

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

CERTIORIA TO OCONEE COUNTY
Court of Common Pleas

NOV - 7 2014

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

S.C. Supreme Court

Appellate Case No. ~~2008 CP 37-1471~~

2013-002380

Clarence Crittendon, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

1. Is Certiorari necessary to review whether the PCR Judge erred in finding Petitioner failed to meet his burden to prove counsel was purportedly ineffective for failing to investigate and present Timothy Crittendon as a defense witness at trial?
2. Is Certiorari necessary to review whether the PCR Judge erred in finding Petitioner failed to meet his burden to prove counsel was purportedly ineffective for failing to make a motion for a speedy trial?

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted where ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove that counsel was ineffective for failing to investigate and present Timothy Crittendon as a witness at trial.

At the PCR hearing, Petitioner testified he listed Timothy Crittendon as a potential trial witness to counsel. App.p.213. Timothy Crittendon testified at the PCR that he witnessed several ladies threaten Petitioner. App.pp.226-27. He testified he witnessed a woman named "Sheka" tell Petitioner "you got thirty days to leave. If you don't leave in thirty days, then you ain't gonna like what I'm gonna do." App.p.227, ln.21-24. "Sheka" also told Petitioner, "I'm tired of you treating me like this. You gonna leave my mama." App.p.227, ln.7-8.

Counsel testified to his course of conduct during the representation. App.p.230. Counsel testified Petitioner provided him with Timothy Crittendon's name and contact

information. App.p.231. He told counsel that Timothy Crittendon witnessed incidents that showed the victim's allegations were made in retaliation for a domestic dispute. App.p.231. Counsel made numerous unsuccessful attempts to contact Timothy Crittendon. App.p.237. He located the witness on the eve of trial. App.p.237. Counsel did not find the Timothy Crittendon to be a credible witness. Timothy Crittendon was incarcerated in Corrections with a substantial criminal record at the time of trial. App.p.231. Counsel testified that Applicant's main defense was that the ten year old victim would not take the stand against him. Applicant also had a lengthy criminal record and was a sex offender. He noted that the victim gave a credible account in a detailed and graphic written statement to the police concerning the Petitioner's brutality. App.p.236.

In denying Petitioner's application for post-conviction relief, the PCR judge noted that Timothy Crittendon's testimony was unconvincing to Petitioner's theory that he was "set up." App.p.279.

Effective Assistance of Counsel

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "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) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

“This Court has stated previously that criminal 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)

Discussion

The PCR judge made a sound finding here. Timothy Crittendon witnessed a confrontation that concerned Petitioner sexually abusing the child-victim. Timothy Crittendon testified [the child-victim] made the statement “I’m tired of you treating me like this. You gonna leave my mama.” to Petitioner. App.p.227, ln.7-8. Certainly counsel did not render deficient performance for not to present a witness that would have offered inculpatory testimony against Petitioner. The witness notably did not offer testimony that confrontation was a result of anything other than the brutal sexual assault of a child. Therefore, the ‘mere speculation and conjecture on the part of a defendant in PCR is insufficient.” Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999).

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

II.

Certiorari is not warranted where ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove that counsel was ineffective for failing to file a motion for a speedy trial.

Not only was Petitioner's allegation here fatally speculative, it was facially absurd. The entire impetus of the allegation is that a potential adverse trial witness died while the case purportedly "languished" in General Sessions Court. Petitioner testified that Sarah Hill, the maternal grandmother of the child victim, died during the pendency of Petitioner's case and thereby was unavailable to testify at trial. App.p.213. Incredibly, Petitioner presents this argument to this Court under the presumption that the grandmother of the child victim would have somehow testified in a beneficial manner to Petitioner's case after Petitioner raped her granddaughter and destroyed her daughter's family. The presumption here is illogical, fallacious and without any other evidentiary support. Thus, the State submits that further discussion on the matter is an affront to judicial economy. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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Attorney General

WALT WHITMIRE
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By: 
ATTORNEYS FOR RESPONDENT

Nov 7th, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-002380

CLARENCE CRITTENDON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

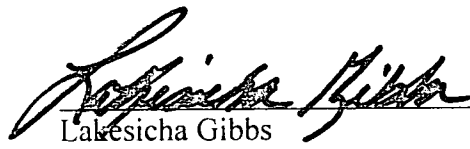
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Mr. David Alexander, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211**

This 7th day of November, 2014


Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent



ALAN WILSON
ATTORNEY GENERAL

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NOV - 7 2014

November 7, 2014

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia SC 29211

RE: Clarence Crittendon v. State of South Carolina
Appellate Case No: 2013-002380

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General
SC Bar No: 100793

JWW/lg
Enclosures

cc: David Alexander, Esquire