

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Colleton County

The Honorable Jennifer B. McCoy, Circuit Court Judge

2017-CP-15-00383

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Andre T. Richardson, #336692,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2019-000212

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. DID THE PCR COURT ERR IN DENYING PETITIONER RELIEF IN FINDING THAT TRIAL COUNSEL WAS EFFECTIVE WHEN HE FAILED TO MOVE TO SUPPRESS AND FAILED TO OBJECT WHEN WITNESSES TESTIFIED THAT THE PETITIONER REFUSED TO ALLOW A WARRANTLESS SEARCH OF HIS CAR AND REFUSED TO ALLOW A GSR TEST ON HIS HANDS IN VIOLATION OF THE 4TH, 6TH, AND 14TH AMENDMENTS?

## STATEMENT OF THE CASE

The Colleton County Grand Jury indicted Petitioner on November 20, 2008, for financial identity fraud. (2009-GS-15-00116) and also on June 25, 2009, for murder (2009-GS-15-00129). (App. pp. 656-660). Harris S. Beach, Esquire represented the Applicant. Deputy Solicitor Sean P. Thornton represented the State.

On September 1, 2009, the Petitioner proceeded to trial before the Honorable Perry M. Buckner, III. (App. pp. 1-454). Petitioner was found guilty on both counts and concurrently sentenced to 35 years in prison for murder and 5 years for the financial identity fraud. (App. pp. 656-660).

Petitioner timely filed a Notice of Appeal from his convictions and sentence and an appeal was perfected. Chief Appellate Defender Robert M. Dudek represented the Petitioner on appeal. On January 6, 2011, counsel filed a brief pursuant to Anders v. California, 386 US 738, 87 S.Ct. 1396 (1967) while also requesting to be relieved as counsel. (App. pp. 455-469). On February 1, 2012, the SC Court of Appeals denied counsel's request to be relieved and requested briefing on an issue related to whether the court erred in denying a directed verdict. (App. pp. 470-471). Petitioner then filed a brief on that issue on June 1, 2012. (App. pp. 472-489). On May 22, 2013, the Court of Appeals affirmed the Petitioner's conviction and sentence. (2013-UP-223). (App. pp. 536-537). The Remittitur was sent on June 14, 2013. (App. p. 538).

Petitioner filed his first application for post-conviction relief (PCR) on June 6,

2013. (2013-CP-15-00442) (App. pp. 539-565). The State filed its Return and on or about August 20, 2014, (App. pp. 566-570). The PCR hearing was held on October 18, 2016, before the Honorable Michael G. Nettles at the Beaufort County Courthouse. (App. pp. 571-613). Petitioner was present and represented by Tristan M. Shaffer, Esquire. Assistant Attorney General Ruston W. Neely represented the Respondent. On December 30, 2016, Judge Nettles denied the Petitioner's PCR application by written order. (App pp. 614-625). No appeal was taken from this PCR matter.

Petitioner filed his second PCR application on May 17, 2017, alleging Mr. Shaffer was ineffective for failing to file an appeal from his first PCR. (App. pp. 626-632). Petitioner amended his PCR application on or about November 27, 2018. (App. pp. 633-634). The State filed its Return on or about November 6, 2018. (App. pp. 635-639). The PCR hearing was held on December 6, 2018, before the Honorable Jennifer B. McCoy at the Beaufort County Courthouse. Petitioner was present and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Christian Saville represented the State. At the hearing the Petitioner conceded the allegations in the amendments were not available and the State consented to a grant of a belated PCR appeal pursuant to Austin v. State, 305 SC 453, 409 SE2d 395 (1991). Judge McCoy granted the belated PCR appeal by written order on February 8, 2018. This petition follows.

## STANDARD OF REVIEW

The reviewing court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the reviewing court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and this court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## STATEMENT OF THE FACTS

Petitioner's grandfather was found lying on the side of Bethel Road in Colleton County on October 27, 2008. His vehicle was parked close by to his body. (App. p. 158, line 2 – 163, line 9). Jerrol Lingard saw the body and called 911. (App. p. 157, lines 13-17). The grandfather had been shot ten times and the trunk of the car was open. (App. p. 185, lines 4-7; p.168, lines 8-14; p. 356, line 16).

