

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Spartanburg County

RECEIVED

Honorable Frank R. Addy, Circuit Court Judge

DEC 13 2017

S.C. SUPREME COURT

CHARLES L. ANDERSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001099

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to move to sever Petitioner's trial from that of his codefendant, Lauri Danielle Hollis, and where Petitioner was prejudiced because if counsel had properly moved for a severance, it would have been granted, and Hollis' statement to a third party witness that "they were about to get somebody because somebody had snitched on somebody," which established motive, would have been inadmissible hearsay at Petitioner's separate trial?

STATEMENT OF THE CASE

The state alleged at trial that Petitioner shot and killed Stephen Means on April 7, 2011 outside Oakview Apartments in Spartanburg, South Carolina. The first officers to respond to the scene found the decedent lying face down on the ground. App. 122, l. 5 – 123, l. 17. He was surrounded by a crowd of eight to ten people, and had been shot once in the back. He ultimately died of his injuries. App. 286, ll. 15-23.

A Spartanburg County Grand Jury indicted Petitioner on August 18, 2011 for murder and armed robbery. App. 743-746. His case was called to trial on October 1, 2012 before the Honorable Roger L. Couch, and a jury. App. 1. Petitioner was tried jointly with his codefendant, Lauri Danielle Hollis. App. 1. Assistant Solicitors Abel Gray and Daniel Cude represented the state, and Christopher Thompson represented Petitioner. App. 1. Ryan McCarty represented Hollis. App. 1.

The two primary pieces of evidence connecting Petitioner to the murder had severe flaws. First, the alleged eyewitness, Molly Bogan, gave several different versions of events. Bogan, who was fifteen years old in April 2011, claimed at trial that she witnessed the shooting. App. 184, l. 12 – 187, l. 19. Investigator Jennifer Watson testified that on the day after the shooting, she presented a photographic lineup of possible suspects, including Petitioner, to Bogan. App. 243, l. 15 – 244, l. 5. However, Bogan did not identify Petitioner. App. 243, ll. 15-25. Investigator Watson also testified that Bogan gave several different versions of what she witnessed. App. 244, ll. 19-24. In the statement she gave the day of the shooting, Bogan claimed she was inside a friend's apartment holding a baby when she heard a gunshot. App. 206, ll. 2-13. Bogan told the police that she opened the door and looked outside. App. 206, ll. 8-13. She saw the decedent "on the grass bent over." App. 206, ll. 10-12.

Bogan's trial testimony was completely different from what she told police on the day of the shooting. At trial, she claimed that instead of being inside an apartment holding a baby, she was outside in a parked car at the time of the shooting. App. 181, l. 11 – 183, l. 4. She testified that several people were standing near her car. App. 183, ll. 4-10. Hollis was in this group. App. 183, ll. 9-14. Bogan claimed Hollis "started talking about some dude and was talking about how – I didn't really catch on to it; she was just like something about they were about to get somebody because somebody had snitched on somebody." App. 183, ll. 15-21. Hollis, and the men with her, then supposedly walked toward the decedent. App. 184, ll. 12-24. Bogan said she looked down at her navigation system and then heard a gunshot. App. 184, l. 25 – 185, l. 2. When she looked up, the decedent was falling to the ground and people were "running away." App. 185, ll. 1-2.

Bogan claimed that Hollis was in a group of four people in a circle around the decedent. App. 185, ll. 3-11. In direct contrast to her inability to identify anyone associated with the murder the day after the shooting, Bogan made an in court identification of Petitioner as one of the individuals surrounding the decedent. App. 186, l. 14 – 187, l. 12. She claimed Petitioner was the only person with a gun in his hand. App. 186, l. 14 – 187, l. 12. Bogan later admitted Petitioner was "easy to pick out" in the courtroom because he was sitting at the defense table. App. 189, ll. 12-21.

On cross-examination, Bogan said that someone named "Little Man" was one of the other men gathered around the decedent. App. 200, ll. 8-10. She also knew several other people who were gathered around, including someone named "J.P." App. 201, ll. 6-13. She admitted she did not know "Little Man" or Petitioner. App. 200, l. 19 – 201, l. 5. Defense counsel asked:

Q. And you basically are going off of Little Man and my client [Petitioner] based upon what somebody else told you their name was; is that right?

A. I guess so.

App. 201, ll. 19-22.

