

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

MAY 31 2019

Honorable Larry B. Hyman, Circuit Court Judge

S.C. SUPREME COURT

CHRISTOPHER HAMPTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002374

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

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**INDEX**

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT

Trial counsel erred in failing to dismiss the case against petitioner because the state failed to preserve evidence in that the video-taped confession produced no audible sound and was impossible to review, and because the tape and confession should have been suppressed as petitioner claimed that police ignored his repeated requests for counsel’s assistance during that taped interview that lacked sound and when the statement was obtained. .... 3

CONCLUSION ..... 6

## **ISSUE PRESENTED**

Trial counsel erred in failing to dismiss the case against petitioner because the state failed to preserve evidence in that the video-taped confession produced no audible sound and was impossible to review, and because the tape and confession should have been suppressed as petitioner claimed that police ignored his repeated requests for counsel's assistance during that taped interview that lacked sound and when the statement was obtained.

## STATEMENT OF THE CASE

Petitioner pled guilty to murder on April 3, 2006, at the Spartanburg County General Sessions Court before Judge John C. Few and was sentenced to life imprisonment. App. 1-44. Inasmuch as trial counsel passed away two days after the guilty plea proceeding, the filing of a notice of appeal out of time was submitted, but the South Carolina Court of Appeals denied and dismissed it on May 17, 2006.

On September 15, 2006, petitioner filed a PCR application with the Spartanburg County Office of the Clerk of Court. In response to the PCR action, a PCR hearing was convened on September 17, 2007, at the Spartanburg County Courthouse before Judge Roger L. Couch. On November 2, 2007, Judge Couch signed an Order of Dismissal, which was filed on November 5, 2007, denying petitioner's allegations of ineffective assistance of counsel in the case, but granting him a belated direct appeal under White v. State, 263 S.C. 110, 208 S.E.2d (1974). App. 46 – 59. However, because PCR counsel failed to appeal Judge Couch's Order of Dismissal per the first PCR action, petitioner did not enjoy the benefit of an appeal of his first PCR action or his belated direct appeal that was granted to him by the first PCR judge.

On April 15, 2014, petitioner filed a PCR application, requesting a belated appeal of his first PCR action. App. 60 – 79. A Return was filed by the Respondent on May 8, 2015. App. 80-85. A second PCR hearing was held on November 9, 2015 before Judge Larry B. Hyman, Junior. App 87-89. At the second PCR hearing, petitioner was present and represented by J. Brandt Rucker, and Assistant Attorney General Alicia A. Olive appeared on behalf of the State. On October 4, 2017, Judge Hyman granted petitioner's request for a belated appeal of his first PCR action per Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 91-99.

Thereafter, petitioner's first PCR hearing was successfully reconstructed via a hearing held on November 26, 2018, at the Spartanburg County Courthouse before Judge Couch. App. 101-170. The undersigned counsel was present and represented petitioner at the reconstruction hearing and Assistant Attorney General Jordan Cox appeared on behalf of the state.

Petitioner appealed. This petition follows.

### **ARGUMENT**

Trial counsel erred in failing to dismiss the case against petitioner because the state failed to preserve evidence in that the video-taped confession produced no audible sound and was impossible to review, and because the tape and confession should have been suppressed as petitioner claimed that police ignored his repeated requests for counsel's assistance during that taped interview that lacked sound and when the statement was obtained.

During the plea proceeding, the solicitor stated that after petitioner was in police custody on the day of his arrest, petitioner led them to where the body of Tamika Huston was buried, and thereafter a video-taped confession was taken from him in the case. The state alleged that petitioner struck Huston with a hot iron App. 13, l. 4 – p.15, l. 24.

Petitioner testified at the PCR hearing with respect to the matter and explained that he repeatedly asked for an attorney while in police custody, especially when the police were attempting to obtain a statement from him during the audio-visual tape recording of him, but that the police did not stop the interrogation and never acknowledged his repeated requests for counsel on that day in question. App. 110, l. 21 – p. 116, l. 2. Also, petitioner claimed that he never saw the video-taped confession, and apparently, he gave up trying to get an attorney. App. 109 l.10-p. 116, l.2.

PCR counsel testified that he reviewed the video-taped confession and found that that there was no sound recorded, but that he could see where petitioner kept mouthing the words indicating that he wanted an attorney. PCR counsel's testimony follows:

Q Mr. McGuirk, it's my understanding that you represented Mr. Hampton at his first PCR hearing.

A That's correct.

Q You were PCR counsel.

A Yes

Q Can you give us what you remember about this issue with respect to the statement of being coerced with respect to the statement being given in violation of his right to have counsel present?

