ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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AUG 28 2019

S.C. SUPREME COURT

Certiorari to Lancaster County

Honorable Brooks P. Goldsmith, Circuit Court Judge

AL MARTINEZ GREEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000191

PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The PCR erred by ruling petitioner was not ineffectively represented where his attorney failed to interview the decedent's four-year-old son, and call the child as a defense witness, where it was undisputed the child told two or three police officers almost immediately after his mother was murdered that "Shi's daddy," who was not petitioner, shot his mother, since there was a reasonable probability that this exculpatory testimony would have led to an acquittal in this purely circumstantial evidence case, and the failure to interview and call this critical witness was not legitimate trial strategy as the PCR court erroneously ruled 11

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ISSUE PRESENTED

Whether the PCR erred by ruling petitioner was not ineffectively represented where his attorney failed to interview the decedent's four-year-old son, and call the child as a defense witness, where it was undisputed the child told two or three police officers almost immediately after his mother was murdered that "Shi's daddy," who was not petitioner, shot his mother, since there was a reasonable probability that this exculpatory testimony would have led to an acquittal in this purely circumstantial evidence case, and the failure to interview and call this critical witness was not legitimate trial strategy as the PCR court erroneously ruled?

STATEMENT

Procedural History

Petitioner was indicted at the June 7, 2012, term of the Lancaster County Grand Jury for the offense of murder. App. 1086 – 1087. Petitioner's case, and that of his co-defendant Devattee Tymer Clinton, were called to trial on March 10, 2014, before the Honorable R. Knox McMahon and a jury. Amy Raney represented petitioner. William Frick represented co-defendant Clinton. App. 1 – 2.

On March 14, 2014, the jury found both petitioner and Clinton guilty. App. 989, ll. 5-10. Judge McMahon sentenced petitioner and Clinton to life imprisonment without parole. App. 1011, ll. 15-22.

On direct appeal, petitioner was represented by Jane H. Merrill as a part of the Appellate Project. Appellate counsel Merrill raised the issue: "Did the trial court err by refusing to direct a verdict for Al Green when the state failed to present direct or substantial circumstantial evidence that Mr. Green was an accomplice to murder?" Direct appeal brief at 1. Following oral argument, the Court of Appeals affirmed in State v. Al-Martinez Green, 2016-UP-205 (filed May 11, 2016).

Petitioner filed an application for post-conviction relief on September 16, 2016. App. 1014 – 1021. The state filed a return to this application dated November 23, 2016. App. 1022 – 1026.

An evidentiary hearing was convened on July 18, 2018, before the Honorable Brooks P. Goldsmith. Nathan J. Sheldon represented petitioner. Assistant Attorney General DeShawn H. Mitchell represented the state. App. 1027.

At the conclusion of the hearing, PCR counsel Sheldon argued that trial counsel was ineffective for failing to call the child as a witness after told the police "Shi's dad" shot the decedent. PCR counsel noted that this was a purely circumstantial evidence case and the child's testimony could have changed the result of the trial. App. 1069, l. 9 – 1071, l. 14.

The assistant attorney general argued that not calling the four-year-old was a strategic decision. App. 1071, l. 17 – 1072, l. 13.

The judge ruled that "[t]he decision to not call the child was clearly trial strategy. I fail to see [the] prejudice suffered by the applicant." The PCR judge denied relief. App. 1072, ll. 15-22.

An order of dismissal was filed on September 6, 2018. App. 1074 – 1085. This order stated that the four-year-old "made a statement to the police about who shot his mother. Trial Counsel testified during pre-trial proceedings she attempted to show the child's statement was an excited utterance. She testified the trial judge ruled that if they could establish the statement was an excited utterance it could potentially come in but a proper foundation would have to be laid. Trial Counsel testified there was also an issue of competency in regard to the four year old potentially testifying. She testified she explained to Applicant that if the child did testify as a witness it would be hard to question the child vigorously if she needed to. Trial Counsel testified she also explained to Applicant *that the statement by the four year old was not that favorable to him* and since he had lived with the child for a period of time, the child could possibly get on the stand and not remember or implicate him. She testified she had discussions with Applicant and their private investigator about not calling the child as a witness. Trial Counsel testified ultimately the child's statements were not introduced." App. 1077. (emphasis added). "This

court finds Trial Counsel was not ineffective for not calling the four year old as a witness as this decision was a strategic one." App. 1083.

Relevant trial facts

The state's main witness in this case was Wayne Blakeney. Blakeney was charged with murder when he testified for the state. He was twenty-two years old. App. 724, l. 21 – 725, l. 17. Petitioner was only twenty years old. App. 1007, ll. 13-15.

Blakeney testified that co-defendant Clinton was known to him as "Tate." Blakeney said he also knew petitioner although Clinton was a relative. App. 727, l. 15 – 728, l. 18.

