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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

FREDERICK FLOWERS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001174

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective in failing to call Petitioner's cousin, Davetta Davenport, as an alibi witness to establish that she picked Petitioner up from his uncle's house at 4:30 PM and drove him to her house in North Charleston prior to the shooting?

STATEMENT

In July of 2011, the Charleston County Grand Jury indicted Petitioner Flowers for murder and possession of a firearm during the commission of a violent crime, indictments #2011-GS-10-4314, 4317. On August 27, 2012, Petitioner proceeded to jury trial before the Honorable J.C. Nicholson, Jr. Mary A. Ford and Beattie I. Butler represented Petitioner at trial. D. Bruce Durant prosecuted the case. The jury returned with verdicts of guilty and Judge Nicholson sentenced Petitioner to forty (40) years for murder and five (5) years concurrent for the firearm charge.. A timely notice of intent to appeal was filed and the direct appeal perfected. On May 5, 2014, the South Carolina Court of Appeals dismissed the appeal. State v. Flowers, 2014-UP-185 (S.C.Ct.App. May 5, 2014).

On August 26, 2014, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on April 15, 2015. On December 17, 2015, an evidentiary hearing was held before the Honorable Deadra L. Jefferson. James K. Falk represented Petitioner at the PCR hearing. J. Rutledge Johnson represented the State. In a written order filed May 18, 2016, Judge Jefferson denied relief and dismissed the application. A timely notice of intent to appeal was served on May 27, 2016. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective in failing to call Petitioner's cousin, Davetta Davenport, as an alibi witness to establish that she picked Petitioner up from his uncle's house at 4:30 PM and drove him to her house in North Charleston prior to the shooting taking place.

Shortly before 5:00 PM on March 1, 2011, the driver of a red Toyota pulled into the back of the St. Andrews Fire Department on Ashley River Road and told the firefighters that the passenger in the car had been shot. (App. p. 132, line 4 – p. 133, lines 1-25). The Charleston Police Department received a report of the shooting at approximately 4:48 PM on March 1, 2011. (App. p. 126, line 17 – p. 127, lines 1-16). Officer Nathaniel Fry of the Charleston Police Department arrived at the St. Andrews Fire Department where firefighters were performing CPR to the passenger, later identified as James Javon "Tiddy" Smith. (App. p. 127, lines 5-13). Tiddy Smith was pronounced dead at 5:05 PM. (App. p. 128, lines 16-17). The driver of the Toyota was the deceased's father, Kennedy Smith. (App. p. 128, line 24 – p. 129, line 1). Kennedy Smith was no longer at the fire department when Officer Fry arrived. (App. p. 128, lines 6-10).

At trial Kennedy Smith admitted that he took a bag of marijuana from the car, fled from the fire department and tried to toss the bag of marijuana on top of a building. (App. p. 169, lines 23 – p. 170, 171, lines 1-5). Police officers, however, chased Kennedy Smith and when he was unable to toss the bag, officers arrested him and recovered the marijuana. (App. p. 171, lines 3-8). Kennedy Smith testified that he drove his son to a house on St. Clair Street in West Ashley when a black male approached the car and shot his son. (App. pp. 157-165). Smith testified that there were approximately nine black males in the yard when he drove up to the house. (App. p. 159, lines 3-6). Smith initially told detectives he could not identify the shooter.

(App. p. 174, lines 23-25). Smith also denied knowing that his son went to St. Clair Street to sell drugs. (App. p. 194, lines 4-21).

Smith was incarcerated for the marijuana and was also charged with obstruction of justice. (App. p. 178, line 1 – p. 179, lines 1-4). On March 2, 2011, Smith described the shooter as a black male, five feet eight inches tall to six feet tall with twists in his hair. (App. pp. 179-180). Petitioner did not have twists in his hair and is approximately six feet five inches tall. (App. p. 60, lines 2-4; p. 62, line 1 – p. 63, lines 1-4). Smith did not identify Petitioner as the shooter until March 9, 2011, when Smith was again transported from the jail to police headquarters and shown a photo line-up containing a photo of Petitioner. When asked why he changed his mind in regard to the identification, Smith answered, "When I was told that I'm going to sit and rot in jail. I did believe -- and also wanted justice for my son and I could not believe that that many people were out there on that day and no one had did anything." (App. p. 186, lines 4-7).

