insists on maintaining his “it was a typo” explanation. It goes to more than Williams' character, motives, integrity or veracity – it goes to his criminal responsibility for the murder of Robinson.

CONCLUSION

Based on the foregoing, Petitioner Juan Nimmons respectfully requests that this Court grant his petition for writ of certiorari and allow further briefing on the issue raised herein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————
Certiorari to Bamberg County

Honorable Edgar W. Dickson, Circuit Court Judge

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JUAN M. NIMMONS,

PETITIONER

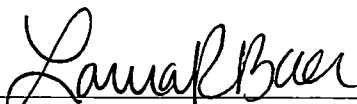
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE
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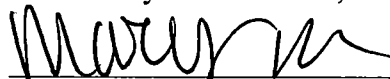
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Juan Nimmons, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of November, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of November, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027