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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

JODY THOMPSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001217

JOHNSON PETITION FOR WRIT OF CERTIORARI

GARY H. JOHNSON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding counsel was not ineffective when he failed to object to petitioner being in visible restraints during his trial creating a prejudicial picture of petitioner as a danger to the jury and court?

STATEMENT

A Spartanburg County grand jury indicted Petitioner on January 11, 2017, for four counts of attempted murder, possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. App. 646 - 661. His case was called to trial on February 11, 2019, before the Honorable J. Derham Cole and a jury. App. 1. Assistant solicitors Spenser Smith and Jennifer Jordan represented the state. App. 1. Clay Allen represented petitioner. App. 1.

During trial, Allen (hereinafter trial counsel) allowed petitioner to be in physical restraints in the presence of the jury. App. 570, l. 21 – 571, l. 7. These restraints were a distraction, causing noise and making petitioner's movements difficult and awkward during trial when he attempted to assist trial counsel. App. 570, l. 21 – 571, l. 7.

Petitioner was charged following a shooting incident at a night club known as Playoffs. App. 165, ll. 4 – 18. Through witness testimony and video evidence, there were two groups of people involved in a verbal argument leading up to the shooting. One faction was aligned with Ramone Smith and contained several people including the alleged victims of the attempted murder charges. App. 428, l. 9 – 429, l. 2. The other faction contained petitioner, his brother Horace Thompson, a friend Stephone Anderson, along with several other people. App. 428, l. 9 – 429, l. 2. The initial dispute was between Smith and Anderson. App. 232, ll. 1 – 20; 428, l. 9 – 429, l. 2.

According to petitioner and his brother, each tried to calm the situation down before shots were fired from the direction of the Smith faction. App. 429, l. 3 - 430, l. 1. Petitioner's defense at trial was self-defense, since he was responding to shots being fired at him from the other faction. App. 429, l.15 – 430, l. 13; 485, l. 10 – 487, l. 25. Smith admitted firing his weapon,

though he claimed it was in response to petitioner firing first. App. 235, l. 8 – 236, l. 21. Smith continued firing at petitioner even after petitioner fled the area. App. 237, ll. 8 – 25.

On February 14, 2019, the jury found petitioner guilty of two counts of attempted murder, two counts of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), and both weapon offenses. App. 532, ll. 7-20. He was sentenced to twenty years for attempted murder, ten years concurrent for the second count of attempted murder, ten years concurrent for ABHAN, five years concurrent for possession of a weapon during the commission of a violent crime, and one year concurrent for unlawful carrying of a pistol. App. 540, l. 19 – 542, l. 4. Petitioner was also sentenced to ten years suspended to five years' probation for the second count of ABHAN to be served consecutively to his twenty-year sentence for attempted murder. App. 540, l. 19 – 542, l. 4.

On direct appeal, petitioner was represented by Lara Caudy, and the sole issue presented was the trial court's refusal to instruct the jury on the lesser-included offense of second-degree assault and battery. The Court of Appeals affirmed the conviction in an unpublished opinion. *See* State v. Thompson, Op. No. 2021-UP-370 (S.C. Ct. App. filed Nov. 3, 2021).[1]

Petitioner sought PCR review, alleging several grounds including ineffective assistance of counsel due to being in restraints during trial. App. 546. An evidentiary hearing was held before the Honorable Frank R. Addy on June 20, 2023. App. 562. Rodney Richey represented

[1]Petitioner asserted appellate counsel was ineffective in failing to pursue the trial court's refusal to direct a verdict on the attempted murder charges for lack of evidence of specific intent. This issue was, by agreement of the State, accepted as an additional ground for relief at the PCR hearing and ruled upon by Judge Addy in his order of dismissal on the merits. App. 625, l. 12 – 626, l. 18; 643-44.

petitioner, and Ambree Muller appeared on behalf of the state. App. 562. Judge Addy denied relief by order of dismissal dated July 11, 2023.[2] App. 629 – 645.

This petition for writ of certiorari follows.

[2]Following the filing of the Notice of Appeal, petitioner filed a *pro se* Rule 59(e), SCRCP, motion to alter or amend the PCR order. A copy of the *pro se* Rule 59(e) motion is included in the Appendix for completeness of the record.