Reginald "Nasty" Wescott testified that he saw Petitioner approach the car and heard gun shots but denied ever seeing Petitioner present a gun. (App. pp. 258-259). At the time of Petitioner's trial "Nasty" was in jail awaiting trial for attempted murder, possession of a gun during the commission of a violent crime and drug conspiracy unrelated to the March 1, 2011, shooting. (App. p. 269, line 18 – p. 270, lines 1-25). Michael "Little Mike" Quarles also testified that he saw Petitioner approach the car and heard gun shots but did not see a gun. (App. p. 289, lines 4-17). His testimony at trial was contradicted by several previous statements he provided to police. (App. pp. 293-301). At the time of trial "Little Mike" was serving prison time for drug charges. (App. p. 281, lines 4-12). Cornelius "CJ" Jenkins refused to testify at trial and was held in contempt. (App. pp. 362-370). Myhesa "My" Wine and Carlos "Butta"

Jones implicated Petitioner at trial. "My," however, originally told police he was not present at the shooting. (App. pp. 346-347). "Butta" originally told police that he had seen nothing. (App. p. 400, lines 3-7).

Petitioner testified at the PCR hearing that his cousin, Davetta Davenport, picked him up from his Uncle's house, two blocks away from the shooting at 4:30 PM and they arrived at her house off of Ashley Phosphate Road in North Charleston about 5:00 PM when they heard about the shooting in West Ashley on the news. (App. pp. 770-772). Davetta Davenport testified at the PCR hearing that she picked Petitioner up before 5:00 or 5:30. (App. p. 766, lines 2-7). She testified

that the drive between West Ashley and North Charleston was about twenty five to thirty minutes. (App. p. 767, lines 1-20). When questioned on cross examination she testified, "What I said was, I believed I picked him up before 5 or 5:30, because by the time he got to my house on Ashley Phosphate, it was breaking news 5 to 5:30 about a shooting West Ashley." (App. p. 768, lines 13-16). Davenport testified that the news airs at 4:30, 5:00, 5:30 and 6:00 PM. (App. p. 768, line 20).

Trial counsel testified at the PCR hearing that her investigator spoke with Ms. Davenport prior to trial and she told him that she picked Petitioner up at 4:30. (App. p. 744, line 24 – p. 745, lines 1-2). After reviewing the trial transcript, trial counsel agreed that the police were called about the shooting at 4:48 and if Ms. Davenport picked Petitioner up at 4:30, she would have picked him up before the shooting took place. (App. p. 745, lines 3-20). Trial counsel did not call Davenport as an alibi witness. Counsel testified, "Even though Davetta mentioned 4:30, it was never my understanding that she picked him up before the shooting. And when we got that statement, it was more than a year later. So I can't even remember if I considered that to be

an issue or not. I don't know over a year later if she would have known the exact time. But, yes, if she had been 100 percent sure, then, yes, that would have been important." (App. p. 745, line 24 – p. 746, lines 1-5).

The order of dismissal contains factual errors. First, the order erroneously states that Ms. Davenport did not come forward with information until over a year **after** Petitioner's trial. The order states, "Additionally, neither Applicant nor Davetta Davenport informed Counsel that Ms. Davenport picked up Applicant from his uncle's house on the day of the shooting at 4:30 PM as to establish a viable alibi defense." (App. p. 801). The order later states, "This Court finds the five (5) witnesses and the Victim's father's testimony more credible than Ms. Davenport's or Applicant's testimony, especially considering Ms. Davenport did not come forward with this information until over a year after Applicant's trial." (App. p. 801). Ms. Davenport spoke with trial counsel's investigator **prior** to the trial. Trial counsel initially testified that she understood that Ms. Davenport picked up Petitioner after the shooting but later testified, "She indicated to my investigator – he got a statement from her. It was actually just a few weeks before the trial. And she indicated it was about – she said it was 4:30 when she picked him up." (App. p. 744, line 24 – p. 745, lines 1-2).

