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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Daniel McLeod Coble, Circuit Court Judge

DAVID RAY BROWN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000058

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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STATEMENT

Petitioner was convicted of four counts of second degree criminal sexual conduct with a minor after a jury trial before the Honorable R. Knox McMahon from January 19 – 21, 2016.[1] App. 708 – 719. The minor identified petitioner as the individual she knew as "Justin Goodwin" with whom she had the sexual encounters. App. 105, l. 19 – 106, l. 18; 108, l. 2 – 110, l. 17. However, she originally identified "Justin" as being 16 to 18 years of age.[2] App. 279, ll. 20 – 25. She was also involved in several online text exchanges, both with "Justin" as well as other male individuals, that were sexual in nature.[3] App. 158, l. 9 – 162, l. 22; 170, l. 11 – 171, l. 24; 185, l. 14 – 186, l. 16. The state used the text messages between "Justin" and minor throughout trial, and connected petitioner to the phone number used by "Justin." App. 236, l. 25 – 237, l. 12.

Petitioner voluntarily sat in on an interview with law enforcement and voluntarily provided a DNA sample. App. 256, l. 24 – 257, l. 7. The DNA analysis from clothing provided by the victim did not yield a large enough sample for complete testing, the STR DNA profiling. App. 365, l. 11 – 366, l. 11. Instead, the state used the Y-typing test which only examines a portion of the Y chromosome aligned with males. App. 366, ll. 12 – 24. This test showed a mixture of two distinct male sources of DNA on one pair of the minor's underwear and a single male source on another pair. App. 370, ll. 3 – 10; 376, l. 18 – 377, l. 18. The major contributor of the two-source under garment "matched" petitioner's DNA sample. App. 370, l. 22 – 371, l. 12.

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[1] During trial, petitioner was represented by Benjamin Stitely with Rhonda Patterson and Shannon Davis appearing on behalf of the state. App. 1

[2] Petitioner was 43 years old on the day of his conviction. App. 716.

[3] The trial judge excluded almost all references to the text messages not associated with "Justin." App. 101, l. 19 – 102, l. 11.

The sole male source on the remaining pair also matched petitioner's DNA sample. App. 377, l. 18 – 378, l. 21.

While the state's expert tried to explain away the statistics, the percentage of match in this case was 1 in 240 people for the mixed sample and 1 in 210 people for the sole source sample. App. 376, l. 1 – 377, l. 24. This "match" was further damaged by the fact that any male relative of petitioner would have shown the same "match" and could have contributed the DNA sample on the minor's undergarments. App. 383, ll. 2 – 7.

Shortly after the jury began deliberations, it requested information concerning when petitioner had lost his cell phone. App. 449, l. 18 – 450, l. 7. This was the "Justin Goodwin" phone number that the minor had been texting both before and during the time of her sexual encounters. Petitioner had, during his voluntary police interview, explained that this phone had been lost prior to the interview, making it impossible for petitioner to have exchanged the text messages minor received from "Justin." App. 258, l. 22 – 259, l. 3. The testimony regarding the lost phone was read for the jury, who then deliberated for an additional five hours before reaching a verdict. App. 486, l. 4 – 487, l. 19. During the PCR hearing, trial counsel admitted to not investigating or presenting any evidence concerning petitioner's lost cell phone. App. 656, l. 22 – 657, l. 2.

ARGUMENT

The PCR court erred in finding counsel was effective when he admittedly failed to investigate and provide evidence regarding petitioner's lost cell phone, which the state argued petitioner used to send incriminating text messages to minor, and which the jury specifically inquired about during lengthy deliberations.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

A. How the issue impacted trial.

The state made extensive use of the numerous text messages exchanged between "Justin" who used a cell phone number ending in 3982 and minor during trial. App. 153, l. 13 – 165, l. 12. These text messages both plan and discuss sexual encounters between "Justin" and minor. App. 153, l. 13 – 165, l. 12. They included nude photographs of minor. App. 160, ll. 2 - 16. The state referenced these text messages, particularly those messages that included photographs, during closing argument. App. 409, l. 23 – 411, l. 21.

The state "connected" the 3982 number in the text messages to petitioner from an unrelated booking report of petitioner's mother that listed her phone number as ending in 8259 which also appeared on the call logs for the 3982 number. App. 242, l. 1 – 245, l. 5. However, the phone used to send the text messages was not recovered and petitioner related to investigators that, while the phone number was his number, he had lost the phone a month before and no longer had access to it. App. 247, ll. 7 - 15.

B. How the issue was raised at PCR.

At his PCR hearing, petitioner relayed how trial counsel ignored the issue about his lost cell phone despite his clear statements regarding same given to the officers during their investigation:

> Q On number five, failure to properly investigate. You're saying Mr. Stitely did not retain any type of an investigator to come speak with you about this case to your knowledge?
>
> A No, he didn't.
>
> Q Number six, let's talk about that. There was some mention on Mr. Stitely failing to advise you the importance of explaining details of a lost -- or when you lost your phone. Now, why is that important for this trial that took place?
>
> A Because I didn't have my phone.
>
> Q And did that issue come up with the jury?
>
> A Yes, sir.
>
> Q And what was –
>
> A That was the first question the jury come back and asked.
>
> Q They wanted to focus on the issue of when you lost the cell phone?
>
> A Yes, sir.

> Q And that's not something you had a conversation with Mr. Stitely about prior to trial?
>
> A That's right.
>
> Q And you felt that should have been explored and handled better by Mr. Stitely since it was important to the jury?
>
> A Yes, sir.

App. 637, l. 3 – 638, l. 2.