Myeshia Yates called the Petitioner to tell him that his grandfather had been found dead and that he had been shot. (App. p. 207, lines 18-20; p. 268, lines 1-18). She did not remember what time she made the call on October 27, 2008, but it could have been in the afternoon. (App. p. 268, line 24 - . 269, line 5). Investigator Taylor testified that the Petitioner was visibly upset after his grandfather's body was found. She stated that the Petitioner's "hands were shaking, his voice was shaking, that sort of thing." (App. p. 209, lines 14-16).

Prior to Ms. Yates contacting him, the Petitioner called to confirm a haircut. The barber, John Yates, testified that the Petitioner seemed normal when he called to confirm his haircut. Petitioner then became upset after Myeshia called him while he was at the barbershop. (App. p. 261, line 24 – p. 263, line 20).

Between October 27, 2009, and February 24, 2009, the Petitioner gave five statements to police. The sixth statement was given to police on February 27, 2009. (App. p. 204-209; p.214-227; p. 307-315). In his sixth statement the Petitioner told police that he and his grandfather were kidnapped by four gunman wanting all their money and that he was being held captive when one of the gunmen killed his

grandfather. (App. p. 311, line 19 – p. 315, line 11).

Petitioner never gave permission for police to search his car nor to swab his hands for gunshot residue. Detective Fred Inabinet testified that on October 28, 2009, the Petitioner refused to consent to a search of his white mustang and his refused to cooperate with a “GSR kit.” (App. p 305, line 24 – p. 306, line 15).

Petitioner told the police that during the robbery he gave his keys to one of the gunmen who left in his car. The other gunmen took the Petitioner and his grandfather in the grandfather’s car to the BB&T in Walterboro where the grandfather banked. (App. p. 312, lines 19-25; p. 313, lines 15-21). Petitioner told Investigator Inabinet that while they were being held hostage the gunman in his car drove up behind them on Bethel Road. Petitioner then stated that when his grandfather refused to give the gunmen money, they took his grandfather out of his car and he heard the trunk open and then gun shots. (App. p. 314, lines 7-14). Petitioner said after the shooting the gunmen left in their own car and Petitioner got in his own car and drove to get a haircut. (App. p. 314, line 13 – p. 315, line 11). The state’s case against the Petitioner consisted of the fact that this last statement was inconsistent with his earlier statements.

## ARGUMENT

The PCR Court erred in denying Petitioner relief in finding that trial counsel was effective when he failed to move to suppress and failed to object when witnesses testified that the Petitioner refused to allow a warrantless search of his car and refused to allow a GSR test on his hands in violation of the 4th, 6th, and 14th Amendments.

The gist of the issue in this matter is that trial counsel was ineffective when he failed to move to suppress testimony concerning the Petitioner's refusal to consent to search of his vehicle and refusal to consent to a gunshot residue (GSR) kit examination. At trial Detective Inabinet testified on direct examination that the Petitioner refused a GSR test as well as a consent to search his white Mustang. The detective stated:

At the latter part of our interview, I asked [Petitioner] if he would consent to a gunshot residue test, which is commonly known as GSR, and he refused. The, I asked him if he would consent to a search of his vehicle, and he also refused.

(App. p. 305, line 24 - 306, line 4). Solicitor Thornton reiterated the statement given by Detective Inabinet directly afterwards:

Q: All-right, sir. Did you feel you had enough evidence or any evidence, at that point to make an arrest?

A: Not at that time, just basically an interview...

...

Q: All right, but he refused to give a GSR and he also refused to consent to search his vehicle, is that right?

A: That is correct.

(App. p. 306, lines 5-15). Trial counsel did not object to this line of questioning.

Instead trial counsel attempted to rehabilitate these facts by asking Detective Inabinet about GSR and how long it takes to dissipate. Detective Inabinet stated gun shot residue dissipates after about six hours and at the time he asked the Petitioner it had been longer than six hours, yet the Petitioner still refused. (App. p. 328, line 22 – p. 329, line 9). The Solicitor then mentioned in closing, "...who refused a gunshot residue test, and refused consent to search their vehicle, who also happened to be kidnapped by these four people." (App. p. 401, lines 13-16).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, a PCR applicant must show: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. To show deficient performance, an applicant must prove "counsel's representation [fell] below an objective standard of reasonableness." Id. at 688. To demonstrate prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Smith v. State, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010) (*quoting Strickland*, 466 U.S. at 694).