Blakeney said he went to a bar, the "Hole in the Wall," with Clinton, petitioner, and another man, Mike McDow, on the night the decedent was murdered. Blakeney did not own a car but he was driving a borrowed Cadillac. App. 729, l. 1 – 738, l. 11.

Blakeney testified that Clinton told him "he needed me to take him to get some money." App. 739, l. 7 – 740, l. 4. Blakeney said he therefore took Clinton, petitioner, and McDow to the location desired by Clinton. Clinton was carrying a gun at the time. Clinton was the only man alleged to have a gun. App. 740, l. 1 – 741, l. 21. App. 749, ll. 6-17; app. 75; app. 766.

Blakeney testified that while he "remained in the car," Clinton, petitioner, and McDow left for about ten minutes to go into a trailer park. App. 742, l. 13 – 743, l. 6. The men returned to the car, and Blakeney did not claim he heard any gunshots in the intervening time. Blakeney said the men then went back to the "Hole in the Wall."

No one spoke about what happened until later that night when Blakeney was alone with Clinton. Blakeney claimed Clinton asked him: "If I could keep a secret. I told him yes I could, and he said to me that I killed that Bitch." App. 749, ll. 6-17; app. 75; app. 766.

When Blakeney was alone he noticed that he almost out of gas so he parked the car in the Piggly Wiggly parking lot. He then saw that he had a flat tire also. Blakeney related that he inexplicably left the key in the car, with the doors unlocked, and that he walked home from the Piggly Wiggly. App. 751, ll. 1-24. Blakeney later sold the gun "to my cousin Marcus Barnes." App. 752, ll. 14-23.

Blakeney said he ultimately told the police that Clinton and petitioner were involved in the robbery with him. Blakeney blamed being scared as the reason he was not forthcoming with the police. Even later, Blakeney told the police that Mike McDow was also involved. App. 754, l. 7 – 755, l. 14. As for the decedent, Blakeney said he later found out "that this girl was dead."

The exculpatory statement of the four-year-old

Prior to trial, a discussion of the victim's four-year-old child's statement to the police was discussed. William Frick, counsel for co-defendant Clinton said the four-year-old "spontaneously states to I think Investigator Crump first and then to another officer and I think maybe a third officer on the scene t*hat 'Shi's daddy shot my momma,' he says this more than once. I think he says later that it's Shortycake shot my momma. So clearly that is someone's nickname. That's not the nickname of either one of these gentlemen. It is I think Rashad Johnson's is who it was determined."* App. 158, l. 15 – 159, l. 5. (emphasis added).

Solicitor Barfield added, "He [the child] was four years old at the time. The child's daddy is Antonio Lamont Truesdale." App. 158, l. 15 – 191, l. 19. Counsel Frick confirmed again to the judge that the statement was "Shi's daddy shot my momma." App. 160, ll. 1-5.

The defense attorneys acknowledged to the judge that their argument was that the four-year-old's statement to two or three police officers was admissible as an excited utterance. The judge said that the "[a]vailablity of a witness is immaterial but you have to determine the

competency of the individual that made the statement. In this regard I'm dealing with a four-year-old." App. 161, ll.11-19.

Counsel Frick told the judge that law enforcement "followed up on it [the child's statement]. They went to go find where Rashad Johnson was and tried to establish an alibi." The solicitor urged, "But the competence from an investigation standpoint is a lot different than the competence for the presentation to a jury." App. 161, l. 21 – 162, l. 8.

Counsel Frick then explained: "Your honor, here is the thing, Minor is four years old at the time of the incident. *Whenever his moma is shot he immediately goes to the next door neighbor's house and asks for help.* They called 911. *The police responded within 15 minutes.* It's cold. It's January. Minor and his younger brother and sister are put in an ambulance. Minor makes the statement Shi's daddy hurt my momma. Jamia's (phonetics) daddy hurt my momma. Jamia and Shi are the same person and daddy they are referring *to is Rashad Johnson. He makes this statement. He does make it to Investigator Crump. He makes it in the ambulance in front of some of the first responders who are on the solicitor's witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous to Christy Rogers who is a CSI officer that on the scene.* <u>We are saying in response to [Rule 803 (2), SCRE], as Your Honor correctly stated this is an excited utterance</u>. . ." App. 162, l. 11 – 163, l. 6. (emphasis added).

The judge ultimately told the lawyers, including petitioner's counsel, Raney: "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and however you all want to do it you all are welcome to do it in whatever manner you all so choose." App. 168, ll. 1-5.

