

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Appeal from Richland County

JUN 04 2014

J. Ernest Kinard, Jr. Cir. Ct. Judge

S.C. SUPREME COURT

Willie Gilmore

Petitioner

vs.

State of South Carolina

Respondent

Case No. # 2013 - 002383

PETITIONER'S PRO-SE BRIEF

Willie A. Gilmore  
#281735/MC C.I./F.4.238  
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Appellate Defender for Petitioner  
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# INDEX

INDEX \_\_\_\_\_ 1

ISSUE PRESENTED \_\_\_\_\_ 3

STATEMENT \_\_\_\_\_ 4

ARGUMENT \_\_\_\_\_ 5 - 12

CONCLUSION \_\_\_\_\_ 12

## TABLE OF CASES

U.S. v Stevens 129 F3d 1261 (4th cir 97) — 6, 12

Strickland v Washington 104 S.Ct. 2052 — 11

U.S. Const. 1<sup>st</sup> / 6<sup>th</sup> and 14<sup>th</sup>, 5<sup>th</sup> — 11

S.C. Const. 1<sup>st</sup> / 6<sup>th</sup> and 14<sup>th</sup>, 5<sup>th</sup> — 11

ISSUE PRESENTED

Whether the PCR court erred in finding that counsel was not ineffective in failing to adequately advise petitioner of his right to testify in his own behalf

## STATEMENT

For the record of this brief, the petitioner argues and agrees with his Appellate Defender's statement upon his Johnson petition.

# ARGUMENT

THE PCR COURT ERRORED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE IN FAILING TO ADEQUATELY ADVISE PETITIONER OF HIS RIGHT TO TESTIFY IN HIS OWN BEHALF

In this case, petitioner testified at the evidentiary hearing that he told defense attorney Megan Lee that he wanted to testify<sup>(1)</sup> SEE: App.p 488 L14 - L22. Ms. Lee told petitioner not to testify because she

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(1)

Ms. Lee was not available to testify at the hearing. Since petitioner's trial, Ms. Megan Lee relocated overseas to England and has refused to response to several attempts by the State viz e-mail viz an address Ms. Lee had previously corresponded to SEE App.p 532  
Nor was anything in Ms. Lee files, to say she

Was concerned about petitioner's prior conviction for burglary in the second degree coming out if he took the stand to testify SEE: App.p 488 L18 - L20; App.p 496 L12 - App.p 497 - L11 Also see App.p 347 L8 - App.p 352 - L18; App.p 207 L22 - App.p 216 - L8.

Petitioner further testified that Mr. Lee never specifically ask him if he wanted to testify. Or told him that it was his decision alone to make SEE: App.p 497 L12 - L17; App.p 488 L23 - L24  
Also see App.p. 364 L3 - L6  
SEE: U.S. v Stevens 129 F3d 1261 (4th Cir 1997).

Mary LaFave testified that she was co -

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had advised petitioner of his right to testify SEE: state's motion for leave to conduct discover and the Judge signed consent order.

counsel on petitioner's case, she testified that she did not talk to petitioner about his right to testify. She did, however, talk to petitioner about testifying and petitioner did express an interest in testifying. But she was not present with Ms. Lee during a discussion about petitioner's right to testify and advice on those rights, so she was not sure if that happened SEE: App.p 504 L6 - L18

Judge Kinard, Sr - the PCR Judge noted that he could not believe the trial Judge - Judge Childs did not go into petitioner's right to testify with him. And the State admitted that was very unusual to not see that on the record SEE: Appp 516 L14 - L21

Judge Kinard goes on to note, that the majority of defense counsel never want the

Defendant to testify, in his experience. They testify over his objection and against his advice whether they have a record or not SEE:

App-p 518 L12 - L16:

But it would be helpful if we had Ms. Lee's testimony, but we don't have it.

Judge Kinard goes on to note Obviously that..... was a concern and a trial strategy.

