

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Certiorari to Darlington County

DEC 13 2017

Honorable Thomas W. Cooper, Circuit Court Judge

SUPREME COURT

JIMMY GALLISHAW, JR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000548

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the PCR Court err in denying Petitioner relief where trial counsel failed to bring to light inconsistencies in law enforcement's testimony during cross-examination, where one officer's testimony directly contradicted another's?

STATEMENT

During the October 26, 2009 term of the Darlington County grand jury, Petitioner was indicted for multiple crimes, including criminal sexual conduct with a minor in the first degree, lewd act upon a child, and incest. App. 862 - 863. He proceeded to a jury trial before the Honorable Howard P King on July 19, 2010. Suzanne Mayes and Sherrie Baugh represented the State, and Tonya Copeland-Little and Matthew Swilley represented Petitioner.

The jury found Petitioner guilty as indicted. App. 697 l. 17 – App. 700 l. 8. Judge King sentenced Petitioner to twenty-five years on each of the two criminal sexual conduct with a minor charges that qualified under Jessie’s Law, twenty-five years on the criminal sexual conduct that does not fall under Jessie’s Law, fifteen years for the first lewd act charge, ten years for the incest charge, fifteen years for the second lewd act charge, and ten years on the third lewd act charge. App. 712 l. 1 – App. 713 l. 25. The two criminal sexual conduct charges which fall under Jessie’s Law were imposed to run consecutive, with the remainder of the sentences to run concurrently. Id.

The South Carolina Court of Appeals affirmed Petitioner’s convictions on September 19, 2012. State v. Gallishaw, Op. No. 2012-UP-532 (S.C. Ct. App. filed September 19, 2012). Petitioner filed a timely application for post-conviction relief on July 3, 2013. App. 760. The PCR application contained allegations of ineffective assistance of trial and appellate counsel. App. 767. The State filed its Return on or about June 11, 2014. App. 773. Counsel for Petitioner amended the post-conviction relief on or about June 15, 2016 by adding a claim that “[t]rial counsel failed to adequately cross-examine and attack credibility of witnesses.” App. 780.

An evidentiary hearing was held before the Honorable G. Thomas Cooper on July 20, 2016. App. 782. Lance Boozer represented Petitioner, and Jessica Kinard appeared on behalf of the State. Petitioner as well as both of Petitioner's trial attorneys, Tonya Copeland Little and Matthew Swilley, testified at the hearing.

An Order of Dismissal was issued on February 17, 2016 and filed on February 24, 2017. App. 850. The PCR judge dismissed Petitioner's application, finding that Petitioner failed to show that either of his attorney's performance fell below an objective standard of reasonableness. App. 857.

This Petition follows.

ARGUMENT

The PCR Court erred in denying Petitioner relief where trial counsel failed to bring to light inconsistencies in law enforcement's testimony during cross-examination, where one officer's testimony directly contradicted another's.

Petitioner's wife accused him of sexually assaulting her daughter. App. 351 ll. 3 – 21. The daughter substantiated that claim and added that Petitioner had also assaulted another minor. App. 355 ll. 21 – 25; App. 226 ll. 2 – 23; App. 233 ll. 20-25; App. 254 l. 21 – App. 257 l. 16.

Petitioner was first arrested on February 4, 2009. App. 789 ll. 2 – 3. Little and Swilley were appointed to retain Petitioner. App. 788 ll. 18 – 23. Little was appointed in April 2009, and Swilley was appointed before Petitioner's trial. App. 789 ll. 6 – 24; App. 790 ll. 8 – 13.

Prior to trial, Petitioner sought to have Little removed as counsel after she questioned his innocence:

[S]he made the comment of - - that of, "Well, I'm not the one sleeping with my - - I'm not the one sleeping with my children." So I said right then, I said, "Well, okay, then. I see right now that you are not the lawyer for me."

App. 790 ll. 14 – 23.

When asked how those comments made him feel, Petitioner suggested that Little was not "the proper counsel" for him and there was "no need to go any further with her if she already felt that way and it wasn't even trial time." App. 791 l. 21 – App. 792 l. 5. Petitioner moved to have Little relieved as his counsel because "she already felt that [he] was guilty." App. 792 ll. 6 – 25. Little was not relieved. App. 793 ll. 1 – 3.

During trial preparation, Little and Petitioner discussed the evidence in the case and the witnesses who might be called on his behalf. App. 797 l. 15 – App. 798 l. 16. They did not discuss defenses to the charges. Id.

Little testified that Petitioner was cooperative during trial preparation. App. 823 ll. 11 – 16. Petitioner rejected two plea offers because he did not want to admit his guilt. App. 824 l. 20 – App. 826 l. 13.

Petitioner alleged that Little did not effectively cross-examine witnesses, including two members of law enforcement. App. 799 l. 10 – App. 804 l. 15. During a Jackson v. Denno¹ hearing, Michael August testified that another individual, “Rick Charles with SLED,” was present with Petitioner before Petitioner gave a statement. App. 87 ll. 7 – 10. August testified that “[Charles] didn’t say anything. He was just present.” App. 87 ll. 11 – 13.

In contrast, Charles later testified on cross-examination that he spoke with Petitioner at that point in time:

I asked him - - it was lunch time. I asked him [if] he was hungry, [whether] he would like something to eat. He agreed that he would. And after Captain Watson came in and started to interview Mr. Gallishaw, I went to Burger King and got him something to eat.

App. 545 ll. 17 – 22.

Petitioner indicated that counsel should have brought to light those inconsistencies. Id. Because that was not done, he was prejudiced. Id.

Petitioner correctly asserted that Counsel was ineffective, because she did not adequately cross-examine these two law enforcement officers. 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

¹ 378 U.S. 368, 408, 84 S. Ct. 1774, 1797, 12 L. Ed. 2d 908 (1964)

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 question Charles as to why August would have claimed that he did not say anything to Petitioner. Had this been brought out, there is a chance that the jury might have questioned the credibility of both witnesses and not convicted Petitioner.

“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 manifested itself in a guilty verdict.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue.

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 13th day of December, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County

Honorable Thomas W. Cooper, Circuit Court Judge

JIMMY GALLISHAW, JR.,

PETITIONER

V.

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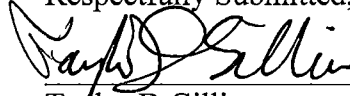
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jimmy Gallishaw 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 Thomas W. Cooper, which was held on July 20, 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 Jimmy Gallishaw.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of December, 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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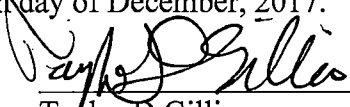
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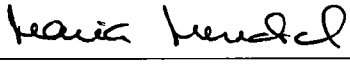
CERTIFICATE OF SERVICE

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 Johnny Ellis James, Jr., 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 Jimmy Gallishaw, #341905, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of December, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 13th day of December, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 7/23/2023