The PCR Court incorrectly concluded that this cross by trial counsel was strategy that was inferred from the trial transcript.<sup>1</sup> (App. p. 617). If the detective

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<sup>1</sup> Harris S. Beach was trial counsel in this case and he passed in May 2016 before the initial PCR hearing.

or the solicitor had never brought up the lack of consent (or had it been ruled not to bring it up) for warrantless searches in the first place, trial counsel would not have had to cross the detective about it. Had trial counsel moved to suppress any mention of the refusal of the GSR and the refusal of the warrantless search, the outcome of the trial would have been different because these statements inferred evidence of guilt, punished the Petitioner for asserting a Constitutional right, and was prejudicial to the Petitioner.

"[I]t is clearly established that the state cannot, through evidence or argument, comment on the accused's exercise of a constitutional right." Simmons v. State, 308 S.C. 481, 484, 419 S.E.2d 225, 226 (1992). Furthermore, in Fortune v. State, Opinion No. 27932 (S. Ct. Dec. 2019), the Supreme Court noted that the relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *citing* Simmons, at 338, 166-67 (1998) and Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

In its questioning, the solicitor used the information regarding the refusal to the warrantless searches to support an inference of guilt. At no point in the trial did the Petitioner open the door, either via his defense or by any other means, to questioning regarding his exercise of Constitutional rights. Neither is a refusal to a warrantless search an element in proving murder. There would be no other reason

to mention the Petitioner's refusal except to go towards showing expressly or implicitly that the Petitioner was guilty.

The state did not have overwhelming evidence of guilt. There were no admissions by the Petitioner that he committed murder. (He did admit to stealing money from his grandfather, but that is not murder.) There is no DNA found anywhere that ties the Petitioner to the scene. There are no fingerprints. The only evidence the state had was inconsistent statements made by the Petitioner and that a stolen gun was used to commit the crime. All the state had was circumstantial evidence at best.<sup>2</sup>

This cannot be inferred trial strategy based on reading the transcript. We don't know what the trial strategy was because trial counsel couldn't testify. Even if it was trial strategy, it was ineffective trial strategy. Had trial counsel moved *in limine* to prevent any mention of Petitioner exercising his Constitutional rights, the jury would never have been told about the Petitioner's refusal and been infected by inference of criminal wrongdoing. (If he's not guilty, why wouldn't he just consent?) Had trial counsel properly objected at the time of the statement from Detective Inabinet and the questioning for the solicitor, the matter would have been preserved for appeal.

If the Government was allowed to admit a refusal of consent in order to show consciousness of guilt, a Petitioner's consent could never be truly voluntary. He could either consent to a search of his vehicle and relieve the state from getting a

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<sup>2</sup> In its order, the PCR Court ruled that the state had no direct evidence to convict the Petitioner yet in contradiction also ruled that the evidence was overwhelming. (App. p. 618 and p. 623).

warrant or he could assert his constitutional right by refusing to grant consent, and have that refusal incriminate him by implication. Admitting such a statement would punish a person for asserting a constitutional right. See United States v. Guess, 756 F. Supp. 2d 730, 748 (2010).

Also, "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing. If the Government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be "freely and voluntarily given." Mackey v. State, 234 Ga. App. 554, 507 S.E.2d 482, 484 (Ga. Ct. App. 1998)

The Fourth Circuit Court of Appeals recognized an exception in United States v. McNatt, 931 F.2d 251, (1991). In McNatt, the defendant was pulled over while driving his pickup truck and placed under arrest based on an outstanding arrest warrant. Id. at 253. At the scene, he denied the officer's request to search his vehicle. Id. However, when law enforcement officers later searched the truck in the impound lot, they found a kilogram of cocaine in the vehicle, which led to a charge of possession with intent to distribute. Id. During the trial, the defendant claimed that one of the arresting officers planted the cocaine in his vehicle. Id. at 256. However, when prosecutors attempted to rebut this assertion by arguing that the defendant had denied the arresting officer permission to search his vehicle, the defendant claimed that it would be a violation of due process for the prosecution to introduce his refusal against him. Id.

The Court held that it is permissible for the government to refer to the defendant's refusal to grant consent to a search where the defendant puts the credibility of the officer conducting the search at issue. Id. at 256-58. "The government did not argue that appellant's refusal supported an inference of guilt, but only that it was inconsistent with the claim that the evidence had been planted." Id. at 257. Since the prosecutor's statement "was not an unfair penalty for defendant's asserting a constitutional privilege," admitting the refusal to consent did not compromise the defendant's constitutional rights. *See also* United States v. Tucker, 30 F. App'x 45, 47 (4th Cir. 2002).

