

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Grace Gilchrist Knie, Circuit Court Judge

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BRYAN HOLDER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001585

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PETITION FOR WRIT OF CERTIORARI

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## **ISSUES PRESENTED**

1. Did the PCR court err in not finding trial counsel ineffective for failing to advise Petitioner Holder that his guilty plea to grand larceny of the same guns that were used in the attempted murder would be used against him in his trial for the same attempted murder which was highly prejudicial to Petitioner Holder?

2. Did the PCR court err in not finding trial counsel ineffective for not objecting to the state handing Petitioner Holder a gun and asking him how he shot it which was highly prejudicial to Holder because it was an unreasonable appeal to the emotions of the jury?

## STATEMENT

On June 28, 2012, Petitioner Holder stole guns from the home of Wayne Lyda while Holder was there visiting Stacey Lawing who was home sitting for the Lydas. App. 15, ll. 24; App. 169, ll. 1- App. 171, ll. 23. Holder then called his friend Tyler Schomer and asked if Schomer could find a ride to pick up some guns Holder had. Schomer got his cousin, Kevin, to put the stolen guns in the trunk of Kevin's car. App. 103, ll. 1 – App. 105, ll. 9.

Later, Holder and Schomer retrieved the guns from Kevin's car and put them in Schomer's house. Holder and Schomer then went to a secluded field near Schomer's house and shot the guns. App.108, ll. 3 – App. 109, ll. 24. Schomer said that the field had the store Ingles on one side and woods on the other. They were shooting towards the woods. App. 111, ll. 1 – 21.

According to Schomer, the next night, July 2, 2012, he and Holder returned to the field to shoot the guns again. Schomer stated that on the second night, Holder left the field area, went up an incline and shot in the direction of the Ingles grocery store. App. 111, ll. 22 – App. 113, ll. 25. Schomer also stated that Holder shot in the direction of the Race Way convenience store. According to Schomer, after shooting toward the Race Way, Holder stated, "I believe I shot someone in the head in the car right there." App. 116, ll. 3 - 25.

On July 2, 2012, Bonnie Raines was shot as she sat in the passenger seat of a vehicle parked at the Race Way convenience store. She spent a week in the hospital. App. 322, ll. 15 – App. 324, ll. 25. At the same time Bonnie Raines was shot, shots from the same gun were also fired at Mark Swanger as he was power washing the road by the gas pumps at the Ingles grocery store. App. 284, ll. 1 - App. 287, ll. 11.

On December 6, 2012, the Spartanburg County Grand Jury indicted Petitioner Holder on the charges of grand larceny, malicious injury to real property. On May 3, 2013, the grand jury

indicted Holder on three counts of attempted murder and the possession of a weapon during a crime of violence. App. 623 – App. 641.

On May 6, 2013, Petitioner Holder appeared before the Honorable J. Derham Cole for a jury trial on the three charges of attempted murder and the possession of a weapon during a crime of violence and a guilty plea to the charges of grand larceny and malicious injury to property which included stealing guns from the home of Wayne Lyda while Holder was at the Lyda house as a guest of Stacey Lawing. Holder was represented by Christopher Paul Thompson, and the state was represented by Barry Joe Barnette. The judge deferred sentencing until the disposition of the three counts of attempted murder and the possession of a weapon during the crime of violence. App. 1; App. 13, ll. 1 – App. 14, ll. 16.

Before the guilty plea, the state told the court that he was going to “talk about the prior grand larceny during the trial” because it led to the “other facts about the weapon being used in the attempted murders.” One of the guns stolen from the Lyda house was used to shoot Bonnie Raines. There was no objection by defense counsel. App. 14, ll. 1 – 25. Holder proceeded to plead guilty to the two charges. App. 15, ll. 1 – App. 22, ll. 25.

During the trial, Holder’s co-defendant, Schomer, testified that Holder was the one who shot the weapon the second night. Schomer denied shooting the gun that night. App. 343, ll. 3 – App. 344, ll. 15.

Holder testified at trial. Early during his testimony, Holder’s trial counsel asked him:

**C:** Now, we’ve taken a lot of testimony on the theft of those guns and other items from this—from Bethesda Road. And you’ve –have you entered a guilty on that yet?

**H:** Yes, sir.

**C:** What did you plead on that?

**H:** I pled guilty to the grand larceny and malicious damage to property.

**C:** Okay. And you're accepting responsibility for those, correct?

**H:** Yes, sir.

App. 345, ll. 1 – 25.

