No. 18-8434

IN THE
SUPREME COURT OF THE UNITED STATES

LEIF HALVORSEN,

Petitioner

v.

DEEDRA HART, WARDEN

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO
REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

Commonwealth of Kentucky)
) ss
Fayette County)

AFFIDAVIT OF MICHAEL R. MOLONEY

I, MICHAEL R. MOLONEY, having been duly cautioned and sworn states as follows:

1. I am a licensed attorney in Kentucky.

2. I represented Leif Halvorsen in his 1983 Lexington, Kentucky murder trial.

3. I understand that Halvorsen's case is currently pending before the United States Court of Appeals for the Sixth Circuit on appeal from the denial of his petition for a writ of habeas corpus challenging his convictions and death sentences imposed in the case where I was Halvorsen's trial attorney.

4. Halvorsen's case was the only death penalty case I have ever handled. It was, to my recollection, the first death penalty trial in Lexington, Kentucky under the separate guilt and penalty phase system that developed in the wake of the Supreme Court of the United States declaring death penalty statutes as they existed in the early 1970s unconstitutional.

5. Halvorsen was tried jointly with codefendant Mitchell Willoughby. Codefendant Susan Hutchens became a government witness and was therefore not tried with Halvorsen and Willoughby.

6. Other than with regard to jury selection, I did not work jointly with Willoughby's attorney on my defense strategy or any other aspect of the trial. Indeed, Halvorsen and Willoughby had mutually inconsistent and incompatible defenses at trial; and other than with regard to jury selection, I did not consult with, or otherwise speak with, Willoughby's attorney about the case during the trial or even during recesses during the trial.

7. I recall that I presented at trial a defense that the prosecution could not prove beyond a reasonable doubt that Halvorsen shot any of the victims and that if he did, the prosecution could not prove beyond a reasonable doubt that the wounds he inflicted, as opposed to the ones Willoughby inflicted, caused the death of any of the victims. I presented this defense because I believed, as will be discussed further in this affidavit, that the indictment, in conjunction with RCr 6.10 and applicable case law, meant Halvorsen would have to defend against murder charges only as a principal. My defense theory and presentation was not intended to frontload mitigation or to make Halvorsen look less culpable during the guilt phase as a means to argue lesser culpability compared to Willoughby at the penalty phase as a reason for the jury to not impose the death penalty. Rather, my trial defense theory and presentation at the guilt phase was geared solely towards trying to convince the jury that the prosecution had not proven the charged murder offense beyond a reasonable doubt and therefore had to acquit Halvorsen of murder.

8. Before signing this affidavit, I reviewed the indictment, the accomplice to murder and combination instructions (whereby the jury can convict of murder if cannot decide if the defendant was a principal or an accomplice), and the transcript of my directed verdict argument and of the objection I made to instructing the jury on accomplice liability.

9. The indictment charged Halvorsen, Willoughby, and Hutchens with murder, citing in that regard only KRS 507.020 (the murder statute), and specifically stated with regard to the murder of each victim that the "defendant(s) committed the offense of Capital Murder by shooting [victim] with pistols when the following aggravating circumstances existed...."

10. Then-existing Kentucky Rule of Criminal Procedure 6.10(3), which required the indictment to "state for each count the official or customary citation of any applicable statute, rule, or other provision of law which the defendant alleged therein to have violated." The language of the indictment, in combination with my familiarity with RCr 6.10(3) led me to understand that Halvorsen was charged with murder only as a principal and that he could therefore be convicted of murder only if the prosecution could prove beyond a reasonable doubt that Halvorsen shot one or more of the victims and caused their death. Accordingly, I developed and presented to the jury a defense that was centered around the prosecution being unable to proof this beyond a reasonable doubt.

