

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Mar 20 2025

S.C. SUPREME COURT

Certiorari to Dorchester County

Honorable George M. McFaddin, Circuit Court Judge

SAMUEL JOLLY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000949

JOHNSON PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX i

ISSUE PRESENTED 1

STATEMENT 2

ARGUMENT

The PCR court erred in denying petitioner’s application because
appellate counsel was ineffective for failing to brief the trial
judge’s refusal to exclude evidence of flight. 3

CONCLUSION 9

PETITION TO BE RELIEVED AS COUNSEL 10

ISSUE PRESENTED

Did the PCR court err in denying petitioner's application because appellate counsel was ineffective for failing to brief the trial judge's refusal to exclude evidence of flight?

STATEMENT

In December 2013 and February 2014, petitioner was indicted in Dorchester County for first-degree criminal sexual conduct with a minor and lewd act upon a child. App. 584-88. On February 12, 2018, petitioner was tried before the Honorable Edgar W. Dickson and a jury. App. 1. Ryan D. Templeton and Michael T. Spears represented the State. App. 1. Michelle R. Williams and John Kornegay represented petitioner. App. 1. The jury convicted petitioner. App. 330. Judge Dickson sentenced petitioner to concurrent terms of thirty years' imprisonment for CSC and fifteen years' imprisonment for lewd act. App. 330.

On appeal, petitioner was represented by Lara M. Caudy. App. 343. Joshua A. Edwards represented the State. On October 15, 2020, a panel of the Court of Appeals consisting of Judges Thomas, Hill, and Hewitt heard oral argument. App. 430. On December 2, 2020, the Court affirmed petitioner's convictions. App. 430.

On May 14, 2021, petitioner filed his PCR application. App. 437. On September 6, 2023, a hearing was held before the Honorable George M. McFaddin, Jr. App. 481. Ashley B. Cornwell represented petitioner. App. 481. Bryan T. Hall and Danielle Dixon represented the State. App. 481. On May 6, 2024, Judge McFaddin denied petitioner's application. App. 566. This petition follows.

ARGUMENT

The PCR court erred in denying petitioner's application because appellate counsel was ineffective for failing to brief the trial judge's refusal to exclude evidence of flight.

The PCR court mistakenly credited appellate counsel with a reasonable strategy for not raising the winning issue of inadmissible flight evidence. App. 580. Had the court analyzed the merits of the flight evidence issue, it would have reached the opposite conclusion. Appellate counsel cannot have a strategic reason for omitting a winning issue from a brief.

The sexual abuse allegations against petitioner first came about in 1997. App. 485. The complainant was his stepdaughter. App. 486. The CSC indictment alleged a one-year time frame for the assault from August 1, 1997, to August 22, 1997. App. 585.

Complainant testified she was in fifth grade when the abuse occurred. App. 143. She claimed petitioner felt her breasts when she began puberty. App. 144. The abuse progressed to digital penetration of her vagina. App. 148-49. After her mother and grandmother did nothing about her claims, she told her gym teacher. App. 153-54. The teacher reported the allegations to DSS and the agency began an investigation. App. 154.

Petitioner denied abusing complainant. App. 277. The first petitioner heard of the allegations was when DSS interviewed him. App. 270. He initially thought DSS was there because he spanked complainant. App. 270-72. DSS asked him if he touched complainant's vagina and he said he did not remember. App. 272-73. Petitioner testified that he gave this seemingly incriminating answer because he was confused and thought the contact might have inadvertently happened during normal bathing or dressing activities. App. 272-73.

DSS told petitioner he needed to leave the house. App. 273-74. He first stayed with a friend then moved to Florida. App. 274. A large portion of petitioner's family lived in Florida.

App. 265. Petitioner worked multiple jobs in Florida and never changed his name. App. 274-75. He thought the social workers would help repair the family with counseling and had no idea a warrant for his arrest had been issued. App. 274-75. Petitioner was not arrested until 2013. App. 276. Petitioner denied moving to Florida because he was guilty. App. 277.

Before trial, defense counsel moved to exclude evidence of flight. App. 46. The trial court asked if the solicitors had any testimony that petitioner left the state because of the allegations. App. 46. The solicitor said he would present the testimony of a detective and of complainant's mother (petitioner's wife). App. 46-48. The trial judge stated he had "concerns" about the flight evidence and wanted to take testimony on the issue. App. 48. Defense counsel told the judge that petitioner had been told to leave the house by DSS and that he was never told an arrest warrant had been issued. App. 49-51.

