

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable G. Thomas Cooper, Circuit Court Judge

REGGIE PINKNEY,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2016-000117

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Taylor D Gilliam  
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

ORIGINAL

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR Court err in denying Petitioner relief where trial counsel provided ineffective assistance by failing to properly confer, consult, and communicate with Petitioner?

## STATEMENT

On February 23, 2005, Petitioner was pulled over by Officer Tyrone Williams of the Conway Police Department due to an expired license plate tag. App. 31 lines 10 – 23. Petitioner was the driver of the vehicle, but not the owner. App. 36 line 25 – App. 37 line 1. In an attempt to prove that the tag was not expired, Petitioner called the owner of the vehicle from his cell phone. App. 165 lines 1 – 5. Another officer on the scene, Robert Bradley, noticed a torn piece of plastic in the floorboard of the truck which Petitioner had been driving. App. 147 lines 19 – 22. After asking Petitioner out of the truck, Officer Bradley testified that Petitioner repeatedly touched his side. App. 148 line 25 – App. 149 line 4. Officer Bradley conducted a pat-down in order to search for weapons. App. 149 line 15 – App. 150 line 1. Soon thereafter, Petitioner attempted to flee from Officer Bradley. App. 150 line 24 – App. 151 line 12. After officers handcuffed Petitioner, they searched his pockets and found what they believed to be cocaine. App. 153 lines 7 – 17.

Petitioner was indicted for trafficking crack cocaine following the traffic stop in Conway on February 23, 2005. App. 658. He was represented at trial by J.M. "Buddy" Long. Petitioner would later state that he met with Counsel to discuss particulars in the case prior to trial on two occasions. App. 628 lines 11-16. Petitioner would also testify that Counsel neither discussed the case with him nor prepared for trial with him. App. 628 lines 17-22. Additionally, the crime of which he was accused and the elements associated with it were not explained to him. App. 628 line 23 – App. 629 line 3. Petitioner would further testify that Counsel did not provide enough information in order to allow Petitioner to decide whether he wanted to plea. App. 629 lines 15-17.

Petitioner was tried in absentia in front of the Honorable R. Markley Dennis, Jr. on October 26-27, 2005. App. 107 lines 6 – 19. Timothy E. Meacham served as the Assistant Solicitor at trial. App. 1. Petitioner's trial counsel moved to suppress the cocaine, arguing that the evidence was found as a result of a search that exceeded the scope of the traffic stop. App. 29 line 11 – App. 30 line 12.

The Honorable H. Markley Dennis, Jr. ruled that the evidence obtained during the traffic stop leading to Petitioner's arrest was admissible. App. 96 lines 15-17. This trial resulted in a mistrial when the jury could not render a unanimous verdict. App. 287 line. 9 – App. 288 line 9.

A second trial on identical charges began on January 11, 2006 in front of Judge James B. Lockemy. J.M. Long, III again represented Petitioner, and Timothy E. Meacham represented the State. At the evidentiary hearing in his subsequent PCR, Petitioner would later testify that Counsel did not contact him regarding his second trial. App. 631, lines 11-16. Petitioner also stated that had he known about his trial, he could have attended and countered testimony which he believed to be inaccurate. App. 631 line 19 – App. 632 line 21.

Following another trial in absentia, the jury found Petitioner guilty of trafficking crack cocaine under indictment 2005-GS-26-1401. App. 534 lines 1 – 8. Due to Petitioner's absence, Judge Lockemy sealed Petitioner's sentence. App. 537 lines 15 – 18.

On March 18, 2011, the Honorable Larry B. Hyman, Jr. opened the sentencing documents and read the sentence imposed by Judge Lockemy of fourteen years. App. 558 lines 4 – 11. Petitioner's conviction was affirmed. No. 2013-UP-490 (filed December 23, 2013). App. 600 - 601. The remittitur was sent on January 8, 2014. App. 602.

On May 1, 2014 Petitioner filed an application for post-conviction relief. App. 603. Petitioner's application contained allegations of ineffective assistance of counsel, including claims that Counsel did not prepare for trial. App. 612. An evidentiary hearing was conducted on August 11, 2015 before the Honorable G. Thomas Cooper. App. 622. Daniel Selwa, III represented Petitioner, and Joshua L. Thomas represented the State. Petitioner testified during the hearing, and the State called trial counsel Long as a witness. On September 18, 2015, Judge Cooper issued his order denying Petitioner relief. App. 648 – 655. This Petition follows.

## ARGUMENT

**The PCR Court erred in denying Petitioner relief where trial counsel provided ineffective assistance by failing to properly confer, consult, and communicate with Petitioner.**

Counsel unknowingly witnessed Petitioner's traffic stop which led to the charges he was later hired to defend. App. 636 lines 2 – 14. Arguably as a result of his firsthand viewing and inadvertent fact-gathering, he may have failed to communicate adequately with Petitioner. He may have believed that further consultation with Petitioner was unnecessary, because his recollections would suffice when it came to preparing for trial.

As briefly discussed above, on the two occasions when Petitioner met with Counsel, neither the crime nor its elements were explained to him. Petitioner testified that Counsel did not provide enough information in order to allow Petitioner to decide whether he wanted to plea. App. 629 lines 15-17. The lack of information exchanged between the two evidences ineffective assistance of counsel.