ARGUMENT

The PCR court erred in finding counsel was not ineffective when he failed to object to petitioner being in visible restraints during his trial creating a prejudicial picture of petitioner as a danger to the jury and court.

"The law has long forbidden routine use of visible shackles during [a jury trial]; it permits a State to shackle a criminal defendant only in the presence of a special need." Deck v. Missouri, 544 U.S. 622, 626 (2005). "Thus, a defendant in a criminal trial may not be required to wear handcuffs, leg shackles, or other restraints in the presence of the jury unless the trial court makes specific findings on the record as to the particular reasons the restraints are necessary. If the court finds restraints are necessary, it must make every reasonable effort to ensure the restraints are not visible to the jury." State v. Heyward, 441 S.C. 484, 493, 895 S.E.2d 658, 663 (2023).

In the context of PCR, trial counsel's failure to object to shackling and requiring specific findings by the trial judge has been found to be ineffective assistance of counsel. *See* Reese v. State, 441 S.C. 392, 405, 894 S.E.2d 295, 302 (Ct. App. 2023) (reversing the PCR court's finding of no prejudice when trial counsel failed to object to shackling of petitioner during trial); Ryals v. State, 439 S.C. 230, 237, 886 S.E.2d 239, 243 (Ct. App. 2023) ("Balancing the impact of Ryals' forced appearance at his trial in prison clothing visible to the jury against the strength of the State's evidence against him, there is a reasonable probability that, but for trial counsel's failure to object to his appearance at this trial in prison clothing, the result of the proceeding would have been different."); Humbert v. State, 345 S.C. 332, 337, 548 S.E.2d 862, 865 (2001)[3] (holding "counsel was deficient by allowing the trial to proceed while petitioner was dressed in

[3]Humbert's use of Rule 59(e), SCRCP, as a procedural bar to addressing a claim raised by a PCR applicant was later rejected in Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

prison clothing. We find it generally improper for a defendant to appear for a jury trial dressed in readily identifiable prison clothing.").

A. Petitioner was shackled during the presentation of evidence in his trial.

Petitioner was shackled beginning on the second day of trial. App. 570, ll. 13 – 19. Petitioner made references to the distracting noise from the shackles and the difficulty the shackling caused during trial:

> Q. You were dressed out; right?
>
> A. I was dressed out, but I was also still in shackles, sitting at that table right there (indicating). And the jury was sitting right there (indicating). They could see without anybody inquiring into why I'm in shackles. That right there automatically just prejudice me. And me being a person that didn't know anything about law, for him to just let me and know it because Mr. Allen's pen had actually fell. And I struggled to reach down to try to pick it up for him. And it was a distraction. You could hear the chains and just drew more attention to my -- to the area over here.

App. 570, l. 21 – 571, l. 7.

This direct evidence of shackling was not contradicted, as neither the solicitor nor trial counsel *could remember* if petitioner was shackled during trial. Trial counsel "did not remember" petitioner being shackled, but did indicate Judge Cole's habit of having a defendant in restraints prior to the jury's verdict being presented:

> Q. Was Mr. Thompson in handcuffs during the trial?
>
> A. I don't remember him being in handcuffs during trial. I do know that around that time, when they bring somebody who's on trial in after the trial is over, prior to the jury delivering their verdict, they will have them come in and sit with their handcuffs on usually in front of them, but they're not required to stand or do anything in front of the jury.
>
> Plus at that time the decision would've been made. I don't remember I know what he testified to. I don't remember that happening.

App. 605, ll. 14 – 24.

This testimony was mirrored by solicitor Steve Smith who testified that he did not "recall" petitioner being in shackles though he did indicate that would not be in keeping with his experience before Judge Cole:

> Q. *Do you recall if Mr. Thompson was in handcuffs during trial?*
>
> A. *I do not.* I have seen Judge Cole do a lot of trials. I've never seen anybody be in handcuffs other than, as Mr. Allen said, once the jury reached the verdict, they usually are with a belly chain, front cuffed and their leg shackled. The vast majority of cases, Judge Cole takes people into custody whether they are out on bond or in custody when the trial begins. And I've never seen anybody be shackled while during a trial.

App. 617, ll. 3 – 12 (emphasis added).

