

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Berkeley County

Honorable Deadra L. Jefferson, Circuit Court Judge S.C. SUPREME COURT

GEORGE SALISBURY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-001289

JOHNSON PETITION FOR WRIT OF CERTIORARI

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The PCR court erred in failing to find trial counsel ineffective for not conducting a thorough investigation into Petitioner Salisbury’s case by not timely interviewing witnesses including the witness inmates whom he knew from discovery; by not interviewing two other inmates who were involved when one gave a statement shortly after the incident; and by not investigating more thoroughly into the prison investigator’s findings regarding Petitioner’s statement that he had not taken his medication. 8

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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not conducting a thorough investigation into Petitioner Salisbury's case by not timely interviewing witnesses including the witness inmates whom he knew from discovery; by not interviewing two other inmates who were involved when one gave a statement shortly after the incident; and by not investigating more thoroughly into the prison investigator's findings regarding Petitioner's statement that he had not taken his medication?

STATEMENT

On January 18, 2008, Petitioner George Salisbury had been in prison since 2001 serving a sentence for his conviction for criminal sexual conduct with a minor second degree. App. 668, ll. 9 – 16; App. 670, ll. 6 – 9. On January 18, 2008, Corrections Officer Sara Adams had been on duty in the Magnolia II Unit at MacDougall Correctional Institute two nights. Petitioner Salisbury was housed in that unit. App. 266, ll. 1 – App. 267, ll. 5.

Officer Adams had completed the required count at 11:00 p.m. and had returned to her desk to eat her dinner. App. 268, ll. 2 – 10. She was updating her log when Salisbury entered her office. He allegedly locked the doors and pulled a shank from his pocket. Officer Adams' story was that he then forced her into the bathroom and took off her clothes. He inserted two fingers into her vagina, and tore her shirt off. App. 268, ll. 16 – App. 271, l. 16.

She heard some inmates outside of the office yelling: "What's going on?" She then screamed for somebody to help her. About that time, one of the office doors was "busted in" and four or five inmates entered. She knew one who was Christopher Simmons. Simmons picked her up and told her she was safe as he carried her out. The inmates took off some of their clothes and tried to cover her as she had on only a t-shirt. They carried her to the day room. She heard a commotion going on in the office so she thought the inmates might have been beating Salisbury. She told Inmate Stagers, who had entered to check on her, to tell the other inmates not to kill Salisbury as all would be in trouble. App. 272, ll. 20 – App. 274, ll. 24. The other officers appeared about that time. App. 274, ll. 25 – App. 275, ll. 13.

Officer Adams testified that Inmate Tyrone Oliver "put his fist" through her office door to enter the office. App. 282, ll. 19 – App. 283, ll. 25. The only inmates that she knew for certain

helped her were Tyrone Oliver, Christopher Simmons, Jefferson Waldrop, and Willie Stagers, and Darden. App. 303, ll. 15 -24.

In September 2008, the Berkeley County Grand jury indicted Salisbury on the charges of prisoner/taking of hostage by an inmate; criminal sexual conduct (CSC) first degree, and assault on a correctional officer. App. 767. On January 26-29, 2009, Petitioner Salisbury proceeded to trial before the Honorable Kristi Lea Harrington and a jury. Salisbury was represented by Chad Shelton and Patricia Kennedy. The state was represented by Ann Williams and Bryan Alfaro. App. 48.

At trial, the officer/victim testified. App. 215, ll. 21 – App. 311, ll. 16. Two inmates testified as well: Willie Stagers and Jefferson Waldrop, Jr. App. 50. Willie Stagers testified that he saw Salisbury acting strange just before the incident as Salisbury was pacing around the dorm between his room and the restroom. Then he started to run past Stagers' cubicle. A few minutes later, Stagers heard another inmate yell for the others to come help as "he was raping her." Stagers saw another inmate kick in the office door. App. 398, ll. 12 – App. 402, ll. 12.

When Officer Adams came out of the restroom where the incident occurred, Stagers said that she ran into him. He gave her some of his clothing to cover up. Due to the broken glass in the office, he saw inmate Simmons and gave Officer Adams to him and told him to take her to the day room. After Officer Adams asked him, he instructed the other inmates not to beat Salisbury any more. App. 404, ll. 9 – App. 408, ll. 21.

Inmate Jefferson Waldrop testified that he saw Stagers ask Christopher Simmons to help Officer Adams. He saw Simmons take her to the day room. App. 456, ll. 1 – 24.

