RECEIVED

Jun 27 2025

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable George M. McFaddin, Circuit Court Judge

JOSHUA WILLIAM PORCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000058

JOHNSON PETITION FOR WRIT OF CERTIORARI

Lara M. Caudy
Senior 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

INDEX

ISSUE PRESENTED

Did the post-conviction relief court err by finding trial counsel's failure to review the video of Petitioner's recorded statement to law enforcement, which was admitted as State's Exhibit No. 50, before it was published to the jury did not prejudice Petitioner, where the video contained a discussion about Petitioner's prior drug use, since the clearly inadmissible evidence was unfairly prejudicial and there is a reasonable probability the outcome of Petitioner's trial would have been different if trial counsel had properly moved to redact the video *before* it was published to the jury?

STATEMENT OF THE CASE

During the early morning hours of May 14, 2006, Nakia Mallory was killed in the apartment she shared with her husband and children. App. 242, ll. 11-25. The Richland County Sheriff's Department initially charged her husband, Justin Mallory, with murder after he found her body and admitted he was having an affair with another woman. App. 258, l. 11 – 259, l. 11. Mallory's first trial ended in a mistrial after the jury could not reach a unanimous verdict. Mallory subsequently opted for a bench trial and was acquitted by the Honorable Thomas Cooper. App. 278, l. 8 – 279, l. 6.

During each of Mallory's trials, Petitioner testified for the state as an eyewitness to the murder. Petitioner testified that he witnessed an altercation between the decedent and Mallory. Petitioner saw Mallory strike the decedent with a weapon, causing her to bleed. Petitioner intervened in the altercation and was injured, leaving his own blood at the scene. App. 1632, l. 14 – 1640, l. 2.

Following the state's failure to obtain a conviction during its prosecution of Mallory, the Richland County Sheriff's Department focused its attention on Petitioner. On July 7, 2009, law enforcement obtained a warrant for Petitioner's arrest for murder. The following day, Sergeant Shawn McDaniels and Sergeant Brian Godfrey travelled to California, where Petitioner was living, and placed him under arrest. McDaniels and Godfrey interrogated Petitioner for several hours during the early morning hours of July 9, 2009. During this interrogation, Petitioner provided a statement implicating himself in the decedent's death but maintained it was an accident. App. 1172, l. 15 – 1200, l. 13.

McDaniels and Godfrey interrogated Petitioner again later that same day. During this second interrogation, Petitioner added details consistent with the evidence collected by law

enforcement. The following day, July 10, 2009, investigators interrogated Petitioner for a third time. This third interrogation was audio and video recorded, unlike the previous two interrogations. During the first six hours of this third interrogation, Roberta Cohen, an investigator with the Los Angeles County Sheriff's Department, questioned Petitioner and administered a polygraph. McDaniels and Godfrey then took over the interrogation. App. 1201, l. 1 – 1222, l. 14; App. 286, l. 3 – 288, l. 14.

The state subpoenaed Cohen to testify during Petitioner's trial. However, Cohen successfully moved to quash the subpoena in California and did not appear at trial. Consequently, the state admitted into evidence only the portion of Petitioner's third interrogation involving McDaniels and Godfrey, which was just over an hour long. App. 287, l. 16 – 290, l. 3. The recorded interview was admitted during trial as State's Exhibit No. 50 over Petitioner's objection.[1] App. 1219, l. 9 – 1222, l. 9.

After the exhibit was published to the jury, trial counsel moved for a mistrial because part of the recorded interrogation in which Petitioner discussed his prior drug use was played for the jury. Counsel stated, "At the end right there in the last minute or two, Investigator Godfrey was asking Mr. Porch [Petitioner] about drug use and using drugs and he's talking about that and whether he did hard drugs, whether Justin [Mallory] led him to that. That – that part wasn't – I mean, I don't think I have ever seen. My law clerk was just saying that wasn't part of our tape. That is unacceptable. That's impermissible." Citing to State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992), trial counsel argued the admission of a defendant's drug use when such drug use is "not an issue in the crime itself" is reversible error. App. 1225, l. 4 – 1226, l. 9.

[1] Petitioner extensively argued during a pretrial Jackson v. Denno, 378 U.S. 368 (1964) hearing that his various statements were not freely and voluntarily given and should be excluded. However, the trial judge ruled Petitioner's statements were admissible.

The assistant attorney general maintained "the full video was turned over to defense counsel" and he asked defense counsel "to review it" to "make sure there wasn't any objection to any of the material in there." He further asserted, "I also leaned over to defense counsel during the playing of the video saying that I would like to stop it early, because there is a great portion at the end, as you can tell, Your Honor, that wasn't really talking about any more additional admissions. He [defense counsel] again stated at that point he wanted to play it [the video] all [the way] through." Finally, the attorney general asserted, "The State didn't seek to introduce this evidence to prejudice the defendant. I'm not going to plan on arguing anything about drug use in closing . . . I don't believe it's that prejudicial to the defense to require a mistrial at this time." App. 1226, l. 11 – 1227, l. 7.