Trial counsel admitted the lost cell phone was not on his radar as he prepared for trial:

> Q The issue of the lost phone, that came back from the jury, so that means they were placing some importance on that issue, correct?
>
> A I suppose.
>
> Q And that's not something you got into with your client and discussed it?
>
> A No.

App. 661, ll. 12 – 18.

This admission by trial counsel is telling, due to the extended effort the state took to connect the cell phone number to petitioner and the emphasis the state placed on the text message exchanges. For trial counsel not to appreciate the importance of the cell phone in question being lost before the incriminating text exchanges were sent does not reflect a valid trial strategy.

C. How the PCR court ruled.

The PCR court ruled that the issue surrounding the lost cell phone was supported solely by petitioner's self-serving statement to investigators and counsel was not ineffective in failing to investigate the claim. App. 698 – 699. The PCR court also noted that the jury heard about the

lost cell phone twice and was provided this information and able to weigh it against the other evidence of guilt. App. 698 – 699.

D. How the PCR court erred.

Generally, this Court "will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." Thompson v. State, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018). Here, the PCR court's factual finding that trial counsel was effective when he admittedly failed to investigate the impact on the lost cell phone is not supported by the record. In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), this Court upheld the decision to grant a new trial when trial counsel failed to adequately investigate and challenge the state's gunshot residue. Contrary to the PCR court's holding, this Court in Catoe admonished trial counsel should "aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." Id., 372 S.C. at 332, 642 S.E.2d at 597 (quoting with approval the *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1020 (2003)).

Further guidance here can be found in Bagwell v. State, 410 S.C. 259, 266, 763 S.E.2d 630, 634 (Ct. App. 2014). Counsel in Bagwell failed to conduct DNA testing on blood evidence the state used to place Bagwell on the scene of the crime. The Court of Appeals noted that "[a]lthough this court must give heavy deference to trial counsel's decision not to investigate, we find trial counsel's decision to not seek DNA testing prior to trial was objectively unreasonable." Id. 410 S.C. at 266, 763 S.E.2d at 634.

Here, trial counsel made no investigation despite having petitioner's statements that he had lost the cell phone used to communicate with the minor before his police interview. Trial

counsel should have investigated the timing of the lost cell phone since it would have countered the state's assertions that petitioner was texting and using coercion to setup sexual encounters with minor. The PCR court's criticism of the lack of additional testimony at trial other than petitioner's own statements speaks volumes about trial counsel's failure to investigate this area. App. 698-99. As noted by the PCR court, the jury heard "no evidence" regarding the details of the lost cell phone other than petitioner's "self-serving" testimony. App. 699. The reason this was the only evidence available to the jury was trial counsel's admitted failure to understand the importance of the lost cell phone and properly investigated.

"Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Gilchrist v. State, 350 S.C. 221, 226–27, 565 S.E.2d 281, 284 (2002). However, "strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting* Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)); *see also* Weldon v. State, 436 S.C. 69, 82, 870 S.E.2d 183, 190 (Ct. App. 2021) (finding "no evidence supports the PCR court's findings that trial counsel provided effective assistance or implemented—much less articulated—any valid trial strategy with respect to the alibi witnesses.").

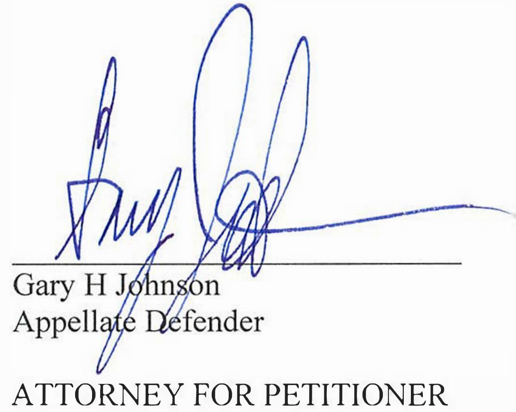
Trial counsel's performance was deficient because it fell below an objective standard of reasonableness in failing to investigate the impact of the lost cell phone used to connect petitioner to communications with minor. *See* Strickland v. Washington, 466 U.S. 668 (1984); Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011).

E. Prejudice.

This case does not involve overwhelming evidence of guilt. Moreover, "[w]hen potentially strong evidence . . . is tainted by a significant error of counsel, it should not be considered as part of 'overwhelming evidence' that precludes a finding of prejudice." Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 846 (2018). The minor's description of "Justin" did not match petitioner. App. 279, ll. 20 – 25. The DNA evidence was far from conclusive, as any male relative of petitioner would have shown the same match percentage, including his male relatives who were of similar age to minor's description of "Justin." App. 376, l. 1 – 377, l. 24; 383, ll. 2 – 7. The jury deliberations started at 12:01 p.m. and it did not reach a verdict until 6:32 p.m. App. 449, ll. 3 – 20; 487, ll. 4 – 17. The jury asked a single question, regarding the timing of petitioner's lost cell phone, an area tainted by trial counsel's failure to investigate. App. 449, l. 25 – 450, l. 19.

CONCLUSION

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



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2024.

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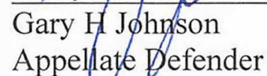
PETITION TO BE RELIEVED AS COUNSEL

Counsel for David Ray Brown 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 Daniel McLeod Coble, which was held on October 24, 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 David Ray Brown.

Respectfully Submitted,



Gary H Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of September, 2024.

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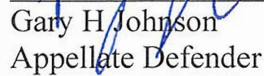
CERTIFICATE OF COUNSEL

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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Appellate Defender

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This 25th day of September, 2024.