

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Kristi F. Curtis, Circuit Court Judge

JOSEPH MICHAEL MANNERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-002109

JOHNSON PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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Trial counsel was ineffective for failing to include Nora Lee Harmon, petitioner’s great aunt, on the witness list, where Harmon would have testified petitioner’s decedent grandfather often violently abused him when drinking and petitioner conversely had a loving relationship with his decedent grandmother, since Harmon made great efforts to contact trial counsel so she could testify, and the judge refused to allow Harmon to testify because defense counsel failed to include her on the witness list 9

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ISSUE PRESENTED

Whether trial counsel was ineffective for failing to include Nora Lee Harmon, petitioner's great aunt, on the witness list, where Harmon would have testified petitioner's decedent grandfather often violently abused him when drinking and petitioner conversely had a loving relationship with his decedent grandmother, since Harmon made great efforts to contact trial counsel so she could testify, and the judge refused to allow Harmon to testify because defense counsel failed to include her on the witness list?

STATEMENT

Petitioner was indicted at the February 6, 2014 term of the Sumter County Grand Jury for the murder of his grandfather, James Topper, Jr., and the murder of his grandmother, Jo Ann Topper. He was also indicted for arson in the first degree; all crimes allegedly occurring on June 1, 2013. App. 482 – 483. Petitioner’s case was called to trial on February 16, 2016, before the Honorable W. Jeff Young and a jury. Timothy Griffith represented petitioner. Ernest “Chip” Finney, III, and John P. Meadors were the solicitors. App. 1.

Rhonda Webster was a neighbor of the decedents, Mr. and Mrs. Topper. App. 109, l. 21 – 110, l. 16. Webster remembered on June 1, 2013, “[T]he noise is what caught my attention. It sound[ed] like a sheet of glass being dropped so you just hear this (makes sound) glass. And then I hear gravel, and I notice (sic) and spot a [white] car coming out of this driveway which is the driveway at the top of the hill. It turns left and heads north down Barnwell. I hear another pane of glass; it’s like somebody just dropped it. And then I see smoke, I see fire. I’m running trying to find my husband.” App. 110, l. 25 – 111, l. 12.

Webster said she was emotional and scared at the time because “you don’t know if someone is in the house, if they’re alive, if they’re in there, not in there.” App. 112, ll. 10-16.

Julian A. Blair, Jr., testified as an expert in the field of fire and arson investigation without objection. App. 134, l. 8 – 135, l. 14. The bodies of both elderly decedents were discovered inside the house. Petitioner’s grandmother, Mrs. Topper, was found “in the kitchen right in the area between the stove and the refrigerator.” App. 153, ll. 12-16. Blair testified that petitioner’s grandfather, Mr. Topper, “was found later on.” His body was buried underneath some fallen material inside the house. Blair opined that the fire was set intentionally using a flammable substance. App. 178, ll. 11-23.

A BOLO was put out for the decedent's 2008 white Honda Accord that was missing. Petitioner was living with his decedent grandparents at the time, so petitioner's name was included in the BOLO. App. 234, l. 5 – 235, l. 24.

The Honda Accord was later spotted in Kentucky. When Sergeant Kimberly Klare activated her blue light, the Honda took off at a high rate of speed. App. 248, l. 22 – 253, l. 6. After a twenty-two mile pursuit, the Honda ended up in the Ohio River. The occupant of the Honda, allegedly petitioner, fled from the car and was later detained. Petitioner was interviewed at the University Hospital in Cincinnati, Ohio. His mental state, his competence, and his ability to willingly communicate with the police were issues in the case. App. 260, l. 2 – 267, l. 24.

Following a Jackson v. Denno, 378 U.S. 368 (1964), hearing prior to trial, the judge admitted petitioner's statements as freely and voluntarily given. Petitioner's statements implicated him in the arson and murders.

Cincinnati police officer Jennifer Mitsch testified that petitioner told her he "lost it . . . I hit my granddaddy, I think I knocked him out . . ." He also admitted he poured gasoline in the home and set it on fire with his grandmother still upstairs. App. 281, l. 18 – 282, l. 7.

