STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED

MAR 19 2018

SC SUPREME COURT

MATTHEW ANTWAIN JACKSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001572

JOHNSON PETITION FOR WRIT OF CERTIORARI

Robert M. Dudek
Chief Appellate Defender

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ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for not securing the testimony of an expert witness, where it was undisputed expert testimony was critical in this case as to how the child was injured, and counsel failed to even request a funding order from the trial judge for the expert she claimed she retained but who never testified. 2

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ISSUE PRESENTED

Whether the PCR court erred by ruling defense counsel was not ineffective for not securing the testimony of an expert witness, where it was undisputed expert testimony was critical in this case as to how the child was injured, and counsel failed to even request a funding order from the trial judge for the expert she claimed she retained but who never testified?

ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for not securing the testimony of an expert witness, where it was undisputed expert testimony was critical in this case as to how the child was injured, and counsel failed to even request a funding order from the trial judge for the expert she claimed she retained but who never testified.

Relevant facts

Petitioner was indicted at the June 2011 term of the Greenwood County Grand Jury for the offense of inflicting great bodily injury upon a child. App. 289 – 290. Petitioner testified at trial that he accidentally dropped the child. The judge told petitioner at sentencing that he had no doubt petitioner loved his son, the child at issue.

Petitioner's case was called to trial on August 7, 2013, before the Honorable Frank R. Addy, and a jury. Meghan Flannery and Janna Nelson represented petitioner. Elizabeth White and Aaron Taylor were the assistant solicitors. App. 1.

The state's theory of the case was that petitioner intentionally injured the approximately twenty-three month old child. Petitioner's defense was that the child was hurt in an accident while he was playing with the child and holding him above his head. Petitioner originally told the police the child fell off a couch, but he later admitted he accidentally dropped the child on his head. He originally lied because he was scared the police would not believe him. App. 263, l. 22 – 268, l. 21.

Defense counsel Flannery admitted at the PCR hearing that given Dr. Crosswell's expert testimony for the state that the injuries did not happen in a single occurrence that it was critical that the defense obtain an expert "that would be on par with Dr. Crosswell . . ." Indeed, the case was going to "hinge" on Dr. Crosswell's testimony. App. 263, l. 22 – 268, l. 21.

Flannery admitted at the PCR hearing that even though she thought she had a radiologist, Dr. Piarti, retained that would testify for the defense, that she had never requested a funding order securing funding for Dr. Piarti. App. 276, ll. 12-25. Instead, Flannery maintained that Dr. Piarti would testify for the defense, and that she would get a funding order later. Flannery's claim was that she called Dr. Piarti the night before trial to talk about "a few little details," and that Dr, Piarti suddenly asked her how she could defend child abusers. He also allegedly told her that he thought there was a special place in hell for people who abuse children. App. 265, l. 17 – 266, l. 25. Counsel testified that she therefore decided not to have an expert witness at all. App. 265, l. 17 – 268, l. 21.

The Trial

Dr. Crosswell examined the child on January 21, 2011. She testified that she found numerous bruises on his body. App. 107, ll. 16-23. Those injuries included around the child's buttocks and his rectum. App. 109, l. 19 – 110, l. 14.

Dr. Crosswell opined that these injuries could not have resulted from the child falling. The size and number of bruises, Dr. Crosswell maintained, "could not have been sustained from an isolated fall." App. 110, l. 12 – 11, l. 10. Dr. Crosswell ruled out the child falling from a couch, and from the child wrestling with petitioner and him falling from petitioner arms as possible causes of the injuries. App. 111, ll. 4-16.

The mother of the child, Lashondra Warden-Fair, testified as a state's witness. Her son was four years old at the time of the August 2013 trial. He was born in 2009. App. 1; App. 46, l. 18 – 47, l. 10. Petitioner was the child's father. App. 47, ll. 17-19.

The mother testified that she sent the child to visit petitioner and his grandmother when the injuries occurred. The mother testified the child was fine at the time he went to visit petitioner, and she claimed that he had no bruises on him. App. 51, ll. 12-18.

The mother further testified that after the child was injured, she went to his hospital room in Greenville. She said that petitioner told her the child fell off of the couch. App. 53, ll. 13-17. She related that petitioner later told her that he was wrestling with the child, and that he accidentally dropped him. App. 54, ll. 1-2. She offered that she had to take the child twice to "head doctors," and that after the second visit, "he [the Doctor] told me everything was fine, but he said if he -- if I see any difference or anything bring him back." App. 55, ll. 19-25.

On cross-examination, the mother said the child was doing well now, eating well, walking fine, and talking and behaving like a normal four-year-old. App. 56, l. 19 – 57, l. 9.

Petitioner's mother, and the child's grandmother, Undrea Segar, also testified as a state's witness. Segar said the child would come and stay with her once or twice a month when petitioner had visitation. App. 58, l. 23 – 59, l. 6. Petitioner did not live with Segar but would bring the child to her house when he had visitation. App. 59, l. 19 – 60, l. 16.