Although, PCR counsel Mr. Schaefer argued, that there was no trial strategy argued about his lack of testimony SEE: App-p

518 L19 - App-p 520 - L. 5 Moreover,

In the order of dismissal, the PCR Judge ruled, that Applicant, "petitioner," proffered the testimony that he would have allegedly given at trial had he taken the stand to testify..... that the sexual encounter

with the victim was consensual. And,  
it was the victim who initiated the physical contact with him after the two shared several drinks at his home. Applicant stated he never had a knife during the incident and that the victim's testimony was simply not true  
SEE: App.p 532 Also see App.p 490 L10 -  
App.p 495 - L25

The court goes on to rule, that based on a thorough review of the record, the relevant law and the testimony presented at the PCR hearing, this court finds Applicant has failed to prove counsel was ineffective in this regard. Having heard the testimony Applicant would have presented to the jury had he taken the stand in his defense, this court can find no reasonable probability that the outcome of the case would have been different had Applicant testified. Applicant's testimony, including his rendition of the how the incident occurred, is wholly not credible

and would have done nothing to persuade the jury to find him not guilty of the charges. Applicant's demeanor, delivery and substantive testimony firmly convince this court that Applicant would have only further damaged his chances of acquittal had he taken the stand before the jury SEE: App-p 533.

Here, petitioner argues that, would have been an jury issue, where there is a reasonable probability that the outcome of his case would have been different had he testified: none consensual vs. consensual; CSP 3rd or ABHAN - (lesser included offenses) as petitioner testified SEE: App 498 L1-L5 which was surely prejudicial SEE: Ex. 1.

Moreover, as the PCR Judge noted, that Judge, Chids never advised petitioner's of

his Constitutional rights to testify SEE:  
App. 516 L14 - L21 Also see App. 364  
L2 - L8 Thus, killing any beyond  
a reasonable doubt instructions in favor  
of any lesser included offense(s). When he  
did not testify thus, there was no evidence  
in the record to support any lesser included  
offense(s) SEE: Strickland v Washington 104  
S.Ct. 2052 ~~here~~, petitioner has clearly  
shown prejudice resulting from him not  
being adequately advised of his right to  
testify in his own behalf, a violation of  
his 1<sup>st</sup> and 14<sup>th</sup> Amend. to the U.S.  
and S.C. Const., as well as the 6<sup>th</sup> and 5<sup>th</sup>  
Amend. And, based on the testimony,  
that was presented at petitioner's P.C.R  
hearing and a review of his trial trans-  
cript, there was no evidence petitioner  
was advised about his rights to testify

When petitioner expressed an interest to testify and was never told that it was his decision to make SEE: U.S. v Stevens 129 F3d 1261 (4th cir 1997)

Moreover, Ms. Lee told him he couldn't thus, this is not a knowing or intelligent waiver. Furthermore, Ms. Lee was not at this hearing to argue any alleged (valid reasons) / certain strategy, as to why she did not adequately advise petitioner of his right to testify in his own behalf.

### CONCLUSION

Based on the foregoing arguments counsel's motion to be relieve as petitioner's counsel should be denied. Which counsel should be ordered to fully brief his (issues) and or petitioner's arguments. Where petitioner's writ should be granted and his conviction should be reversed.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Richland County  
J. Ernest Kinard, Jr. Cir. Ct. Judge

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Willie A. Gilmore

Petitioner

vs

State of South Carolina

Respondent

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Case No<sup>#</sup> 2013 - 002383

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DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL

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- Petitioner proposes the following be included in the record on appeal
- (1) The Court of Appeals ruling Ex 1, and cover letter amended PCR 2/7/12
  - (2) Motion to re-open the record of PCR hearing & motion for leave to conduct discovery - <sup>#</sup>4 pages
  - (3) Consent order granting discovery & to hold in abeyance - <sup>#</sup>3 pg's

I certify that this designation contains no matter which is irrelevant to his appeal.

Willie Gilmore

STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 )  
 Willie Gilmore, #281735, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTH JUDICIAL CIRCUIT

2012-CP-40-0599

**MOTION TO RE-OPEN THE RECORD  
 OF PCR HEARING AND MOTION FOR  
 LEAVE TO CONDUCT DISCOVERY**

FILED  
 RICHLAND COUNTY  
 OCT 19 AM 11:04  
 JACQUETTE W. McBRIDE  
 C.P. & G.S.