The next day, the judge said the minor could be called as a witness. "I'm not saying he should be. I am just saying it does not mean he cannot be, if either side chooses to do that and of

course the jury could determine their observations of his competency. Of course, it has been two years. It's fuzzy in my memory, but there was a big difference in my children four to six years old." The judge told the solicitor his ruling was that if the defense could establish the statement was an excited utterance, that competency would be a matter for the jury to determine on the believability of the child. App. 177, l. 10 – 179, l. 13.

The four-year-old, six years old at the time of trial, was never called by the defense. Defense counsel Raney would later admit that she did not ever even interviewed the child, and she claimed, without explanation, that the defense did not have access to the child prior to trial. Raney had also hired investigator Pete Skidmore as the private investigator on this case. Raney offered that she and Skidmore decided not to interview the child or pursue this matter any further. App. 1060, l. 5 – 1062, l. 18.

Other trial evidence

SIED Investigator Michael Greene testified that on January 25, 2012 he interviewed petitioner. App. 778, l. 3 – 779, l. 1. Greene said petitioner never admitted doing anything illegal on the night of the incident and he certainly never confessed to robbing or killing the decedent. App. 786, ll. 6-19.

Agent Greene told the jurors that petitioner said he had been at the "Hole in the Wall" bar somewhere between 11:30 and 11:45 p.m. on Thursday, January 19, 2012, the night of the murder. App. 834, ll. 13-21. Petitioner did not make any inculpatory statements to Agent Greene.

On cross-examination by Counsel Raney, Agent Greene admitted he spoke to Rashad Johnson on January 23, 2012. App. 838, ll. 3-10. Greene claimed he could not remember any

details of that conversation. Greene offered that Johnson was not "charged with a crime in this case." App. 844, ll. 3-22.

Directed verdict motion

Defense counsel Raney argued the state presented no evidence as to who was allegedly the triggerman in this case. Therefore, under the theory of accomplice liability "the closest we have come to it would be the testimony of Mr. Blakeney, who cannot even state whether or not my client actually ever went inside of Miss Jones's trailer that night. He was unable to see him. He was out of his sight line. . . . He never sees my client with a gun. Never hears him have any conversation with either this co-defendant or any of the other co-defendants in this case about going to do a robbery, intending to aid and assist in any way in hurting Miss Jones or performing any type of lick. In fact, all of Mr. Blakeney's discussions appear to have been with Mr. Tate, Mr. Tate Clinton and Mr. Clinton is just saying hey I need to go pick up some money." App. 844, l. 19 – 850, l. 11.

The solicitor argued that petitioner and Clinton "the day before" had discussed "doing a lick or a robbery." App. 850, l. 14 – 851, l. 6. The solicitor reasoned there was evidence that petitioner was present in the white Cadillac along with Clinton, McDow, and Blakeney on the night of the murder. App. 851, ll. 15-20. The solicitor added that the jury could infer what it wanted about the statement Clinton wanted to "get some money." The solicitor urged there was enough evidence to make this case a jury question. App. 850, l. 14 – 852, l. 17. The judge found there was enough evidence for the case to go to the jury. App. 854, ll. 14 – 17.

As stated, Appellate Project Counsel Jane H. Merrill argued on direct appeal that petitioner was entitled to a directed verdict of acquittal. However, the Court of Appeals ruled the

trial judge did not abuse his discretion in denying the directed verdict motion in this circumstantial evidence case. State v. Al Martinez Green, 2016-UP-205 (filed May 11, 2016).

Post-conviction relief

As seen, trial counsel Raney admitted she never attempted to speak to the child prior to trial. Raney thought the trial judge wanted to explore the competency of the child before ruling whether the child could testify or whether his statement that "Shi's daddy" shot and killed his mother was admissible. App. 1052, l. 12 – 1056, l. 16.

Raney said she discussed this matter with Pete Skidmore, her investigator, and for some reason, "A decision was made based on those conversations that we were not going to put the child on our witness list and [we] was not going to call the child independently at trial." App. 1056, ll. 7-16. (emphasis added).

As stated, PCR counsel Sheldon argued it was ineffective for trial counsel not to even attempt to talk with or call the child as a witness where he was in the home at the time his mother was shot, and not to have the child's testify that "Shi's daddy was the shooter. App. 1069, l. 9 – 1071, l. 14.

Petitioner had also testified and complained at PCR that the child was never called to testify that "Shi's dad" shot his mother. Petitioner said he had lived in the home with the decedent and the child in the past, and the child could have verified petitioner was not one of the men present that evening when his mother was shot, and that "Shi's dad" was the shooter. App. 1038, l. 13 – 1042, l. 18; app. 1044, ll. 11-19.

As also seen above, the PCR court referenced defense counsel Raney's statement that if she called the child as a witness, "it would be hard to question the child vigorously if she needed to." Trial counsel's further statement – accepted by the PCR court and contained in order of

dismissal -- that the statement by the four-year-old "*was not favorable" to petitioner* was without evidentiary support in this record. App. 1077.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 243 of the SCACR.