The only other piece of evidence tying Petitioner to the shooting was a gun found under his mattress. App. 322, ll. 15-20. Unsurprisingly, since it was found in his bed, Petitioner's DNA was present on the gun. App. 451, ll. 16-25. However, the state's DNA expert thoroughly explained the concept of DNA transference from skin cells left behind by individuals. App. 457, l. 1 – 460, l. 6. Furthermore, there was no evidence Petitioner knew the firearm was in his bedroom. Petitioner consented to a search of his room. App. 327, l. 9 – 328, l. 9. Another person charged with the murder, Quartez Lyles, had been at Petitioner's house and in his room after the shooting. App. 545, l. 3 – 546, l. 22. It makes little sense that Petitioner would have consented to a search if he knew the murder weapon was in his bedroom.

Significantly, two of the state's key witnesses contradicted its theory of the case that Petitioner was the shooter. Alice Carroll claimed to witness the murder. She testified that the shooter was heavysset and had dreadlocks. However, she was not sure whether the shooter "was a lady or a man." App. 213, l. 13 – 215, l. 14. When asked if she could identify anyone in the courtroom connected with the murder, Carroll looked around and then asked the solicitor, "Will you – I don't know where to look at. Can you tell me where to look?" App. 215, ll. 7-8. She was ultimately unable to identify anyone. App. 216, ll. 20-22.

The state also called Perry Crain, who the lead investigator had referred to as law enforcement's "main witness." App. 500, ll. 20-23. Crain testified that he witnessed the shooting. App. 218, l. 22 – 219, l. 6. He, like Carroll, asserted that the shooter had dreadlocks.

App. 220, l. 4 – 222, l. 3. However, Crain could not identify the murderer in the courtroom and testified that he did not remember his face. App. 219, ll. 7-17.

Carroll and Crain's description of the shooter closely resembled Hollis. Hollis was a heavyset woman who had dreadlocks on the day of the shooting. App. 188, ll. 12-24; App. 227, l. 8 – 228, l. 8. Suspiciously, either the night of, or the day after the shooting, Hollis drastically changed her hairstyle. She cut her hair into a Mohawk, with the sides shaved short. App. 177, l. 21 – 178, l. 22; App. 230, ll. 17-24. Petitioner, on the other hand, has always had a low cut hairstyle. App. 188, ll. 12-16. Consequently, Petitioner did not match the description of the shooter given by the only two people who claimed to have witnessed the murder.

Significantly, gunshot residue was found on the shirt Hollis wore the day of the shooting. Moreover, Hollis was seen wearing the decedent's necklace at a party three days after the murder. App. 229, l. 10 – 232, l. 5. Consequently, all of the evidence pointed to Hollis as being the shooter, besides Molly Bogan's extremely unreliable in court identification of Petitioner as the shooter.

The jury deliberated for almost an entire day, asked several questions, and requested to rehear certain testimony. App. 622, l. 21 – 247, l. 9. The jury ultimately convicted Petitioner as indicted. App. 638, l. 18 – 639, l. 15. He was sentenced to life without parole for murder and thirty years for armed robbery. App. 651, l. 24 – 652, l. 7.

Despite the significant evidence presented that Hollis was the shooter, which contradicted the state's theory of the case, trial counsel never argued or suggested to the jury that Hollis was the shooter. Most importantly, Hollis matched the description of the shooter provided by Alice Carroll and Perry Crain, two impartial eyewitnesses. Hollis also made a statement to Bogan immediately before the murder that "they were about to get somebody because somebody had snitched on

somebody,” completely changed her hairstyle within hours of the shooting, had gunshot residue on her shirt, and was seen wearing the decedent’s necklace three days after the murder. On the other hand, the only evidence to support the state’s theory that Petitioner was the shooter was the extremely unreliable in court identification made by Molly Bogan.

On January 12, 2015, after Petitioner’s direct appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967), Petitioner filed an application for post-conviction relief (PCR). App. 668-676. The state filed a return to this application dated September 8, 2015 and an amended return and motion for a more definite statement on July 22, 2016. App. 677-687. In response, Petitioner filed an amended application on October 24, 2016 raising the claim argued in this petition. App. 688. On November 7, 2016, an evidentiary hearing was convened before the Honorable Frank R. Addy, Jr. App. 689. Assistant Attorney General Alicia Olive represented the state, and J. Brandt Rucker represented Petitioner. App. 689.

Petitioner, again who was tried jointly with his codefendant Hollis, alleged at the hearing that trial counsel was ineffective for failing to move for a severance. App. 699, ll. 10-21. He testified that trial counsel never explained to him why he was being tried jointly with Hollis, or gave any strategic reason for not requesting a separate trial. Petitioner admitted that, at the time, he did not know whether the state was permitted to try him jointly with Hollis, and that he was relying solely on the expertise of his attorney. App. 702, l. 4 – 703, l. 9. Petitioner asserted that the outcome of his trial would have been different if counsel had properly moved for a severance and the motion had been granted. He testified that there was significant evidence against Hollis, and that he was only convicted under the hand of one is the hand of all theory of accomplice liability because the state claimed Petitioner was with Hollis during the shooting. App. 703, l. 10 – 705, l. 9.

