

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

Honorable R. Scott Sprouse, Circuit Court Judge

JOHN FITZGERALD KENNEDY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000877

JOHNSON PETITION FOR WRIT OF CERTIORARI

Kathrine H. Hudgins
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

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DEC 31 2018

S.C. SUPREME COURT

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for, during a hearing to establish third-party guilt, failing to call Ron Curry as a witness to testify that another witness, Julie Moore, threatened to kill the decedent just prior to his death?

STATEMENT

In September of 2018, the Anderson County Grand Jury indicted Petitioner, John Fitzgerald Kennedy, for murder, indictment #2012-GS-04-2002. On December 2, 2013, Petitioner proceeded to jury trial before the Honorable J. Cordell Maddox. The jury found Petitioner guilty and Judge Maddox sentenced Petitioner to thirty (30) years in prison. A timely notice of intent to appeal was filed and the direct appeal perfected. On May 20, 2015, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Kennedy, Op. No. 2015-UP-256 (S.C.Ct.App. May 20, 2015). Petitioner filed a petition for rehearing that was denied on June 24, 2015. Petitioner filed a petition for writ of certiorari with the South Carolina Supreme Court that was denied on February 16, 2016.

On March 15, 2016, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on February 16, 2017. On October 5, 2017, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Rodney Richey represented Petitioner at the PCR hearing. Lindsey McCallister represented the State. In a written order signed April 18, 2018, Judge Sprouse denied relief and dismissed the application. A timely notice of intent to appeal was served on May 7, 2018. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for, during a hearing to establish third-party guilt, failing to call Ron Curry as a witness to testify that another witness, Julie Moore, threatened to kill the decedent just prior to his death.

A jury found Petitioner guilty of the fatal beating of Claud Schaffer Scott. Petitioner had been staying in a camper behind Scott's trailer home for about one or two weeks prior to Scott's death. (App. p. 148, lines 1-17). Julie Moore lived in the trailer with Scott. Kimberly King, Scott's granddaughter, testified at trial that on the day of Scott's death she checked on him around noon. (App. p. 150, lines 12-21). At that time Moore was also inside the trailer getting dressed to leave and Petitioner was in the yard working on a car. (App. p. 150, line 22 – p. 151, line 1). Scott sold used cars and Petitioner helped Scott prepare the cars for sale. (App. p. 147, lines 5-9; p. 149, lines 6-13). On the day of his death Scott sold a van for fifteen hundred dollars and Petitioner went with Scott to the bank to cash the check received for payment on the van.

King returned to check on Scott between 5:00 and 6:00 PM and found the door locked, which was unusual. (App. p. 151, line 12- p. 152, lines 1-11). King testified that Petitioner came from the back of Scott's trailer and told her that Scott was asleep and did not want to be bothered. (App. p. 152, lines 14-16). According to King, Petitioner appeared real sweaty and looked weird. (App. p. 152, lines 17-19). King testified that when she asked if the back door was locked, Petitioner went to the back and locked the door. (App. p. 153, lines 6-13). King continued to knock on the front door and Petitioner left in a blue Ford. (App. p. 153, lines 15-25). According to King, prior to leaving Petitioner asked King to go the store with him. (App. p. 153, line 24 – p. 154, lines 1-2).

As King continued to knock on Scott's door she heard him say, "Go away. I don't want to be bothered now. Go away." (App. p. 154, lines 22-23). Scott eventually opened the door for King but then collapsed in the doorway. (App. p. 154, line 25 – p. 155, lines 1-11). King testified that Scott had been beaten badly and she immediately called 911. Prior to eventually dying as a result of his injuries, Scott named Petitioner as the person who beat him.