Defense counsel acknowledged that the assistant attorney general did ask about thirty minutes into playing the video before the jury about "whether we should stop it." However, counsel did want the jury to see the entire video because "from the defense perspective" "this is a false confession case." Trial counsel wanted the jury "to sit through at least over an hour of that type of persuasiveness and interrogation, which is only a fraction of what Mr. Porch [Petitioner] actually experienced over the course of three days." App. 1227, ll. 8-18.

Counsel explained that there were two separate videos of Petitioner's third interrogation, each from a different camera angle. Perhaps counsel had the angle not played for the jury transcribed, which is why counsel was not aware of the discussion about Petitioner's prior drug use. However, trial counsel asserted, "The fact is that the jury is aware of it now, this drug use comment, and it is reversible error. It's completely prejudicial." Consequently, counsel argued a mistrial was warranted. App. 1227, l. 18 – 1228, l. 3.

The trial judge maintained that she could not understand what Petitioner said in the video, but stated she would review the recording and read State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992), and then rule on Petitioner's motion for a mistrial. App. 1228, ll. 4-18.

The following morning, the trial judge denied Petitioner's motion for a mistrial. The judge stated, "What I found on the video that I looked at was that at one hour, eleven minutes and forty-five seconds the question came up had he [Petitioner] ever tried drugs, and there was a conversation for about another minute, maybe two minutes, in which he [Petitioner] stated that he had tried drugs, that Justin [Mallory] was not the one who introduced him to the drugs. He started using drugs in the ninth grade when he was seventeen. He would use it once or twice a day. Then - - once or twice in a while. Then it - - it sounded like 'when we moved to Canada' he used it every day. It might have been Columbia. I couldn't tell. He used every day. The he stopped when he met his wife, his wife was against drug use, and so he definitely had stopped at that particular point." App. 1244, ll. 2-23.

The judge determined the remarks about drug use were admitted "accidentally" or "inadvertently." She emphasized that the videos of Petitioner's interrogation were available to trial counsel, but no objection was made before the video was published to the jury. Finally, the judge ruled that because the evidence concerning drug use was "not being used in the same manner in which the evidence of cocaine use [was] used" in Smith, the motion for a mistrial was denied. App. 1245, ll. 2-11.

Trial counsel admitted the admission of the remarks was "a mistake" and his "fault." He asserted, "I own up to it and it might be an issue down the road against me." Either way, counsel argued the evidence of Petitioner's prior drug use was prejudicial, particularly when Petitioner's "credibility is on the line." App. 1245, ll. 17-23. He requested State's Exhibit No. 50 be redacted

to remove the discussion concerning Petitioner's prior drug use to prevent the jury from hearing it again during its deliberation. The judge granted this request. App. 1246, l. 23 – 1247, l. 15.

A Richland County grand jury indicted Petitioner on June 16, 2011, for murder. App. 2506-2507. Pretrial hearings were heard before the Honorable Alison Lee on October 14, 2013, and November 13, 2013. Petitioner's case was called to trial on November 18, 2013, before Judge Lee, and a jury. Assistant Attorneys General Curtis Pauling, Cary Goings, and Joshua Underwood represented the state. Luke Shealey, Brian Shealey, and Arthur Aiken represented Petitioner. App. 116. On November 25, 2013, the jury found Petitioner guilty as indicted. App. 1924, ll. 15-23. He was sentenced to fifty years' imprisonment. App. 1951, ll. 7-8.

On August 3, 2016, after briefing and oral argument, the Court of Appeals affirmed Petitioner's conviction and sentence. State v. Porch, 417 S.C. 619, 790 S.E.2d 440 (Ct. App. 2016); App. 2043-2051. By order filed September 20, 2016, the Court of Appeals denied Petitioner's petition for rehearing. On October 20, 2016, Petitioner filed a petition for writ of certiorari with the Supreme Court. App. 2061-2080. The state filed a return to this petition on November 21, 2016. App. 2081-2109. Petitioner filed a reply on December 1, 2016. App. 2110-2118. By order filed August 22, 2017, the Supreme Court granted certiorari. App. 2119. However, after briefing and oral argument, the Court dismissed the petition for writ of certiorari as improvidently granted. App. 2235-2236.

On August 3, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 2238-2245. The state filed a return to this application on November 8, 2018. App. 2246-2252. With the assistance of counsel, Petitioner filed an amended application on March 21, 2022, raising the claim argued in this petition. App. 2256-2262. An evidentiary hearing was convened on May 27, 2022, before the Honorable George M. McFaddin, Jr. App. 2263. Assistant

Attorney General David Spencer represented the state. Ola Johnson represented Petitioner. App. 2263.