Tonya McCants, the mental health counselor for MacDougall Facility, testified in a proffer that she talked with Petitioner Salisbury shortly after the incident. He told her that he had

been sitting on his bed reading letter from his wife. He looked up in the “booth” and saw his wife. He blacked out and woke up when the inmates were on top of him beating him. He did not know what happened. The booth was the security office. App. 475, ll. 11 – 24; App. 477, ll. 1 – 24.

Investigator Clarke Powell testified that he was an investigator with the Investigation Division of the Department of Corrections. App. 574, ll. 9 – 24. He said that Salisbury told him that on the night of the incident he had been thinking about his wife. He saw his wife in Officer Adams. Salisbury was very apologetic according to the investigator. According to Investigator Powell, Salisbury told him that he did not know “what came over him” as he did not take his medication. He had the shank for his own protection. App. 586, ll. 1 – App. 587, ll. 25.

The jury found Salisbury guilty of the three charges as indicted. App. 660, ll. 6 – App. 661, ll. 7. The trial judge sentenced Petitioner Salisbury to life without parole (LWOP). The LWOP was to run consecutive to the sentence he was currently serving from 2001. . App. 671, ll. 15 – App. 672, ll. 19.

Petitioner Salisbury filed an appeal which was perfected by the Division of Appellate Defense. The Court of Appeals affirmed Salisbury’s convictions and sentences on March 28, 2012. State v. Salisbury, Op. No. 2012-UP-214 (Ct. App. Filed March 28, 2012). App. 781-App. 795.

On January 25, 2013, Petitioner Salisbury filed an application for post-conviction relief (PCR). The state filed a return on October 15, 2013. An evidentiary hearing was held on December 18, 2015 before the Honorable Deadra Jefferson. Salisbury was represented by Rodney Davis, and the state was represented by J. Rutledge Johnson. App. 698 – App. 699.

At the PCR hearing, PCR counsel told the court that there were basically two areas of concern. One was the ineffective assistance of trial counsel where the state served the notice of LWOP and the case was put on the trial docket quickly. Trial counsel did not have sufficient time to fully investigate and be prepared. Some evidence was not presented timely to the defense. App. 701, ll. 1 – App. 703, ll.23.

Trial counsel testified that the first LWOP notice he received was November 13, 2008 based on the CSC charge only. Trial was set for January 26, 2009. Then on January 6, 2009, only twenty days before trial, he received notice of other charges that were directly presented in September 2008 that he did not know about. The state was then seeking LWOP on a second charge of the hostage taking by an inmate which was a second most serious charge. He had to “try to investigate the case as fast as possible” to prepare a defense for those charges. App. 708, ll. 19 – App. 713, ll. 20.

Trial counsel responded that other inmates testified at trial that were helpful to the state. He admitted that most of them were in the discovery and said he “could have investigated” by talking to them. App. 713, ll. 21 – App. 714, ll. 8. There was one, a “small black male” that he did not know his name until late December or early January when he received the witness list. Nevertheless, counsel said, it made no difference because those inmates were not in the “closet” with Salisbury and the victim. App. 714, ll. 13 – App. 715, ll. 2. The state objected by stating that the “small black male” was Christopher Simmons who did not testify. App. 717, ll. 6 – 23. Trial counsel said he did cross examine the inmate witnesses whose credibility was important. However, he did not ask them about the letters of appreciation they received for helping because he “didn’t have an opportunity to investigate that.” App. 731, ll. 13 – App. 732, ll. 16.

Trial counsel said he did request two continuances. The first one was granted, and the second one was denied. App. 715, ll. 13 – 17; App. 730, ll. 8 – 25.

Trial counsel admitted that up until January 6, 2009 when he received the notice of the new charges, “there honestly was not that much investigation that was done in the case, outside investigation, other than preparing for trial.” App. 724, ll. 5 – 12. Counsel stated that he was appointed to Salisbury’s case in June 2008, and the trial was January 26, 2009. App. 19 -25.

Petitioner Salisbury testified at the PCR hearing. When the PCR attorney started to question him about the inmate, Tyrone Oliver who was a witness to the incident, the state objected because Oliver was not at the PCR hearing to testify. The judge sustained the objection. PCR attorney asked for leeway because he wanted to point out what could have been investigated because it went to ineffective assistance of trial counsel. The PCR judge refused to allow it because Oliver was not present. App. 744, ll. 21 – App. 745, ll.