The next day, the court heard testimony from former DSS worker Yvonnia Brown on the admissibility of petitioner's statements. App. 85. Brown said she interviewed petitioner at his home after the allegations were reported. App. 86-87. Judge Dickson ruled petitioner's statements to Brown were admissible. App. 93. The solicitor then advised the court he had two witnesses regarding the flight evidence. App. 93.

The State called Rebecca Jolly, complainant's mother and petitioner's wife. App. 96. She remembered DSS telling petitioner he needed to leave the home. App. 97. She testified on direct-examination that after he left, she met Jolly in Georgia. App. 98. She claimed they discussed the imminent issuance of an arrest warrant for him by the police. App. 98. According to her, petitioner knew the police were looking for him. App. 98. But on cross-examination, she admitted that during the hearing was the first time she told anyone that she had contact with petitioner and that he knew he was wanted by the police. App. 101. She did not know whether

an arrest warrant had been issued when she met petitioner in Georgia. App. 100. She did know she had not seen one. App. 100. Judge Dickson then questioned Ms. Jolly on the timing of the Georgia meeting and whether a warrant had been issued, but she could not remember. App. 103-05.

The State next called Officer Tom Marshall. App. 105. Officer Marshall's testimony was speculative and vague on the flight issue. He went to petitioner's brother's workplace and asked if he had contact with petitioner. App. 106. The officer said, "Eventually there was some contact made, after I talked to him, and then I told him that **if that was him**, you know, to go ahead and let me talk to him." App. 106 (emphasis added). "But he stayed over there and talked to his brother and then after that he left and I left." App. 106.

Judge Dickson then tried to clear up the vague answer about what happened at the brother's workplace. App. 109. The court asked Officer Marshall directly if while he was at the workplace whether petitioner's brother got in touch with petitioner. App. 109. Officer Marshall replied, "As far as I know, no." App. 109. Officer Marshall then responded to the judge that he had no independent recollection of any family member, friend, or other person contacting petitioner and trying to get him to report to the authorities. App. 110. In response to defense counsel's questions, Officer Marshall confirmed he did not know whether petitioner's brother actually spoke to him and that Rebecca Jolly never told him about the Georgia meeting. App. 112.

After Officer Marshall's testimony failed to establish any knowledge on petitioner's part that he was wanted, the solicitor then told the court, "I think we need to call Yvonnia Brown back to the stand. . . ." App. 113. Brown testified from her "work activity notes." App. 113-14. Her notes stated she advised petitioner of his right to counsel. App. 114. Her notes said

petitioner responded that he had already spoken with an attorney and was advised to cooperate with DSS. App. 114. Her notes then stated that she told petitioner the case “will be transferred to the Sheriff’s Department.” App. 114.

Defense counsel argued the State had not met its burden of showing petitioner knew he was being sought by the police and a nexus existed between petitioner’s departure to Florida, where he had family, and the offense charged. App. 117-22. She cited State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006). App. 118-19. Defense counsel argued that none of the testimony showed that an arrest warrant had been issued at the time of any of the State’s witnesses supposed contacts with petitioner. App. 118-19. Petitioner never changed his name. App. 122. The State’s reply largely centered on the DSS worker’s statement that the matter was being forwarded to the police. App. 119-21.

Judge Dickson ruled the flight evidence was admissible. App. 126-27. “To me the nexus is whether or not he was aware of his wrongdoing. And he was aware of his wrongdoing.” App. 127. The solicitor told the jury during opening statements, “Now you are also going to hear that Samuel Jolly knew he was being investigated for these acts and that he left.” App. 139. The State did not call Rebecca Jolly as a witness during the trial so her testimony about petitioner’s knowledge only came from the pretrial hearing.

Appellate counsel raised four issues on appeal, but did not raise the flight issue. App. 348-49. At the PCR hearing, appellate counsel conceded that the issue had some merit and was not wholly frivolous. App. 534-35. She cited Rebecca Jolly’s testimony about the Georgia meeting and the DSS worker’s testimony as reasons she did not raise the issue. App. 535. She also testified that raising the flight issue would have detracted from the issues she raised, which largely dealt with evidence being lost or destroyed. App. 536. In her view, raising the flight

issue would have undercut these issues as highlighting petitioner's supposed responsibility for the missing evidence. App. 536. PCR counsel argued extensively at the hearing's conclusion that the flight issue would have been successful because no one told petitioner a warrant had been issued. App. 554-56.

