

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Letitia H. Verdin, Circuit Court Judge

MICHAEL LAMAR COUCH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000159

JOHNSON PETITION FOR WRIT OF CERTIORARI

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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 suggested that Petitioner may be guilty during his closing argument?

STATEMENT

On February 16, 2011, Petitioner was with his common-law wife, Sommer Grant, at Garry McCall's house. McCall consumed vodka and seven "Natural Light" beers. App. 131 ll. 6 – 15. Petitioner, Grant, and McCall ate dinner together before everyone fell asleep. App. 132 ll. 2 – 24. Petitioner woke up at 3:00 a.m. to see McCall and Grant kissing. When Petitioner made his presence known, McCall "turned, surprised, and pulled his knife" on Petitioner. McCall approached Petitioner with a knife and cut Petitioner in two places as well as kicked him. Petitioner acted in self-defense and disarmed McCall. McCall was cut on the cheek in the process. App. 261 ll. 10 – 20.

During the tussle, Grant jumped on Petitioner's back and was inadvertently struck. App. 261 ll. 21 – 23. A 9-1-1 call was made to the Oconee County Sheriff's Office around 3:00 or 3:30 a.m. the same morning. App. 81 l. 25 – App. 82 l. 25. Matt Patterson and Nina McKey, officers with the Walhalla Police Department, were dispatched to McCall's house. App. 83 ll. 4 – 9; App. 168 ll. 6 – 7. At that time, McCall stated to Patterson that Petitioner had cut him. App. 181 ll. 11 – 25. Patterson subsequently arrested Petitioner. App. 198 l. 21 – App. 199 l. 3.

On May 16, 2011, an Oconee County Grand Jury indicted Petitioner for attempted murder, criminal domestic violence of a high and aggravated nature, and possession of a weapon during a violent crime. App. 478 – 482. Represented by Blair Stoudemire, the State called Petitioner's case for trial before the Honorable Alexander S. Macaulay and a jury on October 17, 2011. R. Delane Rosemond represented Petitioner during the three-day trial.

Grant was unable to remember the details of the early morning incident at trial. App. 112 ll. 7 – 10; App. 116 ll. 14 – 20; App. 118 ll. 11 – 16. She also sought to claim spousal immunity in order to avoid testifying against Petitioner. App. 107 ll. 8 – 25. A statement she provided to

law enforcement following the incident alleged that Petitioner had a knife in his hand and hit her in the head with a glass coffee pot. App. 126 ll. 3 – 9.

During closing arguments, counsel for Petitioner offered the following:

And the burden of proof that we talked about comes from this table and that chair, and they have the responsibility to give you enough information that you can say, you know, I don't have a reasonable doubt in my mind that [Petitioner] tried to kill Harry McCall. And I do believe that there is reasonable doubt out there. **He may be guilty of something else, but it's not attempted murder.**

...

Ladies and gentlemen, this particular case is important because [Petitioner] is charged with attempted murder. But he didn't do it. **He may be guilty of something else**, one of those lesser-includes that you're going to hear about.

App. 309 ll. 4 – 11; App. 311 ll. 7 - 11 (emphasis added).

The jury found Petitioner guilty as indicted on the criminal domestic violence of a high and aggravated nature as well as the possession of a weapon during a violent crime. App. 359 ll. 10 – 20. On the attempted murder charge, the jury found Petitioner guilty of the lesser-included offense of assault and battery of a high and aggravated nature. App. 359 ll. 4 – 9.

Judge Macaulay sentenced Petitioner to twenty years' imprisonment on the assault and battery conviction, suspended to fifteen years with probation for five years. App. 373 ll. 19 – 25. On the criminal domestic violence charge, Petitioner was sentenced to ten years' imprisonment suspended to five years with probation for five years. App. 374 ll. 5 – 10. On the possession of a weapon charge, Petitioner was sentenced to a term of five years' imprisonment. App. 374 ll. 1 – 4. Judge Macaulay structured the sentences to run concurrently. App. 374 ll. 11 – 19.

Petitioner's convictions were affirmed by the Court of Appeals. State v. Couch, Op. No. 2013-UP-313 (filed July 10, 2013).