Salisbury testified that his trial counsel was the one who suggested that he go to trial. Salisbury had been served with the notice of LWOP. Salisbury told the court that clothing items were removed from the scene by Tyrone Oliver, and were then contaminated evidence. His attorney did not investigate that evidence. App. 746, ll. 19 – App. 749, ll. 25.

The PCR judge ruled on the record that Salisbury “failed to establish his burden of proof.” The judge denied Salisbury’s PCR application. App. 755, ll. 23-25.

On May 16, 2016, the PCR judge issued an order denying Petitioner Salisbury’s PCR application and dismissing it with prejudice. App. 766 – App. 776. The judge found trial counsel’s testimony to be credible but found Petitioner Salisbury’s testimony not credible. App. 768. The judge found trial counsel’s representation of Salisbury “well above the professional norms.” App. 773-App. 774. The order also provided that Salisbury did not prove trial counsel’s

performance was deficient nor that Salisbury was prejudiced by it. App. 775. The judge wrote that trial counsel fully investigated this case based on information from Salisbury and the facts of the case. Counsel relied on the witness statements and Salisbury's statement. App. 774. The judge denied Salisbury's PCR application. App. 776.

Salisbury filed a notice of appeal. This petition follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not conducting a thorough investigation into Petitioner Salisbury's case by not timely interviewing witnesses including the witness inmates whom he knew from discovery; by not interviewing two other inmates who were involved when one gave a statement shortly after the incident; and by not investigating more thoroughly into the prison investigator's findings regarding Petitioner's statement that he had not taken his medication.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the Supreme Court found that trial counsel was ineffective because a criminal defense attorney has a duty to investigate, but this duty was limited to reasonable investigation. The Court defined a reasonable investigation at a minimum

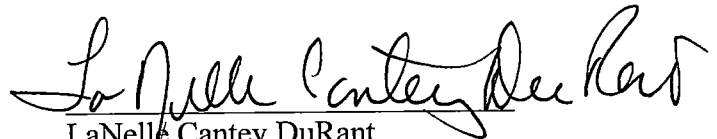
has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court reversed the PCR court's denial of Lounds' PCR application and remanded for a new trial because trial counsel was found to be ineffective for not adequately preparing for trial so as to be able to call key witnesses.

The PCR court erred in not finding trial counsel ineffective for not investigating more thoroughly the case of Salisbury. Tyrone Oliver had given a statement on January 28, 2008 to an interviewer at MacDougall regarding the incident. App. 685-App. 686. Trial counsel could have learned Oliver's name through this if he had investigated. Counsel could have learned the names of Christopher Simmons and Oliver if he had talked to Inmates Staggers and Waldrop who knew these men and testified about their involvement. Counsel could have interviewed Oliver and Simmons and the other inmates months before trial as he had the case for seven months before trial. Counsel may have learned information that could have helped avoid LWOP.

CONCLUSION

Based on the above, certiorari should be granted and the order of the PCR court reversed and the case remanded for a new trial.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2016.

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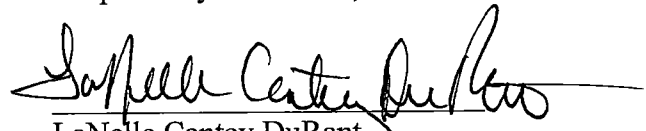
PETITION TO BE RELIEVED AS COUNSEL

Counsel for George Salisbury 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 record of petitioner's trial before Judge Deadra L. Jefferson, which was held on December 18, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for George Salisbury.

Respectfully Submitted,



LaNelle Cantey DuRant

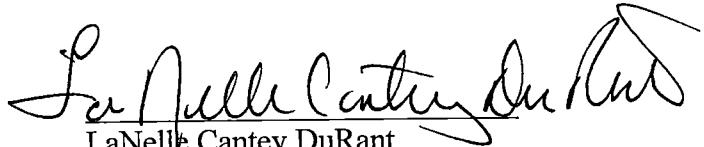
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of December, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her 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."



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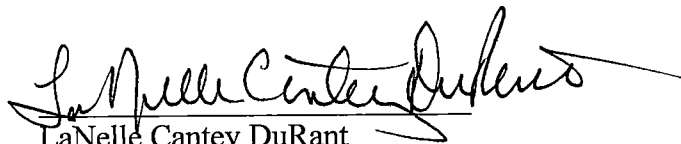
V.

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CERTIFICATE OF SERVICE

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 Alicia Olive, 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 George Salisbury, #263724, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 8th day of December, 2016.


LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of December, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.