The PCR court denied relief on this ground. App. 580. It did not analyze the speculative and equivocal facts regarding flight. App. 580. It did not state the legal test for admission of flight evidence. App. 580. It cited no cases regarding admissibility of flight evidence. App. 580. The court only credited appellate counsel with a strategy of not undermining the other issues she raised. App. 580.

The PCR court erred in its analysis by crediting appellate counsel with a strategic reason without first analyzing whether the flight issue would have prevailed on appeal. Ineffective assistance of appellate counsel logically devolves into an appeal within the PCR. The PCR judge must determine whether the issue would have resulted in reversal. If so, then any asserted strategy by appellate counsel is invalid. "Surely, appellate could have no strategic reason for not raising a ruling that presumably would lead to a new trial for his client." State v. O'Neil, 99 A.3d 814, 824 (N.J. 2014). "Although informed strategic choices made by counsel will rarely be subject to challenge, no deference must be paid to a choice made in disregard of standing precedent." Id. (internal quotations and citations omitted).

As trial and PCR counsel argued, the evidence of flight must have a nexus to the charged offense. State v. Robinson, 360 S.C. 187, 195, 600 S.E.2d 100, 104 (Ct. App. 2004). "The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." Pagan at 209, 631 S.E.2d at 266. The defendant must be aware of the investigation.

United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir. 1981). “The inference that one who flees from the law is motivated by consciousness of guilt is weak at best, and . . . the strength of the inference is further attenuated when the defendant has not actively sought to avoid capture.” United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976). In Foutz, the Fourth Circuit held mere failure to surrender was not equivalent to actual flight. Id.

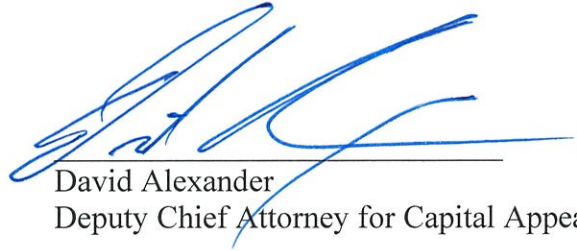
In the recent case of State v. Middleton, 441 S.C. 55, 893 S.E.2d 279 (2023), the Court dealt with a defendant’s “evasive conduct.” “In this case, Middleton’s failure to show up for voluntary interview appointments and his delay in giving a statement to the detective were primarily inaction.” Middleton at 63-64, 893 S.E.2d at 283. Courts must “consider precisely how a particular piece of evidence might show a defendant’s consciousness of guilt.” Id. The chain of inferences showing a guilty conscience must be analyzed. Id. Critically for this case, after examining the weak inferential chain, the Middleton Court stated, “[W]e see a significant difference between a suspect/defendant actively fleeing from authorities **with knowledge of an arrest warrant or indictment** for what was clearly a crime . . . and this case.” Id. at 64, 893 S.E.2d at 284 (emphasis added). Middleton seems to say that awareness of an investigation is insufficient and the State must prove flight after a defendant’s knowledge of the issuance of a warrant or an indictment.

The State failed to meet its burden of proving petitioner had knowledge of an arrest warrant. The DSS worker only told him she was referring the case to the police. His wife did not know if an arrest warrant had been issued when she talked to petitioner in Georgia, but was sure she had not seen one. Officer Marshall’s testimony about talking to petitioner’s brother fell apart under questioning from the trial judge and defense counsel.

Petitioner also had good reasons for moving to Florida. DSS told him to leave the house. He had family in Florida. He found a job there. He did not change his name or attempt to hide. The State presented no evidence he knew about the arrest warrant after it was issued. The State failed to show the required nexus between an issued arrest warrant and petitioner's relocation to Florida. Had appellate counsel raised this issue on appeal, petitioner's convictions would have been reversed. Petitioner showed deficient performance, prejudice, and a deprivation of his Sixth Amendment right to counsel. Strickland v. Washington, 466 U.S. 669 (1984). This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, reverse petitioner's convictions, and remand for a new trial.



David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR PETITIONER

This 20th day of March, 2025.

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—————
PETITION TO BE RELIEVED AS COUNSEL
—————

Counsel for Samuel Jolly 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 George M. McFaddin, which was held on September 6, 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 Samuel Jolly.

Respectfully Submitted,



—————
David Alexander
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR PETITIONER

This 20th day of March, 2025.

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CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

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 20th day of March, 2025.