The Respondent, State of South Carolina, respectfully requests this Court reopen the record from the Thursday, September 13, 2012, post-conviction relief hearing of Willie Gilmore to allow the State to conduct limited discovery and submit any relevant items uncovered to the record of the proceeding. Additionally, due to the unique procedural and factual nature of this matter, Respondent also requests this Court grant leave to conduct limited discovery pursuant to S.C. Code § 17-27- 150.

At the September 2012 evidentiary hearing, Applicant was present and testified on his own behalf. Also testifying was Applicant's former trial co-counsel, Mary LaFave, Esquire. Lead trial counsel, Megan Lee, Esquire, former Fifth Circuit Assistant Public Defender, was not present at the hearing and did not testify at trial as she was unable to be contacted and/or located by Respondent. On information and belief, Lee has since left the public defender's office to relocate overseas to England.

During the course of the hearing, Applicant presented the allegation that Lee was ineffective in her representation for failing to advise Applicant that the decision whether or not to testify at trial was solely his to make, thereby rendering his decision not to

testify involuntary and unintelligent. LaFave, having served as second-chair trial counsel and not having been privy to all conversations between Applicant and Lee, was unable to shed light on the subject other than to say she recalled Applicant mentioning he may want to testify. The record is absent of any express waiver of the right to testify and the trial judge, the Honorable J. Michelle Childs, did not conduct an advisement of that right on the record.

At the close of the hearing, this Court denied the application for post-conviction relief from the bench finding Applicant's testimony to have not been credible on the subject, and saying the proffered testimony submitted that Applicant would have allegedly given at trial would not reasonably have made any difference in the outcome of the trial had Applicant taken the witness stand. The Court did, however, note its concern with the lack of any input from Lee on the matter. Respondent was requested to draft and submit a proposed order of dismissal with prejudice based on the on-record findings set forth. This Court thereafter made mention that it may see fit to grant the application for post-conviction relief in contrast to the findings on the record. To date, the matter is still under advisement.

Since the date of the hearing, Respondent has attempted to contact Lee several times in an effort to obtain any further information to supplement the record with in this regard. Despite having exchanged e-mails with Lee previously on unrelated matters at the e-mail address obtained, she did not respond to Respondent's requests for additional information or insight in this matter. It appears at this time Lee is unavailable or

otherwise unwilling to assist this Court in making an accurate factual determination of her conversations with Applicant.

Accordingly, due to the extraordinary circumstances presented in this matter, Respondent respectfully requests this Court grant leave for limited discovery to allow Respondent the opportunity to review Lee's defense file from her previous representation of Applicant, including any handwritten notes documenting her discussions with Applicant in preparation for trial. Respondent requests the 5<sup>th</sup> Circuit Public Defender's Office be obligated to provide the entirety of the file as retained to Respondent for the limited purpose of investigating Lee's discussions with Applicant about his right to testify at trial.

Further, Respondent requests this Court withhold entering any final judgment in the PCR matter for a reasonable period of time to allow Respondent the opportunity to obtain the file and conduct a thorough review of such.

Finally, Respondent would respectfully request this Court re-open the record of the September 13, 2012, PCR hearing to allow Respondent to attempt to introduce and supplement the record with any additional relevant materials obtained from Lee's defense file regarding Applicant's advisement of the right to testify at trial.<sup>1</sup>

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<sup>1</sup> Respondent recognizes Applicant's right to pose timely/contemporaneous objections under the Rules of Evidence to any item presented for introduction to the record and in no way is asking this Court to predetermine the admissibility of items which may or may not be discovered in the defense file.

WHEREFORE, the Respondent respectfully requests this Court grant Respondent leave to conduct limited discovery as set forth above, hold final judgment in the PCR matter in abeyance for a reasonable time to allow Respondent time to receive and conduct a thorough investigation of the defense file, and re-open the record of the September 13, 2012, PCR hearing to allow Respondent the opportunity to submit supplemental materials obtained from the defense file relevant to Applicant's right to testify at trial.

