

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Cherokee County

J. Derham Cole, Circuit Court Judge

RICKY BRANNON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Trial counsel erred in failing to investigate into and interview the female who was in the car with petitioner at the time of his arrest in order to develop an alibi defense in the case.

STATEMENT

Petitioner Ricky Brannon was convicted per jury trial of first degree burglary and grand larceny per a jury trial held during the April 2006 term of the Cherokee County General Sessions Court before Judge A. Doyet Early. Petitioner was sentenced to life without parole. App. 1-315. Petitioner was represented at trial by J. Roger Poole. Petitioner appealed, but his convictions and sentence were affirmed. App. 467-477; App. 646-670. See. State v. Brannon, Unpublished Opinion No. 2008-UP-313 (Ct. App. June 20, 2008). App. 671-672. Petitioner was represented on appeal by Lanelle Durant.

On June 10, 2009, petitioner filed a PCR application with the Cherokee County Office of the Clerk of Court. App. 317-466; App. 501-517. On October 8, 2009, the respondent filed a return requesting that a hearing be held in the case. App. 523-541. On March 10, 2010, petitioner filed an amended PCR application. App. 518-522.

A hearing was convened on April 6, 2010, at the Cherokee County Courthouse before Judge J. Derham Cole. App. 546-621. Petitioner was represented at the hearing by Rodney W. Richey. On November 15, 2010, Judge Cole issued an order of dismissal in the case. App. 623-637.

Petitioner appealed. This petition follows.

ARGUMENT

Trial counsel erred in failing to investigate into and interview the female who was in the car with petitioner at the time of his arrest in order to develop an alibi defense in the case.

At trial, Ira Jo Gallman testified that she was awakened around 8:30 am on November 19, 2003, when she heard the doorbell ringing. Gallman stated that after looking out of her window, she saw a "vehicle pushed in her front yard off the road." Gallman added that she also saw a man wearing a hooded jacket standing outside. Gallman stated that she did not answer the door and that the man fled when her next door neighbor, who was a school bus driver, arrived on the scene. Gallman testified that she recorded the man's car tag number, which she gave to police, and described the car as blue in color. Then, on the next day, i.e., November 20, 2003, both Gallman and her husband Kenneth Gallman received a call that their house had been burglarized. Both reported that knives, guns, and a safe had been taken out of their home. App. 109, l. 7 – p. 129, l. 23; App. 138, ll. 7-17.

Deputy Richard Turner testified that he was working traffic on November 20, 2003, when he learned of the Gallman burglary and larceny, and that he had been on the look out for a vehicle described in connection with those crimes. At some point, Turner saw the vehicle in question and stopped the driver after he ran a stop sign. Deputy Turner stopped the vehicle and placed the driver, who was petitioner, under arrest. Deputy Turner stated that there was a young girl in the car with petitioner at the time of the stop and arrest, but that he allowed the girl leave the scene. The car was registered to Tarsha Littlejohn, who was petitioner's girlfriend. App. 172, l. 4 – p. 178, l. 22.

Officer Mike Fowlkes testified that he interviewed petitioner after his arrest and that petitioner stated in effect that he did not commit the Gallman burglary and grand larceny, but that he

knew where the stolen guns were located went on to take him to that place. App. 228, l. 4 – p. 247, l. 5.

Officer Jimmy Henson processed the crime scene and took latent fingerprints and pieces of glass from the Gallman residence. Also, Henson compared a pair of Fila tennis shoes that belonged to petitioner with a shoe print found on a piece of glass taken from the crime scene and verified that there was a match between the two. App. 191, l. 23 – p. 219, l. 24.

Petitioner did not present any witnesses in his defense at trial and he (petitioner) did not testify in his defense at trial.

During the PCR hearing, petitioner testified that counsel erred in failing to investigate into and contact the female passenger who was in his car at the time of the arrest because this could have led to the development of an alibi defense (App. 570, ll. 15-23), or established that he did not steal the guns, but rather only had location knowledge of the same. App. 566, l. 11 – p. 570, l. 23.

The PCR court denied PCR relief and ruled that petitioner did not meet his burden of proof with respect to error in failing to investigate into how this young girl could have been favorable to his defense because she was not presented as a PCR hearing witness as the rule is that an applicant “must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” App. 623-637.

Clearly, the young female passenger in question was a lead that counsel should have investigated into and developed in order to learn what valuable information she possessed with respect to petitioner’s defense. Had counsel done so, he might have been able to develop an alibi

defense or to convince the jury that petitioner's knowledge of the location of the gun did not translate into his guilt on the charges.

Counsel representing a criminal defendant has a duty to conduct reasonable investigations, (See Cobb v. State, 305 S.C. 299, 408 S.E.2d 223 (1991)), which encompasses the defendant's right to interview witnesses. See also State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997). A defendant has a right to present witnesses in his defense. Faretta v. California, 422 U.S. 806 (1975); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). Compare, Grier v. State, 299 S.C. 321, 384 S.E.2d 772 (1980) and Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991), where the court reversed convictions where counsels were found ineffective in failing to present alibi witnesses at trial. Also, compare Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), where the Court held that trial counsel was ineffective in failing to call as a defense witness a triage nurse who would have corroborated the defendant's lack of penetration defense on a sexual assault charge. See also Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992), where counsel erred in failing to call the emergency medical personnel who would have testified that the victim stated immediately after the attack that she did not know her assailant where the victim was the sole witness to the rape. Also, compare, Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), where the Court held that defense counsel performed deficiently in failing to hire an independent expert witness to assess the gun residue evidence, especially where there was evidence that the victim had the gun in question and was ready to fire, but the gun went off after the defendant grabbed it, and where the initial finding was that no gunshot residue appeared on the victim, but a subsequent finding on the question of whether gunshot residue was on the victim resulted in an inconclusive finding.

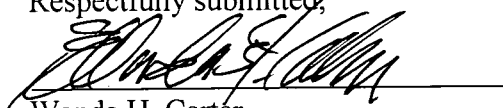
Counsel's failure to conduct investigations into an alibi defense per the potential female witness in question constituted deficient legal performance in violation of the Sixth Amendment.

See also Strickland v. Washington, 466 U.S. 668 (1984)

CONCLUSION

Based on the foregoing argument, petitioner's petition for writ of certiorari should be granted in order to allow full briefing on the issue.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of June, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
J. DERHAM COLE, CIRCUIT COURT JUDGE

RICKY BRANNON,

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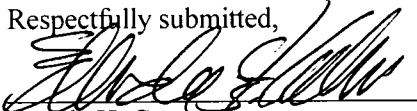
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ricky Brannon states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on April 6, 2010. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Ricky Brannon.

Respectfully submitted,



Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of June, 2011

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Certiorari to Cherokee County
J. Derham Cole, Circuit Court Judge

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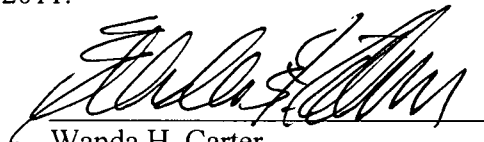
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CERTIFICATE OF SERVICE

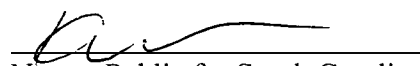
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Suzanne H. White, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ricky Brannon, #179051, at Broad River Correctional Institution this 6th day of June, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of June, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.