At the end of the state's case, defense counsel Griffith asked to be allowed to add some witnesses as defense witnesses to testify about matters including "that there were a lot of alcohol products in that area that the state claims was the source of the fire and the hot point of the fire." App. 323, ll. 6-19. The state objected to allowing these witnesses, including Harmon, being allowed to testify. Assistant Solicitor Meadors stated, "I don't think you can see what evidence develops and then bring in witnesses so I just, I don't think that's appropriate." The judge ruled, "[Y]our objection is on the record. My ruling stands." At that point, defense counsel made an unsuccessful motion for a directed verdict. The solicitor countered that petitioner confessed he

started the fire and hit his grandfather, and that “he knew his grandmother was present when he set the fire.” App. 323, l. 6 – 325, l. 14.

Petitioner was found guilty of two counts of murder and arson in the first degree. App. 375, ll. 4-20. Judge Young sentenced petitioner to life imprisonment on each count of murder, and a consecutive thirty year term for arson. App. 392, l. 15 – 393, l. 6.

Petitioner filed an application for post-conviction relief on December 12, 2017. App. 395 – 401. The state filed a return and motion for a more definite statement. App. 402 – 408.

An evidentiary hearing was convened on July 26, 2018 before the Honorable Kristi F. Curtis. Lance Boozer represented petitioner. Julie Coleman was the assistant attorney general. App. 409.

At the PCR hearing, petitioner testified he was first represented by Timothy Murphy. Petitioner was not sure how Murphy was appointed to represent him. However, he remembered “It was in the beginning of my case after they found it not to be capital.” App. 415, ll. 16-20.

Petitioner testified that Murphy was “eventually relieved” as his lawyer, apparently, in part at least, because they “did not get along.” Timothy Griffith was then appointed. App. 417, ll. 7-16.

Petitioner testified he turned down plea offers of sixty years’ imprisonment and fifty years’ imprisonment. App. 416, ll. 13-24. Petitioner said that Griffith strongly encouraged him to take the guilty plea offers, and they never discussed defenses to the underlying crimes. “He didn’t do nothing for me.” App. 418, ll. 14-21.

Petitioner also said he wanted to testify in his case but “Mr. Griffith told me not to.” App. 419, ll. 5-23. Petitioner said if he had testified, he would have explained to the jury that he lived with his grandmother and grandfather “periodically. Sometimes 30 days, sometimes two or

three months. It was periodic.” App. 420, ll. 5-10. Petitioner testified at the PCR hearing that one the day of the fatal incident that his grandfather had killed his grandmother and petitioner then killed his grandfather after his grandfather attacked him. App. 420, ll. 15-22. Petitioner explained that his grandmother was very old and that his grandfather was tired of taking care of her. His grandfather drank very heavily and his grandfather “put [his] hands on me” when petitioner intervened to protect his grandmother. His grandfather hit petitioner and petitioner killed his grandfather after his grandfather had just killed his grandmother. App. 421, l. 15 – 423, l. 23.

Petitioner also testified he did not know how the fire in the house started but he later remembered ending up in Cincinnati, Ohio. Petitioner took drugs after the fatal incident and he was not in his right mind when he talked to the police. App. 423, l. 24 – 425, l. 10.

Petitioner recalled wanting for his great aunt, Nora Lee Harmon, to testify. Harmon was “my grandmother’s youngest sister.” App. 425, l. 6 – 426, l. 11. Petitioner said that Harmon could have testified about the violence in the home as well as the out-of-control alcohol use by his grandfather, and his violence when he was drinking. App. 426, ll. 13-18. Petitioner reiterated that his grandfather killed his grandmother, his grandfather attacked him, and appellant killed his grandfather “with his bare hands” during this violent outburst. App. 427, l. 12 – 428, l. 22.

Nora Lee Harmon testified she was appellant’s great aunt and the younger sister of petitioner’s grandmother. App. 430 ll. 12-24. Harmon said she had called defense counsel Griffith’s office repeatedly but he never returned her calls. Nonetheless, she came to court on the day of petitioner’s trial and “I thought I was going to be called to testify.” App. 431, l. 4 – 432, l. 2.

