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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Pickens County

S.C. Supreme Court

D. Garrison Hill, Circuit Court Judge

ROBERT LEE DEAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001313

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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The PCR judge erred in refusing to find trial counsel ineffective for failing to cross examine Petitioner’s former wife and mother of the complaining witness, Petitioner’s step daughter, about the fact that prior to the allegations by the step daughter he told his wife that he planned to sue her for divorce on the ground of adultery and then in failing to argue that Petitioner’s testimony about the adultery was relevant to show bias, prejudice or motive to misrepresent pursuant to Rule 608(c).....	4
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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for failing to cross examine Petitioner's former wife and mother of the complaining witness, Petitioner's step daughter, about the fact that prior to the allegations by the step daughter he told his wife that he planned to sue her for divorce on the ground of adultery and then in failing to argue that Petitioner's testimony about the adultery was relevant to show bias, prejudice or motive to misrepresent pursuant to Rule 608(c)?

STATEMENT

In February of 2007, the Pickens County Grand Jury indicted Dean for criminal sexual conduct with a minor second degree and lewd act upon a child, indictments #2007-GS-39-346, 347. On September 21, 2009, Dean proceeded to jury trial before the Honorable Edward Welmaker. John DeJong represented Dean at trial. Peter Them prosecuted the case. The jury returned verdicts of guilty and Judge Welmaker sentenced Dean to twenty (20) years for criminal sexual conduct with a minor second degree and fifteen (15) years concurrent for lewd act. A timely notice of intent to appeal was filed. Wanda H. Carter represented Dean on appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. State v. Dean, Op. No. 2012-UP-097 (S.C.Ct.App. filed February 22, 2012).

On August 31, 2012, Dean filed an application for post conviction relief. The State filed a return on March 28, 2013. On April 21, 2014, an evidentiary hearing was held before the Honorable D. Garrison Hill. R. Mills Ariail, Jr. represented Dean at the PCR hearing. Karen C. Ratigan represented the State. In a written order filed May 30, 2014, Judge Hill denied relief and dismissed the application. A timely notice of intent to appeal was served on June 11, 2014. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to cross examine Petitioner's former wife and mother of the complaining witness, Petitioner's step daughter, about the fact that prior to the allegations by the step daughter he told his wife that he planned to sue her for divorce on the ground of adultery and then in failing to argue that Petitioner's testimony about the adultery was relevant to show bias, prejudice or motive to misrepresent pursuant to Rule 608(c).

The jury found Petitioner Dean guilty of sexual misconduct involving his step daughter. During the PCR hearing Petitioner testified that the charges against him were brought after he told his wife he was going to sue her for divorce on the grounds of adultery. (App. p. 513, lines 3-14). Petitioner asserted that trial counsel failed to attack the credibility of the complaining witness step daughter. Petitioner testified, "Because one of the statements the Prosecutor made at the end in his closing argument was why would [witness] lie? And I think there were lots of reasons that she could have lied, including me divorcing her mother on the grounds of adultery, her wanting to stay in Florida, the problems they were having with the next door neighbor. I think that really wasn't brought out at trial." (App. p. 514, lines 6-12).

Trial counsel testified at the PCR hearing and admitted that in preparing the defense he and Petitioner discussed the divorce and the possibility that the charges were "made up out of spite from the mother." (App. p. 531, lines 22 – p. 532, lines 1-4). Trial counsel testified, "And I think, again, we tried to do that when Mr. Dean was on the witness stand. I would refer you, Mr. Ariail, to, I think, probably Page 358 or 359 of the transcript. I was trying to get into the divorce and the separation. Mr. Them objected to it on the ground of relevancy. His Honor sustained that objection and told me very nicely to move on." (App. p. 532, lines 5-11). Counsel failed to argue that the questioning was relevant as it went to show bias, prejudice or motive to misrepresent pursuant to rule 608(c). (App. p. 359, lines 1-22). When asked if he cross examined the mother in regard to the divorce, trial counsel could not remember. (App. p. 532, lines 12-23). The record of the cross

examination of the mother reflects that trial counsel asked the mother about why she and Petitioner separated but never asked her about the adultery allegation. (App. pp. 272 – 285). Trial counsel was ineffective in failing to cross examine the mother about the adultery allegation as a motive for the mother to convince her daughter to fabricate allegations of abuse against Petitioner. Additionally, trial counsel was ineffective in failing to argue that Petitioner’s testimony in regard to the adultery was relevant to show bias, prejudice or motive to misrepresent pursuant to Rule 608(c).

In the order of dismissal the PCR judge wrote, “Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing norms.” The PCR judge erred. Trial counsel was ineffective in failing to cross examine the mother/ex-wife about the fact that prior to the step daughter making the allegations against Petitioner, Petitioner told his wife he planned to sue her for divorce on the ground that she had committed adultery and failing to argue that Petitioner’s testimony in regard to the adultery was relevant. Petitioner was prejudiced by counsel’s deficient performance because the allegations against Petitioner were based solely on the testimony of the step daughter and her credibility was a critical issue to be determined by the jury.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a claim of ineffective assistance of trial counsel, a PCR applicant must show that: (1) counsel's representation fell below an objective standard of reasonableness and, (2) but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Courts evaluate allegations of ineffective assistance of counsel

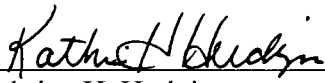
using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Measured by an objective standard of reasonableness, counsel was deficient in not trying to demonstrate, through the cross examination of the ex-wife and the testimony of Petitioner, that the fact that Petitioner was going to sue his wife for divorce on the grounds of adultery was a motive for the step daughter to fabricate allegations against Petitioner. If counsel had demonstrated to the jury that there was a motive to misrepresent, there is a reasonable probability that the jury would have found Petitioner not guilty. The allegations were based solely on the testimony of the step daughter. There was no physical evidence. Petitioner moved out of the marital home in November of 2005, and the step daughter did not make the allegations until the summer of 2006. (App. p. 140, lines 8-24; p. 360, lines 1-4). The PCR judge erred in refusing to grant relief.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO PICKENS COUNTY
D. GARRISON HILL, CIRCUIT COURT JUDGE

ROBERT LEE DEAN,

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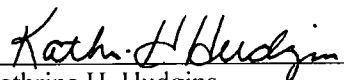
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Lee Dean 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 records and transcript of petitioner's post-conviction relief hearing which was held on April 21, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Robert Lee Dean.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of January, 2015

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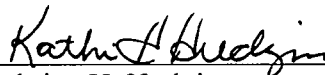
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CERTIFICATE OF SERVICE


I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Robert Lee Dean, #337033, at McCormick Correctional Institution this 5th day of January, 2015.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of January, 2015.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021 .