Petitioner filed a timely application for post-conviction relief on July 29, 2014. App. 377. Petitioner's application contained allegations of ineffective assistance of counsel. The State made its Return on or about October 29, 2014. App. 384. PCR Counsel for Petitioner, Hugh Welborn, subsequently amended the application via letter dated October 29, 2015. App. 390.

An evidentiary hearing was conducted on October 24, 2016 before the Honorable Letitia H. Verdin. App. 392. R. Mills Ariail assumed representation of Petitioner due to health concerns of prior counsel, and Johanna C. Valenzuela represented the State. App. 397 ll. 15 – 17. Petitioner and trial counsel testified during the hearing. Petitioner's notes were included as an exhibit to the hearing. App. 483 – 496.

On December 28, 2016, Judge Verdin issued her order denying Petitioner relief. App. 466 – 476. She found that Petitioner failed to prove that Counsel rendered ineffective assistance. App. 474.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where trial counsel suggested that Petitioner may be guilty during his closing argument.

Trial Counsel was appointed to represent Petitioner. App. 402 ll. 11 – 17. Petitioner only met with Counsel on one or two occasions before trial. App. 403 ll. 22 – 24. They never spoke of the elements of the crimes for which Petitioner was charged. App. 404 ll. 6 – 8.

During trial, Counsel set the stage for self-defense. App. 40 ll. 13 – 16; App. 261 l. 18 – App. 262 l. 3; App. 311 l. 23 – App. 312 l. 2. Petitioner was therefore understandably surprised when Counsel abandoned the self-defense argument during his closing argument:

I said [McCall] came at me with a knife. It was just instinct. It was self-defense. It wasn't, I'm guilty of something else. It was self-defense. I was not guilty of anything. It was self-defense.

App. 421 ll. 8 – 23.

Counsel and Petitioner had never discussed this strategy. App. 422 ll. 4 – 8. As Petitioner stated:

[I]t was not only ineffective, but [Counsel] abandoned the required duty of loyalty to me. He did not simply make poor strategic choices, he acted with reckless disregard for my best interests and, at times, apparently, with the intention to weaken my case.

App. 422 ll. 15 – 22.

Petitioner correctly asserted that Counsel was ineffective, because he violated his duty of loyalty to Petitioner and relinquished the self-defense argument. 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 a change in strategy before closing arguments. Counsel “gave up” the idea of self-defense which he had set forth during trial. App. 421 ll. 8 – 23.

As Petitioner noted:

Defense counsel’s performance was not only ineffective, but counsel abandoned the required duty of loyalty to his client; counsel did not simply make poor strategic choices; he acted with reckless disregard for my best interest and at times, apparently, with the intention to weaken his client’s case.

App. 492.


“Counsel's duty of loyalty includes not only the duty to operate free of third-party conflicts of interest, but also the duty to act as an adversary vis-a-vis the state.” Fisher v. Gibson, 282 F.3d 1283, 1304 (10th Cir. 2002). “An effective attorney ‘must play the role of an active advocate, rather than a mere friend of the court.’ ” Osborn v. Shillinger, 861 F.2d 612, 624 (10th Cir. 1988) (quoting Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)); see also U.S. v. Cronin, 466 U.S. 648, 656-57, 104 S.Ct. 2039, 80 L. Ed. 2d (1975) (“if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

“Implying a client’s guilt by repeatedly lending support to the state’s version of events... is virtually tantamount to a concession of guilt.” Fisher v. Gibson, 282 F.3d 1283, 1304 (10th Cir. 2002).

“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). The jury found Petitioner guilty of the lesser-included offense, as Counsel suggested. Had Counsel not submitted that Petitioner was guilty “of something,” perhaps the jury would not have convicted Petitioner.

CONCLUSION

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



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of October, 2017.

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RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael L. Couch 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 Letitia H. Verdin, which was held on October 24, 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 Michael L. Couch.

Respectfully Submitted,




Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of October, 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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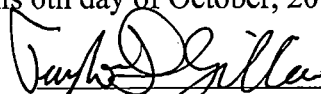
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CERTIFICATE OF SERVICE

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 Lindsey McCallister, 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 Michael L. Couch, #282654, at Livesay Pre-Release Center, Post Office Box 580, Una, SC 29378, this 6th day of October, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of October, 2017.

Laurin Stevens (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.