B. The PCR court improperly ruled that counsels' lack of memory was more credible than petitioner's direct testimony.

The PCR court found the testimony of Allen and Smith "more credible on this issue" in finding petitioner was "not cuffed at any time while the jury was present." App. 642. The PCR court made this finding despite acknowledging that neither "Mr. Allen nor Mr. Smith recall [petitioner] being cuffed during the substantive trial." App. 642. The PCR court erred in elevating the lack of memory of either counsel over the direct testimony of petitioner supported by supporting details such as the noise the distracting noise the shackles made in front of the jury when petitioner attempted to assist trial counsel. App. 570, l. 21 – 571, l. 7.

In Weldon v. State, 436 S.C. 69, 870 S.E.2d 183 (Ct. App. 2021), the Court of Appeals reversed the PCR court's finding of fact that trial counsel was credible in articulating a valid trial strategy to preserve final argument when "counsel repeatedly testified he did not know why he chose not to call the witnesses." Id., 436 S.C. at 83, 870 S.E.2d at 190. In Stone v. State, 419 S.C. 370, 386, 798 S.E.2d 561, 570 (2017), this Court reversed the PCR court's finding that trial counsel had a strategic reason for not objecting to improper victim impact testimony noting

"counsel testified he made the decision not to object for reasons other than the strength of his argument for exclusion." Thus, "counsel's belief the trial court would overrule his objection does not justify the decision not to make it" and would not justify a PCR court's finding of a fact that a valid strategic reason existed supporting counsel's decision. Id., 419 S.C. at 387, 798 S.E.2d at 570.

As in Weldon and Stone, the PCR court's ruling here is not supported by the record. Both trial counsel and the solicitor did not remember the restraints, and the PCR court noted their lack of memory in its order. App. 642. In contrast, the direct evidence of restraints provided by petitioner was supported by a specific description of the impact of the restraints during trial when petitioner attempted to assist trial counsel but the noise from the shackles caused distraction. App. 570, l. 21 – 571, l. 7.

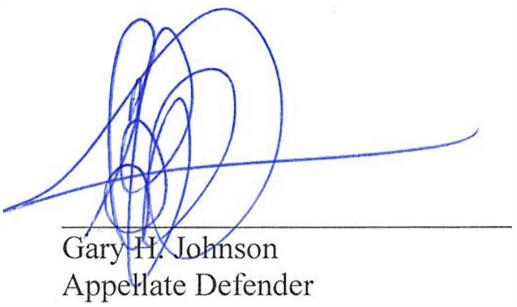
This case centered on the jury's evaluation of petitioner's acts as self-defense and not as an aggressive individual with a propensity towards violence. Due to the inherent danger of forcing an accused to appear in shackles, coupled with the need for the jury to believe petitioner was not the initial person to fire a weapon in this case, the prejudicial impact of counsel's failure to object requires a new trial. *See* Reese v. State, 441 S.C. 392, 405, 894 S.E.2d 295, 302 (Ct. App. 2023) (reversing the PCR court's finding of no prejudice when trial counsel failed to object to shackling of petitioner during trial); Ryals v. State, 439 S.C. 230, 237, 886 S.E.2d 239, 243 (Ct. App. 2023) ("Balancing the impact of Ryals' forced appearance at his trial in prison clothing visible to the jury against the strength of the State's evidence against him, there is a reasonable probability that, but for trial counsel's failure to object to his appearance at this trial in prison clothing, the result of the proceeding would have been different.").

Here, petitioner's entire defense relied upon the jury seeing him as reasonably responding to the use of deadly force, not instigating its use. Forcing him to appear before the jury in shackles created an improper impression of his propensity for violence and directly impaired his right to a fair presentation of his defense to the jury. Petitioner's trial counsel's performance was deficient in failing to object to the visible restraints during petitioner's jury trial. Due to the nature of the prejudicial impact, there is a reasonable probability that, but for counsel's errors, the result of petitioner's trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

The PCR court erred in denying relief and should have granted a new trial.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on this issue.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jody Ray Thompson states:

1. He is 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 Frank R. Addy, which was held on June 20, 2023, 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 Jody Ray Thompson.

Respectfully Submitted,

Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2024.

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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."

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This 16th day of January, 2024.