Second, the order erroneously states that Ms. Davenport testified that she picked Petitioner up between 5-5:30. The order states, "At the PCR hearing, Ms. Davenport testified that she picked Applicant up between 5-5:30 PM and was in North Charleston in time to see the 6 o'clock news." (App. p. 801). Ms. Davenport, however, testified at the PCR hearing, "I would leave – I picked him up before, like, before 5, 5:30. I don't remember what actual time, but it was before 5, 5:30." (App. p. 766, lines 3-5). When questioned on cross examination she testified, "What I said was, I believed I picked him up before 5 or 5:30, because by the time he

got to my house on Ashley Phosphate, it was breaking news 5 to 5:30 about a shooting West Ashley." (App. p. 768, lines 13-16). Davenport testified that the news airs at 4:30, 5:00, 5:30 and 6:00 PM. (App. p. 768, line 20).

Third, the order states, "Counsel cannot be held to be clairvoyant of information not presented to her by Applicant. Moreover, it is more likely that Ms. Davenport would have established Applicant's flight from the crime scene as evidence of Applicant's guilt. It would have been a strategic choice by counsel not to call Ms. Davenport even if she had this information, as not to establish flight by Applicant." (App. p. 802). First, as discussed above, trial counsel had the information prior to trial. Second, trial counsel did not testify that she made a strategic decision not to call Ms. Davenport because her testimony established flight. Instead, trial counsel testified that she did not call Ms. Davenport because Ms. Davenport was not one hundred percent certain about the time when she picked up Petitioner. (App. p. 745, line 24 – p. 746, lines 1-5). Trial counsel admitted, however, that Ms. Davenport told the investigator that she picked Petitioner up at 4:30 PM. Trial counsel was ineffective in failing to call Ms. Davenport as an alibi witness

This is not a case where Petitioner denied being in the area where the shooting took place. Instead, Petitioner told police that he heard shots when he was at his uncle's house down the street from where the shooting took place. (App. p. 744, lines 13-17). During the PCR hearing Petitioner testified that he must have mistaken a nail gun for shots being fired because he was no longer in the West Ashley neighborhood when the shooting took place. (App. p. 770, line 21 – p. 771, lines 1-2; p. 772, lines 10-25). When asked why he wanted trial counsel to talk to Ms. Davenport, Petitioner testified:

> Because she can assure that I wasn't nowhere in West Ashley at the time of this crime, the crimes. Got to her house five o'clock, watched the news. I called her

> earlier that day. She kept putting it off. So can't get me between – 4:30, we got to her house. There's traffic coming up Ashley Phosphate, traffic around that time. So five o'clock, 5:10, we got to her house. I turn the news on. That's the first time I saw the news. So that was around that time.

(App. p. 772, lines 17-25).

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). 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.

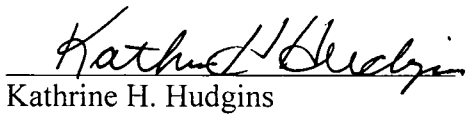
In Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014), the South Carolina Supreme Court wrote:

> "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Grooms v. Solem, 923 F.2d 88, 90 (8th Cir.1991).

Trial counsel was deficient in failing to call Ms. Donovan as an alibi witness. Her testimony was sufficient to establish an alibi defense. As conceded by trial counsel at the PCR hearing, the police were called about the shooting at 4:48 and if Ms. Davenport picked Petitioner up at 4:30, she would have picked him up before the shooting took place. (App. p. 745, lines 3-20). Petitioner was prejudiced by counsel's failure to call the alibi witness. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. As trial counsel testified at the PCR hearing, the witnesses who placed Petitioner at the scene of the shooting all changed their stories and had various credibility issues. (App. p. 749, lines 15-18).

CONCLUSION

Based on the argument above, this court should grant the petition for writ of certiorari to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2016.

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APPELLATE CASE NO. 2016-001174

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Frederick Flowers, #352185, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 9th day of November, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of November, 2016.

Christian Ford (L.S)
Notary Public for South Carolina
My Commission Expires: March 1, 2026