However, this is a limited exception that cannot be used by the government until a **defendant** has opened the door. (Emphasis added.) *See* United States v. Thame, 846 F.2d 200, 206-07 (3d. Cir. 1988) (stating that the government's comment on defendant's assertion of his Fourth Amendment rights "cannot be justified as an invited reply-since the prosecutor raised the argument first."). The Petitioner never opened the door to these statements, the Prosecution created the issue in its direct examination.

Other states have also found that references to a refusal to a warrantless search justifies a new trial. *See* State v. Tung, 460 N.J. Super. 75, (NJ 2019) (Defendant was denied a fair trial because of references at trial to his refusal to consent to a search of his computer or car as the admission of such references improperly encouraged the jury to make negative inferences against him); *See* Padgett v. State, 590 P.2d 432, 434-35 (Alaska 1979) (noting that the Fourth

Amendment right to refuse consent to a search "would be effectively destroyed if, when exercised, it could be used as evidence of guilt"); *see also Longshore v. State*, 399 Md. 486, 924 A.2d 1129, 1159 (Md. 2007) ("An unfair and impermissible burden would be placed upon the assertion of a constitutional right if the State could use a refusal to a warrantless search against an individual."); *Sampson v. State*, 121 Nev. 820, 122 P.3d 1255, 1260-61 (Nev. 2005) (holding that it was "constitutional error for a prosecutor to elicit testimony or comment on a defendant's refusal to consent to a warrantless search to support an inference of guilt"); *Commonwealth v. Tillery*, 417 Pa. Super. 26, 611 A.2d 1245, 1249 (Pa. Super. Ct. 1992) (noting that the assertion of a constitutional right cannot be used to infer the presence of a guilty conscience)

The PCR Court relied on *Gantt v. State*, 354 S.C. 183, 580 S.E.2d 133, (2003) in its denial of the Petitioner's PCR. In *Gantt*, the court put forth several factors to consider when trial counsel's failure to object results in prejudice. *Gantt* applied the *Doyle v. Ohio*, 426 US 610, 96 S. Ct. 2240 (1976) analysis.

[W]e will consider the following factor in determining prejudice on PCR: 1) whether the reference to the accused's exercise of his constitutional right was a single reference; 2) whether the State tied the exercise of this right directly to the accused's exculpatory account; 3) whether the accused's exculpatory account was totally implausible; and 4) whether the evidence of guilt was overwhelming.

The PCR Court did not properly apply and analyze *Gantt* to this case.

First, *Gantt* doesn't require that all the factors are met, only that the court consider the factors. As to factor 1, the PCR Court found there was a single reference. This is wrong. The detective stated the Petitioner refused, the solicitor

reiterated it, trial counsel then has to asked about it to rehabilitate the situation, and then the solicitor mentioned in closing. There were four separate times the refusal was brought up during the trial. Which turns to factor 2. The PCR Court was incorrect to rule that the solicitor did not tie these refusals to knowledge or guilt. The way the refusals were mentioned during the trial is used to show guilt to the jury. (Again, if he's not guilty, why wouldn't he just consent?) At the time of the refusals the detective himself inferred he didn't have enough evidence to make an arrest but would have had the Petitioner just consented.

Turning to the third factor, while the Petitioner's sixth statement may have been a little "out there" it was not implausible based on the evidence. Factor 4 is whether the evidence of guilty was overwhelming. As already noted earlier, there was only circumstantial evidence and none of it was overwhelming.

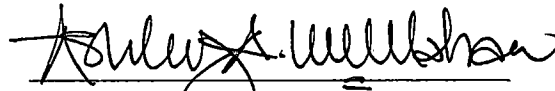
The PCR Court incorrectly ruled that there were four elements to meet prejudice. These were not elements, but factors to consider. The court improperly ruled there was only a single reference to the Petitioner's exercise of his Constitutional rights throughout his trial.

As stated above, the Petitioner has overcome the presumption that his trial counsel was effective and is, therefore, entitled to post-conviction relief.

**CONCLUSION**

For the foregoing reasons, Petitioner submits this Court should grant the  
Petition for Writ of Certiorari.

Respectfully submitted,



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State of South Carolina,.....Respondent.


PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Petition for a Writ of Certiorari and accompanying Appendix on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.  
This 22nd day of January, 2020.

  
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