Holder admitted going to the field with Schomer one time to shoot guns. App. 347, ll. 12-23. Holder testified that when he and Schomer shot the guns they shot at targets into the woods. App. 348, ll. 12-22. Holder denied shooting in the direction of the Ingles or the Race Way and denied shooting at anybody. App. 354, ll. 10-16. Holder testified that after shooting at targets they returned to Schomer's house. App. 351, ll. 2-20. Holder denied ever removing the guns from Schomer's house after the target practice. App. 349, ll. 19-22.

During cross-examination, the state said to Holder: "You wanted to try out the guns you had just stolen, didn't you?" Holder said yes. Then the state handed Holder the gun that Holder had shot. The state said: "If you would, just take the gun for a second. That's the gun you shot, right?" Holder said: "Yes, sir." There was no objection by defense counsel. App. 357, ll. 1 – 24.

The jury found Holder guilty of possession of a firearm during the commission of a violent offense and guilty of the lesser included offenses of assault and battery of a high and aggravated nature and two counts of assault and battery first degree. App. 473, ll. 1 – 22. Judge Cole sentenced Holder to ten (10) years for one count of assault and battery first degree, twenty (20) years consecutive for assault and battery of a high and aggravated nature, five (5) years consecutive for possession of a firearm during the commission of a violent offense and ten (10) years consecutive for the remaining assault and battery first degree resulting in an aggregate sentence of forty five (45) years in prison. App. 484, ll. 8 – app. 486, ll. 5.

A timely notice of intent to appeal was served on May 24, 2013. The appeal was perfected by the Division of Appellate Defense in the Commission on Indigent Defense. The Court of Appeals affirmed Petitioner Holder's convictions and sentences on June 3, 2015. State v. Holder, Op. No. 2015-UP-273 (Ct. App. filed June 3, 2015). Appellate counsel filed a petition for rehearing which was denied on August 20, 2015. Appellate counsel filed a petition for a writ of certiorari which the Supreme Court denied on May 5, 2016.

On October 3, 2016, Petitioner Holder filed an application for post-conviction relief (PCR). The state filed a return on June 14, 2017. An evidentiary hearing was held on February 2, 2018 before the Honorable Grace Gilchrist Knie. App. 599; App. 511. Holder was represented by Susannah C. Ross, and the state was represented by Valerie Giovanoli. App. 511.

At the PCR hearing, Holder testified that his trial counsel was ineffective for several reasons. One of the reasons named in his PCR application was that his trial counsel was ineffective because counsel did not inform Holder that his guilty plea to the grand larceny of the guns that were used in the attempted murder incident could be used against Holder in the attempted murder trial. App. 515, ll. 17 – 23; App. 523, ll. 1 – 23.

Holder testified at the hearing also that his trial counsel was ineffective because counsel did not object when the solicitor handed Holder a gun in front of the jury during cross-examination. Holder argued that the solicitor started screaming at him and tried to make it look like Holder was the shooter. App. 530, ll. 25 – App. 531, ll. 10.

Trial counsel admitted that he "had" Holder plead guilty to the companion property charges which included the grand larceny prior to trial. Counsel admitted also that the guilty plea was used against Holder at trial. App. 535, ll. 20 – App. 536, ll. 25. Counsel explained on

cross examination his reason for having holder plead guilty prior to trial to the property charges.

Counsel said that the state had strong evidence against Holder. He said:

I know on direct—when I questioned Bryan on direct, we ---I went ahead and went into that and his prior record. I wanted to go ahead and get that out before the jury, and let --you know, just to show hey, we did take the guns. We admit it when we do something wrong. We admit it, And, his prior, I think it was car breaking, that he, he had pled on those, and he admitted his guilt on those.

App. 553, ll. 4 – 12.

Counsel said that it was a strategic decision as he wanted to say that “if we do something wrong, we admit it. But we did not do those murders.” Counsel said that the incidents were close, “intimately connected.” App. 553, ll. 13 – 25.

When asked about the strengths and weaknesses of the state’s case, counsel said this was a “credibility” case. The co-defendant Schomer said Holder was at the field shooting two nights and Holder said he was there one night. App. 549, ll. 1 – 4. Counsel then admitted the strength of the state’s case was the “fact of the guns, and the willingness of the witnesses to link those guns to Bryan.” And another strength was that the co-defendant Schomer was willing to testify against Holder. App. 548, ll. 4 – 12.

Counsel stated again later that “the strength of their case was linking Bryan from the house the guns were stolen from to Schomer’s house.” App. 551, ll. 2 – 7.

Counsel admitted on cross-examination that he should have tried to “put the gun in Schomer’s hands more.” He said: “I don’t know why I didn’t come out with that.” App. 560, ll. 1 – 11.

When asked about the solicitor putting the gun in Holder’s hand, counsel said: “I guess everybody’s got their strategies and tactics they use to be a little theatrical.” Counsel then added that it was common for prosecutors “to do that type of thing.” App. 564, ll. 1 – 16.