ARGUMENT

The PCR erred by ruling petitioner was not ineffectively represented where his attorney failed to interview the decedent's four-year-old son, and call the child as a defense witness, where it was undisputed the child told two or three police officers almost immediately after his mother was murdered that "Shi's daddy," who was not petitioner, shot his mother, since there was a reasonable probability that this exculpatory testimony would have led to an acquittal in this purely circumstantial evidence case, and the failure to interview and call this critical witness was not legitimate trial strategy as the PCR court erroneously ruled

The solicitor in this case did not dispute that the statement of the decedent's four-year-old son to two or three police officers very shortly after his mother was murdered was "Shi's daddy" was the shooter. Thus, it was not necessary for petitioner to produce the child to testify at the post-conviction relief hearing that he told police just after the shooting that "Shi's daddy" was the shooter. See Rutland v. State, 415 S.C. 570, 577-78, 785 S.E.2d 350, 353 (2016); Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998).

In this case, the four-year-old son of the decedent was a crucial witness. He was present in the trailer at the time his mother was murdered. His testimony that "Shi's daddy" was the shooter was crucial exculpatory evidence for petitioner. As in Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992), defense counsel here was ineffective for failing to call the decedent's child as a witness given the critical information only he possessed. In Thomas, the victim told emergency personnel in that criminal sexual conduct case that she did not know her assailant. However, she then identified Thomas, her neighbor, at the hospital several hours after the attack as her assailant. This Court held that trial counsel for Thomas was ineffective for failing to call

the emergency room personnel who would have testified the victim told them she did not know her assailant.

Even if the trial court here found that the child's statement about "Shi's daddy" being the shooter was not admissible as an excited utterance pursuant to Rule 803(2) as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," the child still could have testified that "Shi's daddy" and not petitioner was the shooter since it was undisputed he was in the trailer when his mother was shot and killed.

Further, if the child denied making this statement at trial, he could have been impeached with his prior inconsistent statement pursuant to Rule 613(b), SCRE, that "Shi's daddy" was the shooter which he made just after the murder to two or three police officers.

It is difficult to understand how the child's statement would not have been admissible as an excited utterance under these circumstances, but the child could still have testified that "Shi's daddy was the shooter" even if the judge did not allow it as an excited utterance, and, again the child could have been impeached if he denied making the statement pursuant to Rule 613(b), SCRE. See State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008); State v. Bixby, 388 S.C. 528, 550, 698 S.E.2d 572. 584 (2010).

This case is also similar to Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), where the triage nurse's notes stated, "pt states pt did not penetrate the vagina. Was hit in face and laceration rt hand." In Pauling, the petitioner argued trial counsel was ineffective because he was not prepared to present the triage nurse as a defense witness. Defense counsel in Pauling admitted he did not attempt to identify the triage nurse prior to trial. The triage nurse's

testimony would have been substantive evidence that a sexual battery did not occur, and it would have impeached the victim's credibility.

This Court found the PCR court erred because it ruled the petitioner failed to establish prejudice because it did not call the triage nurse as a witness at PCR. This Court held the triage nurse's notes were sufficient evidence to remove Pauling from the holding in Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995), that a PCR applicant could not prove prejudice where he did not produce the witness at the PCR hearing.

Here, similarly, the solicitor at trial did not dispute that the child made the statement -- just after the murder of his mother -- that "Shi's daddy" was the murderer. This case therefore comes under the umbrella of Rutland v. State and Pauling v. State.

Further, there was no evidence to support the PCR court's finding that the testimony of the four-year-old would *not* have been "favorable to him. App. 1077. There was no evidence to support the PCR judge's reasoning that not even talking to the child, interviewing him, or calling him as a witness was acceptable trial strategy. See Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

This was a murder case based on thin circumstantial evidence that petitioner was an accomplice in a robbery that turned into a murder. Petitioner is serving a sentence of life without parole. Respectfully, the order of the PCR court should be reversed.

CONCLUSION

By reason of the foregoing argument, the order of the PCR court denying petitioner PCR relief should be reversed.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable Brooks P. Goldsmith, Circuit Court Judge

AL MARTINEZ GREEN,

PETITIONER

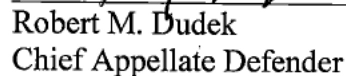
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

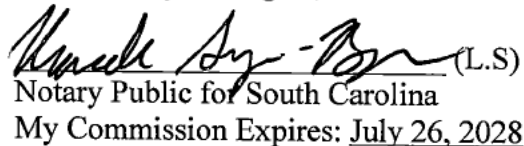
The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Al M. Green, #359254, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 28th day of August, 2019.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 28th day of August, 2019.


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