

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Beaufort County

RECEIVED

Honorable Jennifer B. McCoy, Circuit Court Judge

FEB 04 2020

S.C. SUPREME COURT

DONALD EUGENE PETERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000828

JOHNSON PETITION FOR WRIT OF CERTIORARI

Joanna K. Delany
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The PCR court erred where it found counsel provided effective assistance where counsel failed to properly object to demonstrative exhibits created by Investigator Rice in which text messages between the suspects were put in a PowerPoint presentation (State’s Exhibit #74) and voice actors were recorded reading them aloud (State’s Exhibit #75), where an animation is admissible as demonstrative evidence only when the trial court first undertakes the analysis laid out in *Clark v. Cantrell*,¹ and where the requisite analysis was not performed here.....8

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¹ *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000).

ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective assistance where counsel failed to properly object to demonstrative exhibits created by Investigator Rice in which text messages between the suspects were put in a PowerPoint presentation (State's Exhibit #74) and voice actors were recorded reading them aloud (State's Exhibit #75), where an animation is admissible as demonstrative evidence only when the trial court first undertakes the analysis laid out in *Clark v. Cantrell*,² and where the requisite analysis was not performed here?

² *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000).

STATEMENT

A Beaufort County Grand Jury indicted petitioner for the offenses of first degree burglary, armed robbery, and first degree assault and battery during the July term of 2011. App. 681 – 682; App. 684 – 685; App. 687 – 688. Petitioner was tried before the Honorable Thomas W. Cooper, and a jury, from February 25 – March 1, 2013. App. 1; App. 113. Petitioner was represented by Ehrick K. Wright. App. 113. The state was represented by Meredith Bannon and Mary Jordan Lempesis. App. 113. Petitioner was convicted as indicted³ and he was sentenced to serve concurrent terms of imprisonment of twenty-three years, twenty-three years, and ten years, respectively. App. 517, ll. 11-20; App. 533, l. 15 – 534, l. 6.

Petitioner, who was a lifelong resident of Beaufort County, had a “problem with substance abuse.” App. 529, ll. 23-24; App. 530, ll. 8-10. It appeared petitioner was a good construction worker “when he stay[ed] away from drugs . . .” App. 530, ll. 10-15.

However, in June of 2011, petitioner was romantically involved with Lauren Baughman, who “had some fines that she needed to pay for outstanding warrants and she was freaking out about it.” App. 379, ll. 3-5. Baughman wanted to steal money to pay her fines and buy drugs because she was pregnant and did not want to go to jail since it would result in her “detoxing and losing the baby.” App. 379, ll. 5-6. Baughman testified against petitioner at his trial and admitted that she was romantically involved with both petitioner and with Kurtis Edwards. App. 307, ll. 14-23.

Baughman, who was characterized as a “prostitute” and a “pill head” by the solicitor, also admitted that she was having sex with another man, Ron Lanier, in exchange for money. App. 304, l. 17 – 305, l. 2; App. 449, ll. 2-4; App. 451, ll. 2-3. According to Baughman, she got money

³ Petitioner was also tried for one count of safecracking, but the trial judge directed a verdict of acquittal on that charge. App. 437, ll. 1-2.

from Lanier, her neighbor, at least two to three times a day in exchange for having sex with him and cleaning his house. App. 328, ll. 15-18. Lanier, who was characterized by the solicitor as a “crotchety old man” who “no one could really like,” and by trial counsel as “colorful and salty,” was the sixty-eight-year-old complainant in this case. App. 468, ll. 6-8; App. 470, ll. 14-15; App. 451, ll. 5-6; App. 184, ll. 24-25.

Lanier did not “believe in banks,” and kept cash hidden in his house. App. 192, ll. 13-25. Baughman knew that Lanier kept cash in a locked closet. App. 193, ll. 11-18. She also knew Lanier kept the necessary keys on his person. App. 310, ll. 15-22.