The PCR judge issued an order on August 20, 2018 denying Petitioner Holder's PCR application and dismissing it with prejudice. App. 599 – App. 619. The PCR judge found that trial counsel's testimony was credible, and that Holder failed to prove that trial counsel was deficient or that Holder was prejudiced by any deficiency. App. 608.

The PCR judge found that trial counsel articulated a "reasonable trial strategy" for advising Petitioner Holder to plead guilty to grand larceny and malicious injury to property. Therefore, the judge found that trial counsel was not deficient in his performance. The judge wrote that when trial counsel articulated a strategy, it was measured "under an objective standard of reasonableness." App. 609 – App. 610.

The judge found that Petitioner Holder failed to show how trial counsel was deficient for not objecting to the solicitor handing a pistol to Holder during cross-examination, and that Holder failed to show how he was prejudiced. Trial counsel had testified that he saw no basis to object. App. 615.

PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

### I

The PCR court erred in not finding trial counsel ineffective for failing to advise Petitioner Holder that his guilty plea to grand larceny of the same guns that were used in the attempted murder would be used against him in his trial for the same attempted murder which was highly prejudicial to Petitioner Holder.

Trial counsel advised Petitioner holder to plead guilty to the grand larceny of the gun that was used in the attempted murder charges where a gun was shot in the direction of the Ingles grocery store and the Raceway. Trial counsel said this was his trial strategy to show the jury that Holder would plead guilty if he were guilty. Therefore, he was not pleading guilty to the attempted murders.

In Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), the Supreme Court held that if trial counsel asserts that his actions advanced trial strategy, then trial counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.

Trial counsel was ineffective in allowing Holder to plead guilty to stealing the same weapon that was used in the attempted murders. This was telling the jury that there was a very reasonable probability that Holder shot the gun. This guilty plea made it more difficult to blame the co-defendant for the shootings. If trial counsel had placed more blame on the co-defendant, whose credibility was questionable, there was a reasonable probability that at least one juror would have had reasonable doubt as to who was the shooter.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S.

668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra*.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court held that in determining whether the applicant alleging ineffective assistance of counsel has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the state's case in light of all the evidence presented to the jury.

Because of trial counsel's error in advising Holder to plead guilty to the taking of the same weapon used in the shootings, there was a strong likelihood that the outcome of the trial would have been different.

## ARGUMENT

### II

The PCR court erred in not finding trial counsel ineffective for not objecting to the state handing Petitioner Holder a gun and asking him how he shot it which was highly prejudicial to Holder because it was an unreasonable appeal to the emotions of the jury.

On cross examination, the solicitor handed the same gun used in the shootings to Holder to hold. Then the solicitor talked about how Holder shot the gun. This was highly prejudicial to Holder because it gave the jury a realistic picture of Holder shooting the weapon. It placed this image in the minds of the jurors.

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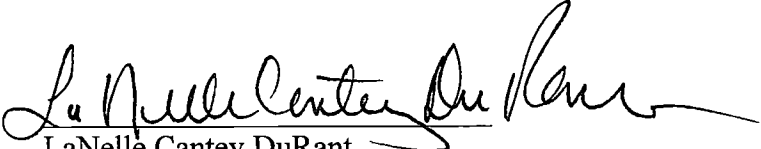
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Trial counsel was ineffective for not objecting to this highly prejudicial tactic by the solicitor for painting this image of Holder as the shooter in the minds of the jurors. The PCR court erred in not finding trial counsel ineffective.

**CONCLUSION**

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, and the case remanded for a new trial.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written in a cursive style.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of March, 2019.

STATE OF SOUTH CAROLINA

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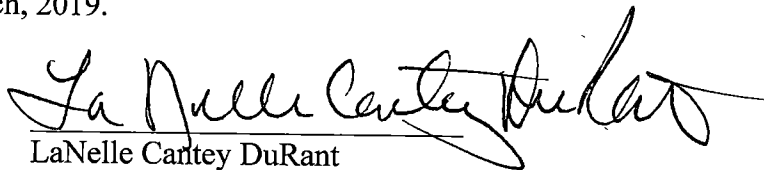
RESPONDENT

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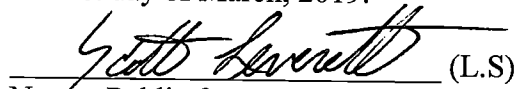
CERTIFICATE OF SERVICE

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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 Johnny Ellis James, Jr., 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 Bryan Holder, #337574, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 1st day of March, 2019.

  
LaNelle Cantey DuRant  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 1st day of March, 2019.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: September 27, 2028.