Harmon was aware from talking to petitioner that petitioner did not kill his grandmother. Harmon said she knew of the loving relationship between petitioner and his grandmother, so she was not surprised. Petitioner told Harmon how his grandfather knocked him out after he had killed his grandmother. App. 432, ll. 9-20.

Harmon said she could have testified from first-hand knowledge that petitioner's grandfather was an alcoholic who was very violent with petitioner. She had seen the grandfather "hit Joe [petitioner] pretty hard." The grandfather had abused appellant since he was about eight-years-old. App. 434, l. 7 – 435, l. 24.

Harmon remembered defense counsel Griffith asking the trial judge to allow certain witnesses, including her, to testify. That request was denied. App 437, ll. 3-19.

Timothy Griffith testified the state had presented evidence that petitioner's grandfather was killed but that his grandmother died as a result of the fire. Griffith said that petitioner told "a couple of different versions" of what allegedly happened on the day his grandparents were killed. App. 444, l. 2 – 445, l. 20. Griffith did not want petitioner to testify because "I wasn't sure that he would be a credible witness." Griffith was also concerned about his "ethical obligations" if he thought petitioner would be "presenting false testimony." App. 446, l. 16 – 447, l. 4.

However, Griffith admitted if petitioner had testified he could have received a voluntary manslaughter instruction. However, he did not think even with petitioner's testimony that self-defense would have been instructed. App. 448, l. 16 – 449, l. 13.

Griffith admitted that Harmon had told him about petitioner being abused by his grandfather, and that she could have explained the conditions and violence in the household to the jury. App. 451, l. 17 – 453, l. 9.

On the day of the PCR hearing, Griffith acknowledged several times he was not sure of the specifics of petitioner's statement to law enforcement in Cincinnati, Ohio. App. 455, l. 20 – 458, l. 4.

Assistant Solicitor Bronwyn McElveen testified she prosecuted Jason Dustin Compton in another case. Compton confessed to killing petitioner's grandfather and grandmother. McElveen said the authorities did not believe Compton's confession. "[He] had three murders and an arson. He wanted the death penalty. He wanted to be put to death. We would not give him that request and, at that point, he then inserted himself into this situation and tried to claim he did these murders, again with the hopes of getting the death penalty, but it did not add up." App. 462, l. 19 – 463, l. 20.

In his order of dismissal, the PCR court wrote that it found no prejudice from "trial counsel's failure to call Harmon as a witness . . ." "Although she could have testified about her personal experience when she witnessed applicant's grandfather pushing and hitting him when he was sixteen years old, this court finds this evidence would not have changed the outcome of the trial. This testimony alone does not qualify for a valid self-defense argument at trial, especially in light of applicant's testimony at the PCR hearing. Applicant admitted to killing his grandfather with his bare hands, even though his grandfather had not threatened him or provoked him at that time." App. 478.

The PCR court also found defense counsel was not ineffective in advising petitioner not to testify. "Trial counsel voiced his *ethical concerns* about condoning applicant's testimony on the stand. Because applicant had changed his story numerous times, trial counsel did not believe he would present honestly [sic] testimony at trial." App. 479. (emphasis added). The PCR court

concluded, “Trial counsel’s advice did not result in prejudice to the applicant as his testimony would likely still have resulted in a ‘guilty’ verdict.” App. 480.

ARGUMENT

Trial counsel was ineffective for failing to include Nora Lee Harmon, petitioner's great aunt, on the witness list, where Harmon would have testified petitioner's decedent grandfather often violently abused him when drinking and petitioner conversely had a loving relationship with his decedent grandmother, since Harmon made great efforts to contact trial counsel so she could testify, and the judge refused to allow Harmon to testify because defense counsel failed to include her on the witness list.

Defense counsel Griffith admitted that Harmon's testimony about the decedent grandfather being violent towards petitioner, and the grandfather being a violent alcoholic would have been helpful testimony at trial. Further, petitioner said at the PCR hearing that he would have testified that his grandfather killed his grandmother before petitioner killed his grandfather after his grandfather attacked him.

Griffith admitted Harmon's testimony coupled with the testimony of petitioner -- consistent with what petitioner said at the PCR hearing -- would have resulted in a jury instruction on voluntary manslaughter. This is true because a court must charge the lesser included offense of voluntary manslaughter unless it appears there is no evidence whatsoever tending to reduce the crime from murder to manslaughter, voluntary or involuntary. See State v. Burriss, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999).