Luke Shealey, Petitioner's trial counsel, testified that he was "very surprised" when the discussion about Petitioner's prior drug use on State's Exhibit No. 50 was published to the jury. He said, "[O]nce it came in, it was damaging. It was clearly prejudicial." Accordingly, Shealey moved for a mistrial, but it was denied. App. 2322, l. 24 – 2325, l. 24. However, Shealey admitted he did not review the exhibit before it was published to the jury. He maintained he trusted the prosecutor "a little too much." App. 2345, ll. 3-18.

Brian Shealey, who also represented Petitioner at trial, testified that the defense was "extremely upset when" the discussion about Petitioner's prior drug use was published to the jury. He admitted that he and the other defense attorneys could have reviewed the video admitted as State's Exhibit No. 50 before it was published to the jury, but they did not. He maintained that the defense "had a lot of trust" in the prosecutor. App. 2379, l. 19 – 2380, l. 9.

By order filed December 19, 2024, the PCR court denied Petitioner relief. App. 2401-2505. The court found trial counsel was deficient for failing to review the recording of Petitioner's interview with law enforcement, which was admitted as State's Exhibit No. 50, to ensure Petitioner's statements concerning his prior drug use were properly redacted before the exhibit was published to the jury. App. 2483. However, the PCR court concluded Petitioner was not prejudiced by counsel's deficient performance because the outcome of Petitioner's trial would not have been different if trial counsel had properly ensured the inadmissible evidence was not published to the jury. App. 2484.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to ensure the video of Petitioner's recorded

interrogation by law enforcement was properly redacted to remove the inadmissible discussion about Petitioner's prior drug use, and since Petitioner was prejudiced by this extremely damaging evidence, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief court erred by finding trial counsel's failure to review the video of Petitioner's recorded statement to law enforcement, which was admitted as State's Exhibit No. 50, before it was published to the jury did not prejudice Petitioner, where the video contained a discussion about Petitioner's prior drug use, since the clearly inadmissible evidence was unfairly prejudicial and there is a reasonable probability the outcome of Petitioner's trial would have been different if trial counsel had properly moved to redact the video *before* it was published to the jury.

The parties had an extensive pretrial Jackson v. Denno, 378 U.S. 368 (1964) hearing where Petitioner argued his various statements to law enforcement were not freely and voluntarily given and should be excluded. However, the trial judge ultimately found Petitioner's statements were admissible. Despite this extensive hearing, trial counsel failed to review the video of Petitioner's third interview with law enforcement in California, which was admitted as State's Exhibit No. 50, before the video was published to the jury. As a result of trial counsel's failure to properly review the evidence, the jury heard a discussion between Petitioner and one of the investigators about Petitioner's prior drug use. This evidence was clearly inadmissible and extremely prejudicial.

While trial counsel moved for a mistrial after the jury heard this improper character evidence, the damage was done. The PCR court erred by finding trial counsel's deficient performance did not prejudice Petitioner. Petitioner's defense at trial was that he falsely confessed because his will was overborne by law enforcement. Consequently, his credibility was crucial to his defense. There is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had properly moved to redact this inadmissible evidence before the video was

published to the jury. The trial judge would have granted counsel's request as she did after the jury already heard the damaging evidence.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

The PCR court correctly found trial counsel was ineffective for failing to review the video of Petitioner's recorded statement to law enforcement, which was admitted as State's Exhibit No. 50, *before* it was published to the jury. Because of counsel's deficient performance, the jury heard the discussion Petitioner had with an investigator in which Petitioner admits to prior drug use.

Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had moved to redact the video before it was published. Petitioner's defense was that he falsely confessed. Consequently, his credibility was crucial. The evidence of Petitioner's prior drug use, which is

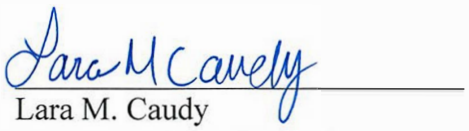
undeniably inadmissible character evidence and was in no way relevant to the case, was extremely prejudicial and damaged Petitioner's credibility before the jury. It is evident from the record that the trial judge would have granted trial counsel's request, if one was made, to redact the video before it was published as the judge did after the jury already heard the damaging evidence.

Respectfully, because of counsel's deficient performance and the resulting prejudice, this Court should reverse Petitioner's conviction and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2025.

RECEIVED
Jun 27 2025
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable George M. McFaddin, Circuit Court Judge

JOSHUA WILLIAM PORCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua W. Porch states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Petitioner.

2. She has reviewed the record of Petitioner's post-conviction relief hearing, which was held on May 27, 2022, before the Honorable George M. McFaddin, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She 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 her as counsel for Joshua W. Porch.

Respectfully Submitted,

Lara M. Caudy

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2025.

RECEIVED

Jun 27 2025

S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."

Lara M. Caudy
Senior 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

This 27th day of June, 2025.