On the night of June 28, 2011, Lanier asked Baughman and another woman, Ashley Pierce, to come over for sex because he “liked girls to mess with each other in front of him . . .” App. 281, ll. 17-23; App. 341, ll. 24-25. However, Baughman went over to Lanier’s house with other ideas—while there, she furtively unlocked his front door. App. 341, ll. 15-19. Two masked men later entered through the unlocked door and found Lanier passed out in his kitchen chair; Lanier awoke to the men demanding his keys, and one or both of the men beat Lanier numerous times with a metal baton until they found the keys. App. 189, l. 17 – 194, l. 21. Lanier could not identify either of the men, but they stole a substantial amount of cash. App. 161, ll. 13-17; App. 163, l. 22 – 164, l. 4; App. 317, ll. 23-25.

Lanier told police officers he thought one of the men was black and the other was white, based on their voices. App. 229, ll. 17-25. Nevertheless, the state alleged that petitioner and Kurtis Edwards, who were both white, were the men who committed the robbery at Baughman’s behest. App. 465, l. 21 – 466, l. 3; App. 72, l. 24 – 73, l. 12.

Police officers arrested Baughman, Edwards, and petitioner for the robbery. App. 357, ll. 14-20; App. 397, ll. 9-17. When police detained Baughman, she had over two thousand dollars of

Lanier's money hidden in her brassiere. App. 231, ll. 5-13. Baughman and Edwards claimed that petitioner was with Edwards when he entered the house and robbed Lanier. App. 316, l. 9 – 317, l. 3; App. 384, ll. 2-12. Edwards claimed that it was petitioner who had the baton and used it on Lanier. App. 383, ll. 15-20; App. 387, ll. 3-6. However, the baton, which had Lanier's blood on it, was recovered in the closet of a locked bedroom that belonged to Baughman and Edwards (not petitioner). App. 415, ll. 19-20; App. 237, ll. 1-5; App. 362, ll. 18-24.

Baughman claimed that petitioner was so besotted with her that he would do anything for her; she claimed she "begged him" to commit the crime. App. 311, ll. 4-9; App. 329, ll. 12-14. No DNA or forensic evidence linked petitioner to the crime. App. 418, l. 23 – 419, l. 19; App. 276, l. 24 – 277, l. 3. Petitioner initially denied entering the home, but after he was further interrogated, he told Investigator John Gobel that he was a lookout. App. 424, l. 17 – 425, l. 5. However, while the confessions of Baughman and Edwards were recorded, this alleged incriminating remark by petitioner was not recorded. App. 65, ll. 5-10.

Pretrial, counsel was aware that the state intended to introduce text messages between Baughman and three others: petitioner, Edwards, and Ashley Price. The solicitor characterized the messages to the trial judge as "quite voluminous." App. 109, ll. 5-6. Trial counsel would later admit that "text messages were a big part of the State's case." App. 616, l. 10.

Rather than simply use the writings of the text messages, Investigator Rice prepared a PowerPoint presentation of the messages and enlisted the help of four voice actors who were recorded while they read the messages aloud. App. 241, l. 21 – 242, l. 24. The PowerPoint presentation (State's Exhibit #74) is included in the Appendix at pages 650 – 679. An audio recording of the voice actors reading those messages (State's Exhibit #75) is on file with this Court. Both exhibits were admitted and heard by the jury. App. 270, ll. 19-22. To be clear, the

voices contained in State's Exhibit #75 were not the actual voices of the suspects, but the voices of persons pretending to be them. App. 242, ll. 21-24.

Trial counsel stated pretrial that he had "concerns" the text messages were "highly prejudicial" and "hearsay," and he mentioned authentication. App. 96, ll. 3-12. The solicitor responded that the messages were admissible as statements by a coconspirator in furtherance of a conspiracy. App. 97, ll. 1-6. The court said the issue would need to be raised later, when the court had been given more context. App. 101, ll. 1-12. Later in the case, counsel brought up the text messages and said, "I will object to those as hearsay." App. 208, ll. 5-10. The court stated that it noted counsel's objection "in that regard." App. 208, ll. 11-13.