Segar remembered petitioner called her after the child got hurt, and that he was upset. Petitioner asked her to come over to his house immediately. Segar, a nurse, remembered that when she arrived at petitioner's house "there was a girl sort of a couple feet inside the door on her knees. And when I looked around her, she was kind of pressing down on [the child's] chest. And I was like, 'you don't know what you're doing, stop that.' And when [the child] heard me he lifted his arm up. And then he laid his arm back down. And I said 'Baby, talk to grandma. It's grandma.' And every time I said it, he would lift his arm up and lay his arm back down." When EMS arrived, Segar allowed them to tend to the child. App. 61, l. 9 – 63, l. 15.

Segar testified that she did not remember seeing any bruising on the child but she did say the child had diaper rash and red splotches from that condition. App. 63, l. 16 – 64, l. 3.

Dr. Crosswell

Dr. Crosswell was employed by Greenville Health Systems in Greenville, South Carolina. She was a child pediatrician. App. 104, ll. 15-25.

The "intensive care team" consulted Dr. Crosswell because they thought the trauma to the child might not have been accidental. Dr. Crosswell examined the child on January 21, 2011, and noticed numerous bruises on his body. App. 107, ll. 16-20. As stated supra, Dr. Crosswell opined the injuries were not accidental, and that the child was intentionally harmed.

Petitioner testifies

The twenty-four-year-old petitioner testified at his 2011 trial that he worked as a roofer. Petitioner told the jury that on the day in question, he fixed the child breakfast and played with him. Petitioner walked into the living room where the child was on the couch. He was going to give the child a bath, so petitioner said he played with the child until the bath water got warm. Petitioner held the child in the air "like I was lifting weights because he was a hefty baby and he was heavy," and "I felt a sharp pain to my wrist because I used to lift weights back in high school, played football and track -- ran track and whatnot." Petitioner said the sharp pain "caused me to release him with my left hand." "He dropped so quickly by the time I caught him he hit the floor." Petitioner said he was very scared. App. 152, l. 3 – 155, l. 18.

Dropping the child was "a terrible accident." The child's head hit the floor, and petitioner ran screaming to his neighbor's house that he needed help. The neighbor said she would call 911, and petitioner called his mother, the nurse. App. 156, l. 5 – 157, l. 25.

Petitioner said when his son was transferred to the hospital in Greenville, he went with his mother and girlfriend to see him. Petitioner saw the child, and he spent time with him in the hospital. Petitioner denied the state's insinuation that he spent too little time with the child in the hospital. App. 161, l. 12 – 163, l. 24.

On cross-examination, petitioner told the solicitor he initially lied about how the child got hurt because he was scared no one would believe him, and that he would get arrested. App. 167, l. 15 – 169, l. 25; App. 173, ll. 15-21.

After petitioner was convicted, the judge told petitioner he believed he lied when he testified, and for that reason he sentenced him to twenty years' imprisonment, suspended upon the service of twelve years and five years' probation. App. 229, l. 15 – 230, l. 9.

Post-conviction relief

After petitioner's conviction was affirmed on direct appeal, he filed an application for post-conviction relief alleging, inter alia, that his attorney was ineffective for failing to procure an expert witness. App. 235. The state filed a return dated November 7, 2016, acknowledging petitioner's allegation of ineffective assistance of counsel for "failure to have an expert witness." App. 240 – 243.

An evidentiary hearing was convened on February 27, 2017 before the Honorable Eugene C. Griffith, Jr. Ashley McMahan represented petitioner. Justin Hunter was the Assistant Attorney General. App. 244.

Petitioner testified he was told by defense counsel Flannery that she had an expert to testify on his behalf. However, petitioner said on the second day of his trial that his attorney said she could not get an expert to testify for him. App. 250, l. 25 – 251, l. 5.

As stated, defense counsel Flannery testified that even though she did not approach the trial judge with a funding order for expert funds, she believed Dr. Piarti was going to testify for petitioner. Flannery maintained that she had subpoenaed Dr. Piarti, and that the night before the trial began, he suddenly, essentially changed 180 degrees, and asked her how she could defend "child abusers." He allegedly also said there was a special place in hell for child abusers.

For this reason, Flannery testified that she did not call Dr. Piarti or any other expert witness, even though she admitted "this was a case that was going to hinge on Dr. Crosswell's testimony that there were injuries, and that they were intentional." App. 263, l. 6 – 268, l. 21.