Ron Curry was King's roommate. (App. p. 165, lines 15-21). At trial King admitted that she called Curry after calling 911. (App. p. 168, lines 13 – 22). King testified that she asked Curry if he knew anything about the beating because she believed he and Julie Moore had something to do with it. (App. p. 168, line 24 – p. 169, lines 1-12). During the defense opening statement the State objected to references to Ron Curry and Julie Moore as an improper reference to third-party guilt. (App. p. 140, lines 10-19; p. 141, lines 9-18; p. 142, lines 6-7). The trial judge cautioned defense counsel not to go too far. (App. p. 142, line 20 – p. 143, 144, lines 1-13). Later during trial counsel sought to question an investigator about his interview with Moore and Curry, the fact that they were found the next day in one of Scott's cars and Moore knew Scott was going to sell the van. (App. pp. 348-357). The cross examination of the investigator was proffered for the judge outside of the presence of the jury. Ron Curry was not called as a witness during the proffer. The judge excluded the questioning stating, "And Holmes¹ says that it should be excluded only if it has a very weak logical connection to the central issue. I just – I think – and actually, if you read the facts in Holmes, this is all sort of similar. I'm not going to let you introduce that. I think that's logical. The probative value just is not strong enough given what I've heard. And I've looked at both sides of the case according to Holmes."

¹ Holmes v. South Carolina, 547 U.S. 319 (2006).

And not just the State's case, but the Defense case is what was proffered. Okay?" (App. p. 356, line 23 – p. 357, lines 1-7). The third- party guilt issue was not raised on direct appeal.

In the PCR application Petitioner alleged that "Trial counsel was deficient in his representation because he failed to thoroughly investigate and pursue facts and circumstances regarding third-party guilt defense." (App. p. 491). During the PCR hearing Petitioner testified that trial counsel was ineffective in failing to investigate Julia Moore, Ron Curry, Jamie Manning and John, last name unknown. (App. pp. 522-523). Applicant's exhibit #1, a three-page written statement from a witness, Santonio L. Carson "S.L.C.", was admitted in evidence during the PCR hearing. (App. p. 535, lines 1-5; pp. 555-557). The witness wrote that he heard Curry make statements about the events leading up to Scott's death including the fact that Julie Moore threatened to kill Scott and later had a large amount of cash. The statement was addressed to trial counsel on an inmate request sheet. Trial counsel testified that he was unable to locate the witnesses but was still able to argue third-party guilt. (App. pp. 542-543).

In the order of dismissal Applicant's exhibit #1 is incorrectly identified as a document purporting to be an affidavit from Ron Curry. (App. p. 565). As discussed above, the exhibit was a written statement from a witness about statements made by Curry and could have been used to impeach Curry had he been called as a witness during the proffer and denied making the statements. The order states, "In addition, Counsel testified he felt it was unlikely anyone would admit to being involved if they were called as witnesses." (App. p. 566). Later the order states, "The Court finds Counsel was not deficient in his investigation of third-party guilt issue as he hired an investigator to attempt to track down the witnesses named by Applicant, and when he was unable to do so, he communicated that fact to Applicant. Further, Counsel still presented and argued a third-party guilt defense to the jury using the information and witnesses he has

available.” (App. p. 567). The PCR judge erred. Trial counsel was ineffective for failing to call Ron Curry as a witness to testify that Julie Moore threatened to kill Scott and had a large amount of cash. If Ron Curry had testified during the proffer consistently with the statements overheard by “S.L.C.” in Applicant’s exhibit #1, there is a reasonable probability that the judge would not have excluded the additional third- party guilt evidence that Moore knew Scott was going to sell the van and that both Moore and Curry were found in one of Scott’s vehicles the day after his death.

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.

Trial counsel was ineffective in failing to properly proffer the third-party guilt evidence with the testimony of Ron Curry. Curry’s testimony would have met the requirements for

admission of third party guilt pursuant to State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941).

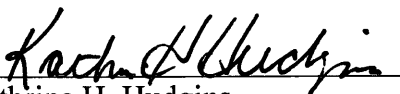
In Gregory, the South Carolina Supreme Court wrote:

[T]he 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.... But before 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. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.

198 S.C. at 104–05, 16 S.E.2d at 534–35 (internal citations omitted). If the third-party guilt evidence had been admitted, there is a reasonable probability that the result of the proceeding would have been different.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of December, 2018.

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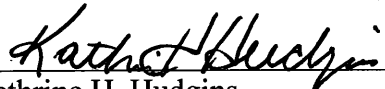
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Fitzgerald Kennedy states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge R. Scott Sprouse, which was held on October 4, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 John Fitzgerald Kennedy.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 31st day of December, 2018.

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S.C. SUPREME COURT

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."



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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 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 Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on John Fitzgerald Kennedy, #358076, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 31st day of December, 2018.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of December, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028