The details of the text messages were entered into evidence as State's Exhibit #21 through a Verizon records custodian but those records were not published. App. 219, ll. 1-22. Shortly thereafter, the solicitor stated she intended to publish the messages "through Detective Rice who has reviewed voluminous records and created a PowerPoint and an audio where it is read . . ." App. 209, ll. 4-7. Trial counsel replied, "They say it's non emotional, but . . . **I'm not quite sure how that's going to sound and whether I object to it or not.**" App. 210, ll. 7-13 (emphasis added). Counsel did not, in fact, make a contemporaneous objection when the exhibits were introduced, although the court said the exhibits were entered, "Subject to objection." App. 270, ll. 5-18.

As seen, petitioner was convicted as indicted. Petitioner was represented on direct appeal by Kathrine H. Hudgins. App. 545. After exhausting his direct appeal remedies, petitioner timely filed an application for post-conviction relief (PCR) and the state made its return. App. 592 – 601; App. 602 – 608.

A hearing was held on the matter before the Honorable Jennifer McCoy on December 4, 2018. App. 609. Petitioner was represented by James Falk. App. 609. The state was represented by Christian Saville. App. 609. At the PCR hearing, petitioner proceeded on the sole allegation that trial counsel provided ineffective assistance when he failed to properly object to the admission of State's Exhibit #74 and #75. App. 614, ll. 1-5; App. 611, l. 24 – 613, l. 10. Although the two trial exhibits were not made exhibits at the PCR hearing, the PCR court stated that it would view and listen to the exhibits and consider them. App. 635, ll. 15-23; App. 638, ll. 20-22.

Trial counsel testified that he attempted to make an objection to the text message presentations contained in State's Exhibit #74 and #75. App. 618, l. 4-12. However, as seen, the transcript reflects that trial counsel only said, "I'm not quite sure how that's going to sound and whether I object to it or not." App. 210, ll. 12-13.

Petitioner's appellate counsel, Kathrine Hudgins, had written in a footnote of her brief that, "Trial counsel's failure to object to the State's interpretation of the text messages through the summary and added audio may be an issue to be explored in post-conviction relief." App. 553. Appellate counsel testified at the PCR hearing and opined that trial counsel's objection to the exhibits was not preserved. App. 631, ll. 19-25. Appellate counsel said that had the objection been preserved she would probably have raised the issue on appeal. App. 632, l. 25 – 633, l. 3.

PCR counsel cited the opinion of this Court and the opinion of the Court of Appeals in *Clark v. Cantrell*,⁴ for the position that this type of demonstrative evidence must be first subjected to the requisite analysis (as laid out in those cases) by the trial court as gatekeeper before it may be admitted. App. 612, l. 14 – 613, l. 10; App. 638, ll. 8-19.

⁴ *Clark v. Cantrell*, 332 S.C. 433, 504 S.E.2d 605 (Ct. App. 1998), *affirmed as modified by Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000).

On May 3, 2019, the PCR court issued an order of dismissal, in which it found that “even if trial counsel did not [object] with enough specificity to be preserved for appellate review, [petitioner] was not ultimately prejudiced as a result.” App. 647. The order continued that, “This court was able to review the audio recordings in question and finds that the tone in which they were read was not improperly prejudicial to [petitioner].” App. 648. “The failure to properly preserve the issue with more specificity would not have changed the outcome of the trial, as the jury heard other substantial evidence of guilt as to [petitioner].” App. 648.

At trial, it was undisputed that the robbery was for Lauren Baughman’s benefit, was planned by her, and she got the “lion’s share” of the money. App. 329, ll. 2-5; App. 400, ll. 13-15; App. 402, ll. 14-16; App. 464, ll. 23-24. Nevertheless, Baughman was charged with and pleaded guilty only to a single count of accessory after the fact, and she said she expected to get out of jail shortly. App. 357, l. 17 – 359, l. 2. Edwards pleaded guilty to the same offenses for which petitioner was tried and to an additional burglary: he received a sentence of eighteen years. App. 397, l. 9 – 399, l. 4; App. 539, ll. 21-25. As seen, petitioner received sentences of twenty-three years, twenty-three years, and ten years. App. 533, l. 15 – 534, l. 6.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective assistance where counsel failed to properly object to demonstrative exhibits created by Investigator Rice in which text messages between the suspects were put in a PowerPoint presentation (State's Exhibit #74) and voice actors were recorded reading them aloud (State's Exhibit #75), where an animation is admissible as demonstrative evidence only when the trial court first undertakes the analysis laid out in *Clark v. Cantrell*,⁵ and where the requisite analysis was not performed here.