Voluntary manslaughter is the unlawful killing of a human being in the heat of passion upon a sufficient legal provocation. Both heat of passion and a sufficient legal provocation must be present at the time of the killing. State v. Cole, 338 S.C. 97, 99, 525 S.E.2d 511, 513 (2000).

Harmon testified that petitioner and his grandmother had a very loving relationship. Petitioner testified at the PCR hearing that his grandfather killed his grandmother and then

attacked him. Petitioner then killed his grandfather. Based upon this evidence, the defense would have requested the trial court to give a jury instruction on and verdict option of voluntary manslaughter, which the trial court would have been obligated to charge. State v. Burriss, 334 S.C. 256, 264, 513 S.E.2d 104, 109 (1999); State v. Cole, 338 S.C. 97, 99, 525 S.E.2d 511, 513 (2000). Trial counsel therefore was deficient in failing to call Harmon as a witness.

Further, defense counsel's "ethical concerns" about petitioner testifying were misguided. Although petitioner's statements about what occurred were not always consistent, this respectfully did not give defense counsel the right to decide that petitioner testifying would be the equivalent of him presenting "false testimony." See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001)(inconsistent testimony and inconsistent statements do not deprive a defendant of a jury instruction on a lesser-included offense if any of his statements or his testimony contain evidence of that lesser-included offense).

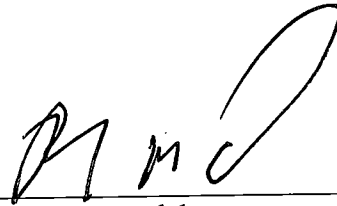
While petitioner's right to counsel did not include the right to insist that counsel assist him in presenting fraudulent testimony, counsel here was ineffective for arrogating onto himself the right to decide which version of the killing and arson *he believed* was true. That was the province of the jury, and not that of defense counsel. See North Carolina v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976). See, also, In the matter of Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983)(Attorneys were in contempt of court for disobeying order to proceed with the trial when they discovered the defendant would be giving false testimony).

Defense counsel was deficient for not having Harmon on his witness list so that she would have been allowed to testify about witnessing petitioner's grandfather, his sister's husband, abusing petitioner. Harmon also had her firsthand knowledge of the grandfather's alcoholic violence against petitioner. This testimony, when coupled with petitioner's testimony

that his grandfather killed his grandmother before attacking him, would have secured a voluntary manslaughter instruction from the trial court. There was a reasonable probability petitioner would have been convicted of voluntary manslaughter rather than murder if counsel had not provided deficient representation. The prejudice to petitioner was substantial where petitioner was sentenced to two life sentences, and a thirty year consecutive sentence for arson following his two murder convictions. Counsel in this case was therefore ineffective. See Strickland v. Washington, 466 U.S. 668 (1984).

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

A handwritten signature in black ink, appearing to read 'R M D', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of September, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

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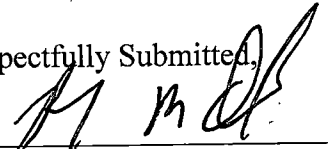
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joseph Michael Manners states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Kristi F. Curtis, which was held on July 26, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Joseph Michael Manners.

Respectfully Submitted,

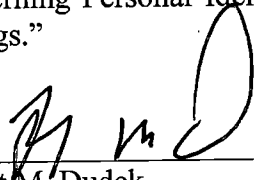


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 20th day of September, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his 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."



Robert M. Dudek
Chief Appellate Defender

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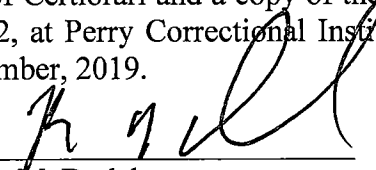
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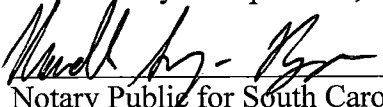
CERTIFICATE OF SERVICE

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 Janell Gregory, 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 Joseph Michael Manners, #367122, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 20th day of September, 2019.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2019.

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