

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

MARIO SHIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000855

JOHNSON PETITION FOR WRIT OF CERTIORARI

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

RECEIVED

DEC -9 2016

S.C. SUPREME COURT

INDEX

INDEX.....i

ISSUE PRESENTED1

STATEMENT2

ARGUMENT4

CONCLUSION8

PETITION TO BE RELIEVED AS COUNSEL.....9

ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where trial counsel provided ineffective assistance by failing to call two alibi witnesses to testify at Petitioner's trial?

STATEMENT

An Orangeburg County Grand Jury indicted Petitioner for murder, burglary in the first degree, armed robbery, possession of a weapon during the commission of a violent crime, and kidnapping during its May 2010 term. App. 1353 – App. 1358. On December 13, 2010, Petitioner and four co-defendants proceeded to a five-day trial before the Honorable Edgar Dickson. App. 166. Joshua Koger represented Petitioner. David Pascoe and Donald Sorensen served as the Solicitor and Assistant Solicitor, respectively. Rickard Lackey represented Christian Coleman, Jillian Ullman and Mark Wise represented Ralph Coleman, Scott Palmer represented Willie Harris, and Douglas Mellard represented Danny Ryant, Jr. The facts presented at trial are as follows:

On Friday, March 12, 2010, then-minor Patrick T. claimed that along with Petitioner, he and four other men planned to purchase marijuana prior to robbing the seller. App. 466 line 23 – App. 468 line 25; App. 480 line 4 – App. 484 line 2. Petitioner later complained that his brother and ex-girlfriend would have provided him an alibi if only Counsel Koger had called them as witnesses at trial. App. 1314 line 18 – App. 1315 line 17. In fact, Petitioner's brother was at the courthouse and prepared to testify. App. 1332 line 25 – App. 1333 line 4.

According to P.T., all six men entered the apartment of the seller and taped him up. App. 485 lines 2 – 21.¹ P.T. testified that most of the co-defendants were armed at this time. App. 484 lines 3 – 24. While searching for the money, shots were fired and the seller was struck; P.T. claimed he, Petitioner, and all of the other co-defendants ran. App. 486 line 2 – App. 487 line

¹ P.T., a minor at the time of the alleged crime, had his charge reduced from murder to voluntary manslaughter as a result of his cooperation with law enforcement and the Solicitor's Office.

21. Law enforcement responded to the scene and discovered the decedent. App. 350 line 19 – App. 353 line 25.

P.T. turned himself in to the police. App. 492 lines 12 – 22. Based on his statement, all of the other individuals involved in the shooting on March 12, 2010 were located and arrested. P.T. testified at Petitioner's trial on behalf of the State.

Following a jury trial, all five defendants were found guilty of various charges. App. 1242 line 16 – App. 1264 line 3. In particular, Petitioner was found guilty on the murder, armed robbery, and burglary in the first degree charges. App. 1259 line 7 – App. 1264 line 3.

Judge Dickson sentenced Petitioner to fifty years imprisonment for murder, fifty years imprisonment for burglary, first degree, and thirty years imprisonment for armed robbery, with sentences to be served concurrently. App. 1288 lines 11 – 22. Petitioner's conviction was affirmed. No. 2012-UP-646 (filed December 5, 2012). App. 1301.

On January 10, 2013, Petitioner filed an application for post-conviction relief. App. 1294. Petitioner's application contained allegations of ineffective assistance of counsel, including claims that Counsel failed to investigate his case and interview potential witnesses. App. 1296.

An evidentiary hearing was conducted on October 27, 2014 before the Honorable Kristi L. Harrington. App. 1306. Charles Brooks represented Petitioner, and James Mitchell represented the State. Petitioner testified during the hearing, and the State called trial counsel Koger as a witness. On January 15, 2015, Judge Harrington issued her order denying Petitioner relief. App. 1344. The Order of Dismissal was filed on January 22, 2015. This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where trial counsel provided ineffective assistance by failing to call two alibi witnesses to testify at Petitioner's trial.

Petitioner testified that he gave the names of two potential alibi witnesses to Counsel, but neither witness testified at trial. App. 1314 line 21 – App. 1315 line 20. An alibi would have countered the State's most damaging piece of evidence, the testimony of a sixth co-defendant. App. 1331 lines 4 – 19. Counsel served the notice of alibi on the prosecution. App. 1328 lines 8 – 11. However, Counsel did not call either witness, his younger brother or his ex-girlfriend, to testify at Petitioner's trial, even though the former spoke with Counsel and was present at the time of trial. App. 1332 line 25 – App. 1333 line 12.

“[C]riminal 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). The duty to investigate a potential witness is even more critical when the witness might provide an alibi. Accordingly, the Sixth Amendment requires that criminal defense attorneys thoroughly investigate potential alibi witnesses.

Petitioner correctly asserted that Counsel was ineffective, because he did not call either witness to the stand during Petitioner's 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 call the alibi witnesses and/or communicate to Petitioner any potential problems with their testimony. Petitioner's testimony, as outlined above, indicates that Counsel did not call either witness. Furthermore, Counsel did not recall whether he advised Petitioner that his brother's testimony was not going to be helpful. App. 1337 lines 3 – 7. 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.

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984).

In this capacity, Petitioner testified that he believed the two potential alibi witnesses would have aided his case by placing him away from the crime scene on the night in question. Because Counsel did not call either individual as a witness at trial, Petitioner was unable to combat the damaging testimony of Patrick T. The resulting prejudice manifested itself in a conviction.

During cross examination, Petitioner discussed in greater detail the two alibi witnesses whose names he provided to Counsel: his younger brother and his former girlfriend. App. 1327 line 20 – App. 1328 line 20. Neither witness testified at the evidentiary hearing. App. 1328 lines 19 – 20. Counsel testified that he spoke with Petitioner's former girlfriend, but she was unwilling to help. App. 1332 line 16 – 24. Counsel also determined that Petitioner's younger brother was not going to be helpful to Petitioner's case. Counsel testified that he alerted Petitioner to this fact. App. 1337 lines 3 – 19.

Because there was no physical evidence linking any of the defendants to the crime scene, the universal defense strategy revolved around impeaching the testimony of a co-defendant. App. 1332 lines 12 – 15; App. 1334 lines 10 – 20. The two alibi witnesses would have testified regarding Petitioner's whereabouts during the night in question. App. 1315 lines 5 – 17.

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 9th day of December, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

MARIO SHIVERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

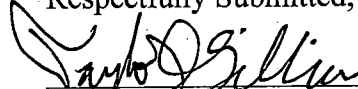
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mario Shivers states:

1. He is 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 Kristi Lea Harrington, which was held on October 27, 2014, 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 Mario Shivers.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of December, 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
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 9th day of December, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Kristi Lea Harrington, Circuit Court Judge

MARIO SHIVERS,

PETITIONER

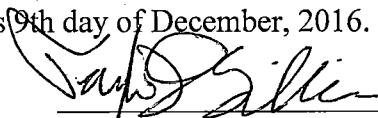
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

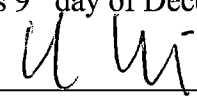
CERTIFICATE OF SERVICE

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 Ruston Neely, 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 Mario Shivers, #344174, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 9th day of December, 2016.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

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



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