A What I remember—of course, it's been many years—but there was as video-tape that Lamb and Steadman had of the conference room where he was questioned at the narcotics building here, and I know initially I didn't think that Steadman or Lamb were going to be available for the hearing, because when I went to issuing subpoenas they were at a conference, but then Mr.—Detective Steadman showed up, but that video-tape to me seemed to be the only real strong point that Mr. Hampton had for getting, you know, his plea overturned at that point, but there was no audio on that video-tape, there was only video. So Mr. Hampton to the best of my recollection was pointing out that on certain parts of the video-tape that's what he was saying is, I want an attorney, I want an attorney, and I think the video-tape showed that they gave him a cheeseburger and he was in the room and—for periods—I don't—I don't recollect that the video was five hours long. I mean I don't know that they—I'm not—I'm not saying they didn't keep him there for five hours, but I'm saying that that video-tape did not have five hours worth of—so that's basically—at the hearing, you know, Mr. Hampton testified about some other stuff that he—you know, that he talked with you briefly about just a few minutes ago, but—that—about the—the—his request for a lawyer I don't have any specific recollections about what the car all (sic) went. I just remember that there was a video-tape that had no audio with it from the narcotics room. I'm assuming that was placed in evidence with the Court at the time of the PCR hearing, which likely would

no longer be available. I don't know if it would be or not. At least that's my recollection. App. 132, 1.4-p. 133, 1.18.

The PCR judge ruled that petitioner's statement was voluntary in nature and that his plea waived the right to challenge his statement. App. 54.

Note that the statement was entered into evidence at the plea proceeding (see Supp. Appendix) and that the video-taped confession was mentioned, but never legitimately marked and entered into evidence during the plea proceeding. App. 15, 1.21-p.18, 1.19.

If a defendant invokes his or her right to counsel while in custody, then the interrogation must cease; and if not, then the statement is inadmissible into evidence. State v. Johnson 41 SC 6458, 776 S.E.2d 367 (2015), citing to Edwards v. Arizona 451 U.S 477 (1981). There must be a determination of whether the accused invoked his right to counsel and whether he subsequently waived the right be invoked . See Edwards v. Arizona, *supra*.

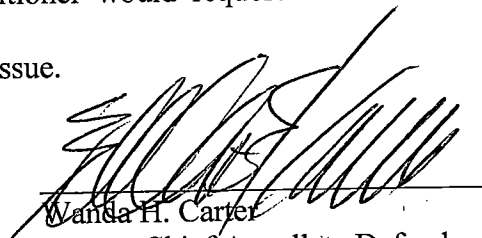
Also, in Arizona v. Youngblood, 488 U.S. 51 (1988), the Supreme Court of the United States has set forth the analysis required when the state fails to preserve evidence that might have exonerated a defendant. South Carolina has adopted the "duty to preserve" analysis under Youngblood (see State v. Mabe, 306 S.C. 355, 412 S.E.2d 386 (2001), and the added showing that the defendant must demonstrate that either the state destroyed the evidence in bad faith, or that the state destroyed evidence that possessed an exculpatory value that was apparent before the evidence was destroyed, and that the defendant cannot obtain other evidence of comparable value by other means. See also State v. Moses, 391 SC 502, 702 S.E.2d 395 (2010), and State v. Cheeseboro, 346 S.C. 526, 532 S.E.2d 300 (2001). In other words, there must be misconduct or bad faith. Also, if the exculpatory value is apparent before its destruction, then the disposal of the evidence is a denial of due process. State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995).

In the case at bar, the missing sound from the video-taped confession taken by police while in police custody where petitioner was saying via a reading of his lips that he wanted the assistance of an attorney would in effect indicate misconduct and/or bad faith on the part of the state. Note that according to a transcript of the guilty plea, the video-tape was mentioned, but not exactly entered into evidence. Furthermore, the record revealed that petitioner also asked for counsel's assistance during the time the statement was obtained as well. Had the video-taped recording not malfunctioned, there would have been proof in existence establishing that an Edwards v. Arizona, supra occurred in the case.

Clearly, the statement and video-taped confession constituted evidence to be suppressed under Youngblood and Edwards v. Arizona, both of which were linked in this case; and had petitioner been advised of this prior to pleading guilty, he might have opted for a trial, and a reasonable probability exists that the suppression action would have been granted prior to trial. Trial counsel erred in failing to investigate and develop the Youngblood and Edwards v. Arizona errors in this case, which constituted deficient legal representation in violation of the Sixth Amendment, and petitioner's case in his defense was prejudiced due to the ineffective assistance of counsel. See Hill v. Lockhart, (1985).

### CONCLUSION

Based on the foregoing argument, petitioner would request that this Court grant the petition and allow briefing on the above raised issue.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

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CHRISTOPHER HAMPTON,

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CERTIFICATE OF SERVICE

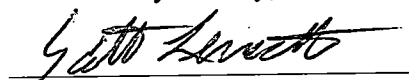
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix have been served on Christopher Hampton, #314697, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 31st day of May, 2019.

  
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Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 31st day of May, 2019.

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