The record does not support a finding of effective assistance, because Counsel's failures to confer and communicate with Petitioner regarding the details of his case indicate Counsel did not adequately prepare for trial. When asked whether Counsel went over the case with him, Petitioner testified: "He didn't really actually go over the case with me because we didn't never really actually prepare for a trial, you know, it's like I told him what was going on, I told him what had happened but we didn't actually collaborate on anything as far as a defense and going to trial." App. 628 lines 17-22. Additional information and further interaction would have affected Petitioner's decision regarding a plea. The level of communication between

Counsel and Petitioner appears to have been minimal, and Petitioner submits that as a result, Counsel's conduct was deficient.

Additionally, Petitioner believes one of the arresting officers "used [the] scale that was found in [his] vehicle because it read more weight" when compared to the police department's scale. App. 612. Had Counsel notified Petitioner of the alleged discrepancy between the weight of the cocaine at the time of arrest versus the time of testing (20.68 grams versus 23.3 grams) which was discussed at his first trial, Petitioner could have offered his own testimony to explain the difference at his second trial. App. 199 lines 21 - 22, App. 205 lines 21 - 22, App. 262 lines 9 - 13. At the evidentiary hearing, Petitioner testified:

I see where [there] was a debate about how much the drugs were. Okay. When I was arrested, [there] was a scale also found in my vehicle. They used that scale and the scale that they have at the police department. The scale that they got out my vehicle had showed more weight than the scale that they had at the police department.

App. 632 lines 5 - 10. Counsel testified that his defense strategy was an "all or nothing" approach wherein he focused heavily on suppressing the evidence seized at the traffic stop. App. 637 line 20 - App. 638 line 4. In order to prepare for that issue, Counsel reviewed case law about traffic stops and discussed these details with Petitioner. App. 637 lines 22 - 24.

However, following the mistrial, Counsel did not immediately begin planning for a second trial. App. 639 lines 18-19. Counsel testified that he was unsure whether he spoke with Petitioner face-to-face in order to tell him the second trial was approaching. App. 641 lines 22-25. Had Counsel discussed the weight difference issue with Petitioner prior to his second trial, rather than focusing solely on the suppression issue, Petitioner could have provided additional facts and details which may have prevented Petitioner's conviction.

Petitioner correctly asserted that Counsel was ineffective, because he did not communicate with Petitioner regarding details of the case, including those garnered at the first trial. The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687. “[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting *Strickland* at 690).

First, to be entitled to PCR, the applicant must show that counsel's performance was deficient. *Payne v. State*, 355 S.C. 642, 645, 586 S.E.2d 857, 859 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In this regard, Counsel failed to consult with Petitioner regarding certain details of the case. Petitioner’s testimony, as outlined above, indicates that Counsel did not go over certain aspects of the case with him. Such conduct falls within the gamut of deficiency.

“The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that 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. 115, 118, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

However, it is not always necessary for a defendant to offer objective evidence to support a claim of actual prejudice. Instead, depending on the facts of the case, a defendant's self-serving statement may be sufficient to establish actual prejudice. See *Jackson v. State*, 342 S.C. 95, 97, 535 S.E.2d 926, 927 (2000) (rejecting objective evidence requirement established in *Judge* and finding Petitioner proved he was prejudiced by counsel's deficient performance in failing to properly advise the Petitioner that he was pleading to a felony rather than a misdemeanor where Petitioner's uncontradicted testimony established that he would not have pled had he known the charge was a felony), *overruling Judge v. State*, 321 S.C. 554, 562, 471 S.E.2d 146, 150 (1996) ("The second prong of the ineffective assistance inquiry—prejudice—is shown by demonstrating through *objective* evidence ... [the existence of] a reasonable probability that, but for counsel's advice, [the defendant] would have accepted the plea.

In this capacity, Petitioner testified that he could have countered what he believed to be inaccurate evidence regarding the weight of drugs seized at the traffic stop. Because Counsel did not communicate enough, however, Petitioner was unable to combat that testimony. The resulting prejudice manifested itself in a conviction.

Through his own testimony at the evidentiary hearing, Petitioner testified that he was prejudiced as a result of Counsel's deficiencies. According to *Jackson, supra*, Petitioner's self-serving statements prove that he was prejudiced by the limited number of meetings between him and Counsel.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charges against him, and remand the case for a new trial.



Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of September, 2016.

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Reggie Pinkney states:

1. He is an 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 trial before Judge G. Thomas Cooper, which was held on August 11, 2015 (PCR hrg), 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 Reggie Pinkney.

Respectfully Submitted,

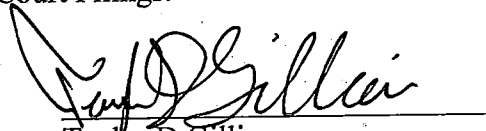
  
Taylor D Gilliam

ATTORNEY FOR PETITIONER

This 14th day of September, 2016.

**CERTIFICATE OF COUNSEL**

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."



Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

This 14th day of September, 2016.

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CERTIFICATE OF SERVICE

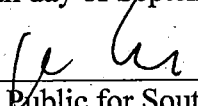
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Caitlin Hastings, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Reggie Pinkney, #259522, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 14th day of September, 2016.

  
\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 14th day of September, 2016.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: 5/12/2025