Respectfully submitted,

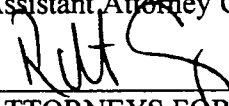
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\_\_\_\_\_  
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October 16, 2012  
Columbia, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Willie Gilmore, #281735, )

2012-CP-40-0599

Applicant, )

CONSENT ORDER GRANTING  
DISCOVERY AND TO HOLD  
IN ABEYANCE

v. )

State of South Carolina, )

Respondent. )

2012 NOV 19 AM 11:39  
FILED  
JANETTE W. MORNING  
C.C.P. & G.S.

This matter comes before the Court by way of application for post-conviction relief filed January 23, 2012. An evidentiary hearing was convened before this Court on Thursday, September 23, 2012, at the Richland County Courthouse. Applicant was present with counsel, Mark Schnee, Esquire. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office. At the hearing, Applicant alleged trial counsel, Megan Lee, Esquire, was ineffective for failing to adequately advise him of the right to testify at trial. The record is void of any mention of the right and Applicant was never advised of the right by the trial court.

At the close of the evidentiary hearing, this Court placed on the record that it intended to deny the application with prejudice, and requested Respondent draft and submit a proposed order of dismissal. This Court thereafter notified the parties that it was still considering the matter to determine whether to grant or deny the request for relief. To date, the order has not been signed and the matter is still pending a final decision.

By motion dated October 16, 2012, Respondent requested this Court grant a request for leave to conduct discovery in the matter and to hold the signing of any final order in the matter in abeyance to allow reasonable time for discovery to be conducted. Specifically, Respondent requested access to the defense file maintained by the Fifth Circuit/Richland County Public Defender's Office from Lee's representation of Applicant before and at trial. Lee has since left the public defender's office and moved overseas. Despite Respondent's efforts to locate and contact Lee, she was unavailable to present testimony at the PCR hearing on her discussions, or lack thereof, with Applicant about the right to testify.

Due to the rare and unique circumstances involved in this case, this Court finds good cause exists to grant Respondent's motions in this regard. Further, it appears opposing counsel, Mark Schnee, Esquire, has consented to Respondent's request. South Carolina Code §17-27-150(A), states, in relevant part: "A party in a non-capital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise". This Court finds such good cause does exist and, accordingly, grants the aforementioned motions.


**IT IS THEREFORE ORDERED THAT:**

1. Discovery is GRANTED to Respondent to obtain and review the entirety of any and all files in the custody of the Fifth Circuit/Richland County Public Defender's Office relating to the June 2008 trial of Willie Gilmore (2006-

GS-40-2809), including but not limited to any notes relating to counsel's discussions with Gilmore during pretrial preparations;

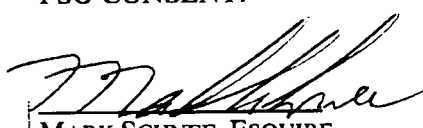
2. ~~This Court will hold the signing of any final order in abeyance for sixty (60) days from the entry of this order to allow Respondent the opportunity to obtain and review the file(s) mentioned above, and to bring forth any items it intends to supplement the record of the September 2012 PCR hearing with;~~
3. This order in no way affects Applicant's ability to object to the admissibility of the supplemental items set forth by Respondent under the South Carolina Rules of Evidence, and does not serve to predetermine the admissibility of any such items; rather, this Court will determine the admissibility of the proposed items at the time which they are brought before the Court.

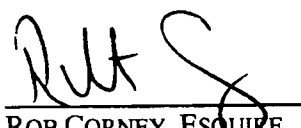
~~IT IS SO ORDERED~~ this 16 day of Nov, 2012.

  
J. ERNEST KINARD, JR.  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina.

I SO CONSENT:

  
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(803) 734-5178  
Attorney for Respondent

PROOF OF SERVICE

I Willie Gilmore certify that I have served the below Hon. Clerk of Ct. brief and designation of matter. By placing the above said into the Mc Corr. Inst. mail room on this 30 day of May 2014 to be placed in the U.S. mail with postage perpaid

The Hon. Supreme Ct. Clerk  
Daniel E. Shearouse  
PO. Box 11330  
Colo SC 29211

S WORN to before me Willie Gilmore

This 30 day of May 2014

J. Franklin  
Notary Public

my Commission Expires 12-16-2019

**RECEIVED**

JUN 04 2014

S.C. SUPREME COURT