The following occurred on cross-examination of Counsel Flannery regarding not having funds approved for an expert in advance:

> Q. And so if you had found an expert that would have satisfied your needs, would you have had money available to do that?
>
> A. I would have requested it at that time, I know that was one of your grounds, I didn't request the money because I didn't have anyone. But, yes, once I found someone I would get a quote and request it.
>
> Q. Is that typically the process that you would ask for money after you located the expert?
>
> A. Yes. Normally, because honestly the Court is a little stingy sometimes with money to give to us and they usually want a very detailed accounting of where that money is going to go. And have actually had it denied before because it was too much.

App. 276, ll. 12-25.

In the order of dismissal, the judge noted that defense counsel testified she did not need the money for an expert approved in advance and that counsel said Dr. Piarti, the night before trial, said that he did not understand how she could defend child abusers "and that he read the scans but the outlook didn't look good. Counsel testified as a result of Dr. Piarti's sudden

change, she did not want to risk his testimony harming Applicant at trial." App. 284. The judge found that petitioner was not ineffectively represented. App. 288.

Discussion

Defense counsel admitted at the PCR hearing that the case of child abuse against petitioner "hinged" on Dr. Crosswell's testimony. Yet, defense counsel failed to approach the trial judge for a funding order for an expert witness to testify, or even to help her prepare to cross-examine Dr. Crosswell at trial. The PCR court accepted defense counsel's strange explanation of Dr. Piarti's eleventh hour conversion at almost literally 11:59 p.m. in the process at face value. Thus, petitioner was unable to effectively refute the allegations of the indictment that he intentionally inflicted great bodily harm upon his son, that his son suffered a subdural hematoma, and "severe bruising to the body of the said victim . . ." App. 290.

In McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), this Court held that defense counsel rendered ineffective assistance when she failed to call an expert witness whose testimony supported their defense, and when she called an expert whose testimony undermined the defense. In McKnight, the state called Dr. Proctor, the pathologist, to testify that the fetus died in part due to the defendant's cocaine use. Dr. Brett Woodard, an expert in pediatric pathology, testified that in his opinion, the defendant's cocaine use alone resulted in the fetus dying.

In "response," counsel for the defendant called two expert witnesses who were not helpful. Dr. Carch, one expert, testified the only conclusion he could draw was that the defendant was a cocaine user. Counsel for McKnight also called Dr. Sandra Conradi, a pathologist at MUSC. Dr. Conradi testified she could not rule out the mother's cocaine use as the cause of the baby's death.

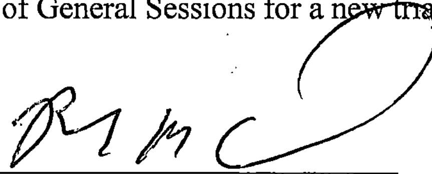
This Court found defense counsel in McKnight v. State was ineffective for failing to call an expert whose testimony supported the defense, and for calling an expert witness whose testimony actually undermined the defense. This Court noted this was the second trial in the McKnight case, and this Court found defense's counsel's actions were unreasonable.

In the present case, it was unreasonable for defense counsel not to have procured a funding order, where she testified she expected Dr. Piatri to appear the next day in court and offer favorable testimony on petitioner's behalf. This favorable testimony could only have been that Dr. Piatri disagreed with Dr. Crosswell, and he thought the injuries may well have been unintentionally suffered. Yet, it appears from defense counsel's PCR testimony that Dr. Piatri may not have "read the scans" when he agreed to testify for the defense. See, also, Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

In sum, defense counsel in this case performed deficiently in her failure to obtain a funding order, and obtain an expert witness to refute the testimony of Dr. Crosswell. If her expert betrayed her at the eleventh hour, counsel was deficient for putting her trust in him where she failed to secure any funds to pay him. These deficiencies were very prejudicial to petitioner where his case "hinged" on refuting the opinion of Dr. Crosswell.

CONCLUSION

By reason of the foregoing arguments, the order of the PCR judge should be reversed, and this case remanded to the Newberry County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of March, 2018.

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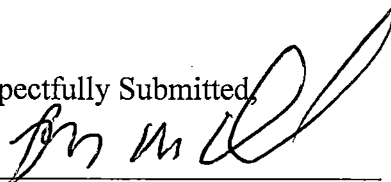
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Matthew Antwain Jackson states:

1. He is Chief 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 PCR before Judge Eugene C. Griffith, which was held on February 27, 2017, 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 Matthew Antwain Jackson.

Respectfully Submitted,

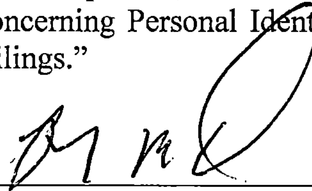


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

This 19th day of March, 2018.

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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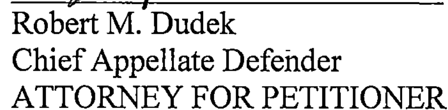
CERTIFICATE OF SERVICE

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 Justin J. Hunter, 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 Matthew Antwain Jackson, #356505, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 19th day of March, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 19th day of March, 2018.

Courtney Powell (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.