Counsel provided deficient representation here, where he failed to lodge a proper objection and thus failed to require the state's demonstrative exhibits undergo analysis by the trial court in its role as gatekeeper. Counsel's deficient performance prejudiced petitioner as the evidence of guilt was thin, and the exhibits likely contributed to the jury's verdict.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687.

Here, counsel's performance was deficient, because although animations must be "screened carefully and admitted cautiously," counsel did not make a timely and specific objection to the state's demonstrative exhibits of the text messages, and instead allowed the exhibits to be admitted without the careful screening by the court that was required. *Clark v. Cantrell*, 339 S.C. at 384, 529 S.E.2d at 536.

⁵ *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000).

This Court in *Clark* helpfully explained that an “animation is used to illustrate a witness’s testimony by recreating a scene or process, and properly is viewed as demonstrative evidence.” *Id.* at 382, 529 S.E.2d at 535 n. 2. “Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness’s testimony, but it may be admissible as an exhibit for the jury to examine and consider during deliberations.” *Id.* at 383, 529 S.E.2d at 535.

“Demonstrative evidence is distinguishable from exhibits that comprise ‘real’ or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements.” *Id.* “These categories sometimes overlap. For example, a bank surveillance photograph of a robbery suspect may be classified as demonstrative evidence because it illustrates the crime scene; however, it may be classified as substantive evidence of the identity of the perpetrator.” *Id.*

Here, as in the bank robbery example above, the exhibits were demonstrative exhibits with overlap into the category of substantive evidence. The audio recording and PowerPoint presentation, while accurate in terms of reproducing the text messages obtained from phone records, were more than simply the words themselves, since they had been reformatted. Particularly with the audio recordings, an unnecessary element of drama was introduced that heightened the potential prejudice to petitioner.

Here, appellate counsel explained that trial counsel did not make a timely and specific objection to the exhibits. App. 631, ll. 19-25. A review of the record shows this to be true: counsel only objected to the exhibits as hearsay. When discussing the formats in which the messages were being exhibited to the jury, trial counsel said, “I’m not quite sure how that’s going to sound and whether I object to it or not.” App. 210, ll. 12-13. Counsel thereafter failed to make an objection.

In *Clark, supra*, this Court held that a “computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is:

- (1) authentic under Rule 901, SCRE;
- (2) relevant under Rules 401 and 402, SCRE;
- (3) a fair and accurate representation of the evidence to which it relates, and
- (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

Clark v. Cantrell, 339 S.C. at 384, 529 S.E.2d at 536. This was the analysis which should have been undertaken by the trial court but was not, due to counsel’s deficient representation. An application of these factors shows that the exhibits would not have been admitted if they had been properly challenged by trial counsel.

An application of the factors from *Clark* to State’s Exhibit #74 and #75, shows that the exhibits fail the four-pronged test for admission. As to factor (1), whether the exhibits were properly authenticated: counsel told the trial judge that he conceded Baughman could authenticate her text messages. App. 98, ll. 8-10. However, Baughman did not authenticate her messages before the exhibits were published to the jury. Moreover, none of the other three alleged parties to the messages (petitioner, Edwards, and Ashley Pierce) authenticated their text messages to Baughman.

As to factor (2), whether the exhibits were relevant: the messages were not even arguably relevant until page ten of the PowerPoint presentation, and well into the audio recording. App. 659; State’s Exhibit #75. The first nine pages of slides in the PowerPoint contain no discussion about a robbery.

As to factor (3), whether the exhibits were a fair and accurate representation of the underlying evidence: while the PowerPoint may have been a fair and accurate representation of the messages, the audio recording was not, as it was made by voice actors rather than the parties.