11. In light of the indictment and RCr 6.10(3), I was surprised when the Commonwealth sought an instruction on accomplice liability and that the jury could convict Halvorsen of intentional murder as an accomplice or even if it could not determine if he was an accomplice or a principal. I had not prepared a defense to that and did not think Halvorsen would face at trial accomplice liability charges since it was not contained in the indictment. Indeed, this is demonstrated by the portion of the trial transcript where I argued for a directed verdict and where I objected to any accomplice liability instruction. I have reviewed that portion of the trial transcript, and what I argued reflected my understanding of the law at that time.

12. At the conclusion of the prosecution's case-in-chief, I moved for a "verdict of acquittal" on the murders charges because the prosecution's evidence at trial did not demonstrate that Halvorsen fired a weapon. Judge Angelucci denied the motion.

13. When proposed instructions were submitted and when the court discussed with counsel the guilt phase instructions, I objected "to the giving of any instructions relating to Mr. Halvorsen's being an accomplice at all for the reason that Criminal Rule 6.10(3) requires that the official or customary citation of any applicable statute be set forth in the indictment and further provides that if it is not set forth in the indictment, it can be grounds for dismissal or reversal if the omission worked to the prejudice of the defendant. This particular indictment with respect to the three counts of capital murder cites as the applicable statute KRS 507.020 and makes no reference whatsoever to the accomplice statute KRS 502.020, under which the instructions relating to Leif Halvorsen being an accomplice, specifically instruction number 3, 4, 5, 6, 8 and part of 9, 11, 13, 15,

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page of 16, 18, and 20, all of which relates to accomplice liability." I then cited to the court a case that established all statutes a defendant is alleged to have violated must be specified within the indictment, and argued that the Commonwealth had plenty of time to develop its case and could have indicted Halvorsen under the accomplice liability statute if it intended to pursue an accomplice liability theory of culpability. Judge Angelucci overruled my objection. I believed my theory and argument was a correct reading of the law, and I based my trial defense on this understanding of the law.

14. I did not present a defense to murder as an accomplice or present a theory that Halvorsen was guilty of a lesser-included murder offense. I failed to do so because I understood the indictment to mean the prosecution had to prove beyond a reasonable doubt that Halvorsen was the principal (had shot the victims and thereby caused their deaths). My defense preparation and strategy might have been different if I had known before trial that Halvorsen could be convicted of murder as an accomplice or under an instruction by which the jury did not have to decide whether Halvorsen was a principal or an accomplice. If I had known the Commonwealth would pursue an accomplice liability theory of culpability at trial and that the trial judge would instruct the jury that it could convict Halvorsen of intentional murder as an accomplice or without determining whether he was an accomplice or a principal, I would have considered attempting to develop and present defenses to the murder charge in addition to, or instead of, just the defense that the prosecution could not prove beyond a reasonable doubt that Halvorsen had actually shot and killed the victims (was the principal).

15. To be clear, I did not understand the indictment and applicable law to mean being indicted as a principal permitted Halvorsen to be convicted as an accomplice or without the jury determining whether Halvorsen acted as a principal. When I argued to the trial court that RCr 6.10 and the applicable case law prohibited instructing the jury that it could convict Halvorsen of murder as an accomplice I was not aware that the law permitted an accomplice instruction under the circumstances. I certainly did not operate under the belief that I would obtain an acquittal because of a technicality within RCr 6.10 that was inconsistent with applicable law. Instead, I believed RCr 6.10 was the controlling law and was supported by case law. I relied on that belief and understanding of the law in deciding what theory to pursue at trial. Simply, based on the language of indictment and the applicable law, I believed the prosecution had provided notice of only an intent to pursue a principal theory of liability, and intended to pursue only a principal theory of liability at trial. I also believed that based on the language of the indictment and the applicable law regarding what must be contained within an indictment, the prosecution could at trial pursue the murder charge only under a principal liability theory. My defense at trial was developed and presented in light of this understanding of the law.

Further Affiant says naught,

Affiant

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Sworn to and subscribed before me by Michael P Mckay this 13th day of July, 2018.

Notary Public, Commonwealth of Kentucky

My commission expires: 3-10-2022 #595861

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