Christopher Thompson, Petitioner's trial counsel, testified that he thought it was beneficial to Petitioner to be tried jointly with Hollis. He explained, "I felt good with her [Hollis] coming to trial with us because there was eyewitness testimony that a person with dreadlocks was the shooter and . . . she had dreadlocks, and . . . was . . . obviously there on the scene, so I felt like that helped our case somewhat." App. 714, l. 12 – 715, l. 1. He also mentioned that Hollis "quite frankly, looked a lot like a man." App. 715, ll. 12-15. Moreover, Thompson asserted that Hollis did not testify at trial and none of her statements implicating Petitioner were admitted. App. 715, ll. 16-22.

However, Thompson admitted that if Petitioner had been tried separately, Hollis' alleged statement to Molly Bogan that "they were about to get somebody because somebody had snitched on somebody" would have been inadmissible hearsay. App. 723, l. 16 – 724, l. 3. When asked why he did not move for a severance when he knew that Hollis' statement to Bogan could be used against Petitioner if the pair was tried jointly, Thompson continued to maintain that he thought it was beneficial to Petitioner to be tried with Hollis since the eyewitnesses, with the exception of Bogan, testified that the shooter had dreadlocks. App. 725, l. 21 – 726, l. 14.

By order filed April 14, 2017, the PCR judge found Petitioner failed to prove trial counsel's conduct in not moving for a severance fell below an objective standard of reasonableness. App. 737-738. The judge emphasized trial counsel's testimony that he felt it was helpful to Petitioner to be tried jointly with Hollis because she had gunshot residue on her clothing and her appearance most closely resembled the eyewitnesses' description of the shooter. App. 738. The judge also found that Petitioner failed to prove he would have been entitled to a severance if counsel had made such a motion. He stressed that Molly Bogan's in court identification of Petitioner as the shooter, as well as the fact that the murder weapon was found under Petitioner's mattress, would have been admissible regardless of whether Petitioner was tried jointly with Hollis. App. 738. Consequently,

the judge concluded that the outcome of Petitioner's trial would not have been different if counsel had moved for a severance. App. 739.

Because Petitioner's rights to the effective assistance of counsel were violated when trial counsel failed to move for a severance, and Petitioner was prejudiced since if counsel had properly moved for a severance, it would have been granted, and Hollis' alleged statement to Molly Bogan that "they were about to get somebody because somebody had snitched on somebody," which established motive, would have been inadmissible hearsay at Petitioner's separate trial, this petition for writ of certiorari follows.

ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to move to sever Petitioner's trial from that of his codefendant, Lauri Danielle Hollis, and where Petitioner was prejudiced because if counsel had properly moved for a severance, it would have been granted, and Hollis' statement to a third party witness that "they were about to get somebody because somebody had snitched on somebody," which established motive, would have been inadmissible hearsay at Petitioner's separate trial.

Trial counsel was ineffective for failing to move pretrial to sever Petitioner's trial from that of his codefendant, Lauri Danielle Hollis. Petitioner was indisputably prejudiced by the joint trial. Because Petitioner was tried jointly with Hollis, the statement Hollis made to Molly Bogan that "they were about to get somebody because somebody had snitched on somebody" was admissible against Petitioner under Rule 801(d)(2), SCRE, and used by the state to establish motive. Notably, the theme throughout the assistant solicitor's closing argument was "snitches get stiches." App. 580, l. 8 – 590, l. 21. However, if Petitioner had been tried separately, Hollis' statement would not have been admissible under Rule 801(d)(2), SCRE, or Rule 804(b)(3), SCRE. Consequently, Petitioner was clearly prejudiced by counsel's deficient performance.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. Under the second prong, Petitioner must show "there is a reasonable

probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right." State v. Dennis, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999) (citing State v. Kelsey, 331 S.C. 50, 73-74, 502 S.E.2d 63, 75 (1998)). "A defendant who alleges he was improperly tried jointly must show prejudice before [the] court will reverse his conviction." Id. (citing State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972)). The trial judge must act cautiously in allowing a joint trial. Id. The judge must carefully consider problems that may arise from a joint trial and must assure protection of each defendant's constitutional right to confront witnesses against him. Id. (citing State v. Singleton, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991)).