Moreover, some of the statements by the voice actors did not exactly track the text of the PowerPoint slides.

Finally, as to factor (4), whether the exhibits should have been excluded under Rule 403, SCRE: the exhibits should have been excluded. Their probative value was low as to petitioner, since petitioner is not alleged to have texted anything incriminating. In fact, when Baughman appeared to assign credit for the robbery to petitioner, petitioner replied that “your man,” i.e., Edwards “did [it].” App. 679; State’s Exhibit #75. Nevertheless, the potential for unfair prejudice against petitioner was high, since the messages portrayed him as someone engaged in an affair and were written with poor grammar and spelling. The messages were also confusing because they contained a large number of abbreviations.

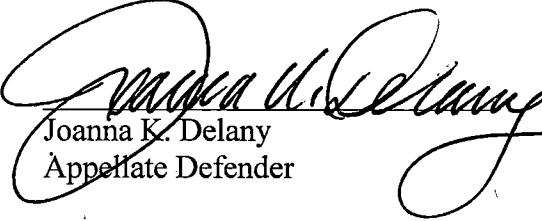
“To show prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability the result of the trial would have been different.” *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Appellate counsel said that if an objection had been preserved, she would likely have raised the issue on appeal. App. 632, l. 25 – 633, l. 3. As discussed above, entry of the exhibits should not have been allowed. Had trial counsel timely and specifically objected, either the trial court would have suppressed the exhibits, or appellate counsel would have successfully raised the issue on direct appeal. While petitioner did not say anything explicitly incriminating in the messages, the messages linked petitioner to Baughman, Edwards, and Ashley Pierce, who did make incriminating remarks and appear to be plotting a crime.

The case against petitioner was not strong. The complainant did not identify petitioner as a perpetrator and no forensic evidence connected him to the crime scene. Petitioner's alleged incriminating remark to police officers was not recorded. Trial counsel admitted that the "text messages were a big part of the State's case." App. 616, l. 10. The solicitor never published State's Exhibit #21 to the jury, so absent State's Exhibit #74 and #75, the jury would likely never have seen the messages. Therefore, absent counsel's deficient failure to object to the offending exhibits there is a reasonable probability the outcome of the case would be different.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of February, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable Jennifer B. McCoy, Circuit Court Judge

DONALD EUGENE PETERS,

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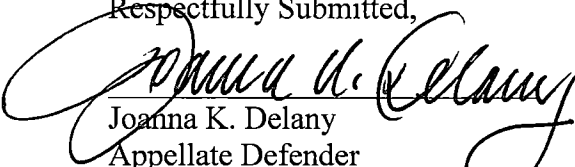
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Donald Eugene Peters 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 Jennifer B. McCoy, which was held on December 4, 2018, 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 Donald Eugene Peters.

Respectfully Submitted,

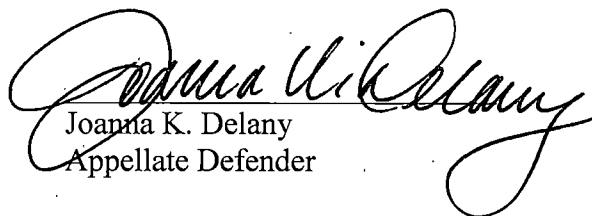


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 4th day of February, 2020.

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."



Joanna K. Delany
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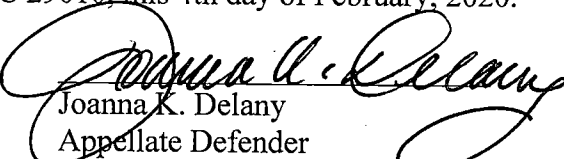
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STATE OF SOUTH CAROLINA,

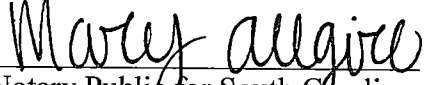
RESPONDENT

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 Benjamin Limbaugh, 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 Donald Eugene Peters, #316642, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 4th day of February, 2020.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.