

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT


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Certiorari to Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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FRANKIE MOORE VEREEN,

  
**RECEIVED**  
SEP 18 2017  
S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000226

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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

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**ISSUE PRESENTED**

Did the PCR Court err in denying Petitioner relief where plea counsel provided ineffective assistance by failing to discuss with Petitioner the possibility of suppressing Petitioner's statement and where Petitioner would have elected to go to trial had counsel informed him of the defenses available to him?

## STATEMENT

On August 13, 2014, petitioner pled guilty to first degree criminal sexual conduct with a minor in front of the Honorable Maite Murphy in Dorchester County. Glen Justis represented the State, and Petitioner was represented by Ash Chisolm.

The facts presented at the guilty plea by the prosecution are as follows:

Petitioner's alleged act of malfeasance took place on June 29, 2013. App. 8 l. 1. Petitioner was allegedly looking after his brother's six-year old daughter. App. 8 ll. 5 – 10. When Petitioner's brother returned, the girl's pants were on "crooked or on backwards." App. 8 ll. 11 – 13. The girl's mother asked the girl, and she explained that Petitioner had called her into the bathroom, pulled her pants down, taken a picture of her vagina with his phone. App. 8 ll. 14 – 18. According to the girl, Petitioner then asked her to close her eyes and forced her to perform oral sex on him. App. 8 ll. 18 – 19.

The child disclosed these events at a forensic interview on August 13, 2013. App. 8 l. 20 – App. 9 l. 4. Petitioner, who was homeless at the time, was arrested on February 7, 2014. App. 9 ll. 5 – 15. Petitioner gave a statement which confirmed what the girl reported. App. 9 ll. 16 – 20. Petitioner signed his written statement. App. 9 ll. 21 – 24. Petitioner was charged with criminal sexual conduct with a minor in the first degree. App. 9 l. 23 – App. 10 l. 3.

Petitioner waived presentment and proceeded to sentencing after Judge Murphy accepted his guilty plea. App. 10 l. 20 – App. 11 l. 2; App. 13 ll. 18 – 22. Subject to a negotiated plea, Judge Murphy sentenced Petitioner to the statutory minimum of twenty-five years' imprisonment. App. 15 ll. 3 – 9.

Petitioner did not appeal his sentence or conviction. He filed a timely application for post-conviction relief on August 14, 2015. App. 17. Petitioner's application contained

allegations of ineffective assistance of counsel, including failure to research, investigate, communicate, and explain, as well as a claim that his guilty plea was not voluntarily or intelligently made. App. 18 – App. 27. The State made its Return on or about July 20, 2016. App. 28.

An evidentiary hearing was conducted on October 25, 2016 before the Honorable Diane Goodstein. App. 34. Rodney Davis represented Petitioner, and Ruston Neely represented the State. Petitioner and plea counsel testified during the hearing. Counsel for Respondent moved for summary judgment at the end of the hearing. App. 65 ll. 18 – 23. Judge Goodstein denied the motion. App. 66 ll. 16 – 17.

On January 9, 2017, Judge Goodstein issued her order denying Petitioner relief. App. 68. The Order was filed January 11, 2017.

This Petition follows.

## ARGUMENT

**The PCR Court erred in denying Petitioner relief where plea counsel provided ineffective assistance by failing to discuss with Petitioner the possibility of suppressing Petitioner's statement and where Petitioner would have elected to go to trial had counsel informed him of the defenses available to him.**

Petitioner did not feel as if he had any option other than to plead guilty, based on his attorney's advice. App. 52 ll. 2 – 4. At his PCR hearing, Petitioner testified that he never spoke with plea counsel during the two times they met prior to the guilty plea about the following topics: grand jury presentment, how trials are conducted in South Carolina, Petitioner's rights to discovery under Rule 5, SCRCrimP, witnesses, investigating witnesses, Petitioner's statement, an interview with Petitioner's accuser, any defenses Petitioner would have if he went to trial, the sex offender registry, the term "sexually violent predator," the State's evidence, or trying to block the State's evidence. App. 44 l. 6 – App. 48 l. 24.

If counsel had met with Petitioner on more than three occasions, Petitioner would have felt more comfortable with his representation and requested a jury trial. App. 50 ll. 1 – 7. Additionally, had counsel spoken with Petitioner about any of the above topics, Petitioner would have elected to request a jury trial. App. 50 l. 8 – App. 52 l. 1. However, there was not a discussion between counsel and Petitioner about suppressing Petitioner's statement if he chose to go to trial. App. 58 l. 23 – App. 59 l. 2.

Petitioner was under the impression that once he began his guilty plea, he would be unable to interrupt or pause it in any way. App. 58 ll. 14 – 22. He was not informed by counsel that he had the option to stop the plea in order to explain his answers or seek clarification.

Petitioner correctly asserted that Counsel was ineffective, because he did not communicate with Petitioner regarding details of his case, including how evidence and witnesses would be utilized at 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 how defenses, witnesses, evidence, and basic trial procedures might affect his case. Petitioner’s testimony, as outlined above, indicates that Counsel did not go over any suppression issues in his case. 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). As evident from Petitioner’s testimony, the

prejudice in his case manifests itself in his plea which was made without full knowledge of possible defenses available to him.

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. Through his own testimony at the evidentiary hearing, Petitioner testified that he was prejudiced as a result of plea counsel’s deficiencies. According to Jackson, supra, Petitioner’s self-serving statements prove that he was prejudiced by the lack of information when it came to material defenses in his case.

“This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable ‘only to the extent that reasonable professional judgment supports the limitations on the investigation.’ ” McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Counsel's less-than-adversarial approach was unreasonable. Plea counsel could have pursued a suppression theory in the pre-trial phase but then changed gears if the evidence was admitted. Plea counsel could have argued that even if Petitioner was the actual perpetrator, his

statement should have been suppressed for a multitude of reasons. As it stands, however, Petitioner was not made aware of possible defenses which would have affected the evidence used against him. Therefore, his plea was not knowingly entered.

**CONCLUSION**

For the foregoing reasons, Petitioner requests this Court grant his petition for writ of certiorari and allow full briefing on the issue, reverse the charge against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

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FRANKIE MOORE VEREEN,

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PETITION TO BE RELIEVED AS COUNSEL

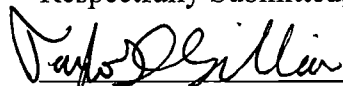
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Counsel for Frankie Moore Vereen states:

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 Diane Schafer Goodstein, which was held on October 25, 2016, 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 Frankie Moore Vereen.

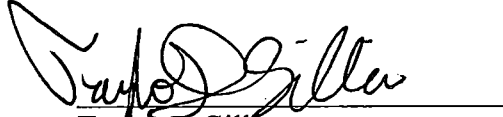
Respectfully Submitted,

  
\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of September, 2017.

**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."



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Defense  
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ATTORNEY FOR PETITIONER

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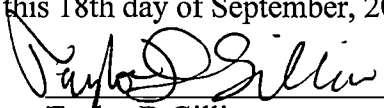
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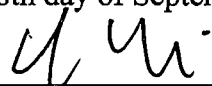
RESPONDENT

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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 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 Frankie Moore Vereen, #324568, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of September, 2017.

  
\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 18th day of September, 2017.

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