Here, trial counsel was ineffective for failing to move for a severance because Petitioner's joint trial with Hollis allowed for the admission of her statement to Molly Bogan pursuant to Rule 801(d)(2), SCRE, and Rule 804(b)(3), SCRE, which otherwise would have been inadmissible against Petitioner if he had been tried separately. Trial counsel admitted at the evidentiary hearing that Hollis' statement to Bogan would have been inadmissible hearsay against Petitioner in a separate trial. App. 723, ll. 16-23.

If counsel had properly moved for a severance, his request would have been granted. A trial judge must act cautiously before allowing a joint trial and is required to carefully consider problems that may arise from a joint trial. Dennis, 337 S.C. at 281, 523 S.E.2d at 176. If

counsel had requested a severance, the trial judge would have been required to consider how a joint trial would infringe on Petitioner's right to a fair trial.

The joint trial indisputably prejudiced Petitioner and affected the outcome of his trial. Consequently, Petitioner was prejudiced by trial counsel's deficient performance. Without the statement Hollis allegedly made to Molly Bogan that "they were about to get somebody because somebody had snitched on somebody," the state would have been unable to establish any motive. The entire theme of the assistant solicitor's closing argument was "snitches get stitches." Without any motive, there is a reasonable probability that the jury would have found Petitioner not guilty, particularly given the flawed evidence presented against him. The only evidence against Petitioner was Bogan's wholly unreliable in court identification of Petitioner as the shooter and the fact that the murder weapon was found in his bedroom. However, again, there was evidence that another person charged with the murder, Quartez Lyles, had been at Petitioner's house and in his room after the shooting.

While trial counsel claimed at the evidentiary hearing that he "felt like it helped us with Hollis being present [tried jointly] because there was eyewitness testimony that a person with dreadlocks was the shooter and . . . she had dreadlocks," counsel shockingly failed to argue to the jury that the evidence presented showed Hollis was the shooter, rather than Petitioner. He failed to capitalize during his closing argument on the overwhelming evidence against Hollis, including the presence of gunshot residue on her shirt, her statement to Bogan which established motive, her resemblance to the description of the shooter, her change of hairstyle immediately after the murder, and the fact that she was seen wearing the decedent's necklace days after the shooting. Counsel's failure to argue that Hollis was the shooter completely contradicts his alleged trial strategy in refusing to request a severance. Such an argument would have

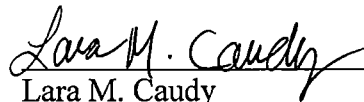
completely refuted the state's theory of the case, which was that Petitioner was the shooter and Hollis was merely guilty under the hand of one is the hand of all theory of accomplice liability.

Respectfully, this Court should hold trial counsel was ineffective for failing to move for a severance, and that Petitioner was prejudiced by counsel's deficient performance because if counsel had requested a severance, the motion would have been granted, and the outcome of Petitioner's trial would have been different, particularly where Hollis' statement to Bogan would have been inadmissible hearsay against Petitioner in a separate trial. Consequently, this Court should reverse the ruling of the PCR judge and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented. In the event this Court dispenses with further briefing, Petitioner respectfully requests this Court reverse the decision of the PCR court and remand a new trial.

Respectfully submitted,

_____

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of December, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CHARLES L. ANDERSON,

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V.

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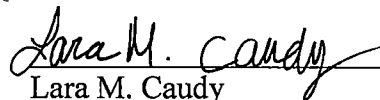
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Charles L. Anderson states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.
2. She has reviewed the records and transcript of Petitioner's post-conviction relief hearing, which was held on November 7, 2016 before the Honorable Frank R. Addy, and, in her opinion, seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Charles L. Anderson.

Respectfully Submitted,

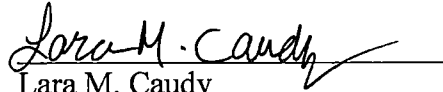

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of December, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."



Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent
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Division of Appellate Defense
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(803) 734-1330

ATTORNEY FOR PETITIONER

This 13th day of December, 2017.

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IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

CHARLES L. ANDERSON,

PETITIONER

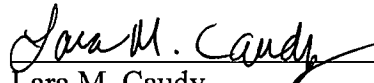
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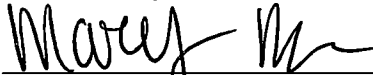
CERTIFICATE OF SERVICE

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 have been served upon Valerie Garcia Giovanoli, 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 upon Charles L. Anderson, #338944, at Evans Correctional Institution, 610 Highway 9 West, Bennettsville, SC 29512, this 13th day of December, 2017.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of December, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.