

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Georgetown County

Honorable Roger E. Henderson, Circuit Court Judge

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RONDELL LEON CARTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002134

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

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Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent Defense  
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ATTORNEY FOR PETITIONER

**RECEIVED**  
JUN 11 2018  
S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR court err in denying Petitioner relief, where counsel failed to cross-examine one of Petitioner's co-defendants who pled guilty and testified against him, where the co-defendant was eligible to receive a sentence of less than fifteen years, and where Petitioner received a sentence of life without parole?

## STATEMENT

A Georgetown County grand jury indicted Petitioner for burglary in the first degree, assault and battery with intent to kill, possession of a weapon during the commission of a violent crime, two counts of kidnapping, and two counts of armed robbery during its May 2009 term. App. 447 – App. 456.

Petitioner proceeded to trial before the Honorable Benjamin H. Culbertson and a jury on June 27, 2011. App. 1. Erin Bailey appeared on behalf of the State, and James R. Felts, IV represented Petitioner.

At the conclusion of trial, the jury found Petitioner guilty as indicted. App. 334 l. 19 – App. 335 l. 13. Judge Culbertson sentenced Petitioner to life imprisonment on the assault and battery with intent to kill, burglary in the first degree, kidnapping, and armed robbery charges. App. 347 ll. 16 – 25. On the possession of a weapon charge, Judge Culbertson sentenced Petitioner to five years' imprisonment. Id.

Petitioner's convictions and sentences were affirmed by the South Carolina Court of Appeals. State v. Carter, No. 2013-UP-157 (S.C. Ct. App. filed April 17, 2013). Petitioner filed a timely application for post-conviction relief on July 18, 2013. App. 361. It contained allegations of ineffective assistance of counsel, including claims that trial counsel failed to object or elicit certain testimony. App. 362 – 366. The State made its Return on or about February 27, 2014. App. 368 – 372.

An evidentiary hearing was conducted on February 5, 2013 before the Honorable G. Thomas Cooper. App. 373. Tristan Shaffer represented Petitioner, and Joshua Thomas appeared on behalf of the State. Petitioner and trial counsel testified during the hearing.

On April 27, 2015, Judge Cooper issued his order denying Petitioner relief. App. 399. In particular, he found that Petitioner did not demonstrate that counsel's performance fell below a reasonable standard or that he was prejudiced by counsel's performance. App. 405.

On January 6, 2016, Petitioner filed a second application for post-conviction relief. App. 410 – App. 417. He raised an ineffective assistance of PCR counsel claim under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 396 – App. 397. The State filed a Return and Partial Motion to Dismiss on February 15, 2017. App. 418 – App. 425. A second evidentiary hearing was held on May 23, 2017 before the Honorable Roger E. Henderson. App. 426. James K. Falk represented Petitioner, and Johnny E. James, Jr. appeared on behalf of the State.

During this hearing, the State conceded that Petitioner should receive relief under Austin, supra, because no notice of appeal was filed following the filing of the prior Order of Dismissal. App. 430 ll. 1 – 17. As a result, Judge Henderson issued an Order Granting Relief Pursuant to Austin v. State on August 22, 2017 and granted the State's Partial Motion to Dismiss as to new claims brought by Petitioner in the second PCR application. App. 438 – App. 446.

This Petition follows.

## ARGUMENT

**The PCR court erred in denying Petitioner relief, where counsel failed to cross-examine one of Petitioner’s co-defendants who pled guilty and testified against him, where the co-defendant was eligible to receive a sentence of less than fifteen years, and where Petitioner received a sentence of life without parole.**

Trial counsel was appointed to represent Petitioner in early 2011. App. 376 l. 16 – App. 377 l. 8. Petitioner indicated that counsel assumed representation from his prior attorney and the duo met twice prior to trial. App. 388 ll. 18 – 24. His strategy in representing Petitioner was to “at least review the evidence, try to figure out if there is a way we can work out a plea, and if not, then try the case.” App. 378 ll. 12 – 18. He testified that a plea offer of twelve years for burglary second was made by the State soon before trial. App. 378 l. 19 – App. 379 l. 9. However, Petitioner did not want to take it. Id.; App. 389 ll. 3 – 7; App. 395 ll. 12 – 14.

Counsel recalled the testimony of Petitioner’s co-defendant, Herman McCray. App. 380 l. 6 – App. 381 l. 6. He did not recall whether he asked on cross-examination about the sentencing range that McCray was facing. Id. This was one of Petitioner’s allegations of ineffective assistance against trial counsel: that counsel failed to bring out inconsistencies between charges, convictions, and sentencing ranges. App. 390 l. 15 – App. 391 l. 22.

The PCR court found that Petitioner failed to meet the burden of proving that he received ineffective assistance of counsel and was prejudiced for a total of four issues: trial counsel’s failure to call two witnesses, trial counsel’s failure to cross-examine McCray on his plea deal, appellate counsel’s failure to argue that the trial judge erred in instructing the jury on accomplice liability, and appellate counsel’s failure to argue that the trial judge erred in admitting evidence

without a sufficient chain of custody. App. 404 – App. 408. Appellate counsel was not called as a witness at the evidentiary hearing.

Petitioner correctly asserted that Counsel was ineffective, because he did not cross-examine McCray on the full extent of his plea deal. 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 elicit details about Petitioner’s co-defendant’s plea deal, namely a more favorable sentencing range. Petitioner’s testimony, as outlined above, indicates that Counsel did not go into enough detail in order to prove the bias that was fueling McCray’s testimony. 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 convictions which were the result of counsel’s failure to cross-examine McCray fully.

Petitioner’s co-defendants pled guilty and cooperated with the State and with law enforcement. App. 390 ll. 4 – 18. Notably, Herman McCray testified against Petitioner. App. 232 – App. 251. He testified that Petitioner was armed with a gun and allegedly threatened someone with it. App. 236 l. 8 – App. 237 l. 16. During direct examination, McCray was briefly questioned regarding his guilty plea. App. 245 l. 17 – App. 246 l. 9. Quite inexplicably, McCray testified that he was testifying at Petitioner’s trial, following a guilty plea of his own, to “prove [his] innocence.” App. 246 ll. 8 – 9.

Trial counsel questioned McCray as to whether McCray testified to help himself or to profess his innocence. App. 246 l. 15 – App. 248 l. 20. McCray pled guilty to burglary second degree. However, trial counsel failed to ask questions about the sentencing discrepancy. Burglary in the second degree, governed by S.C. Code Ann. § 16-11-312, entails a sentence of up to ten or fifteen years depending on the facts and circumstances. S.C. Code Ann. § 16-11-312(C). Petitioner received a sentence of life without parole. Counsel should have fully cross-examined McCray on the discrepancy in order to prove to the jury that McCray was the recipient of an incredible favor. If counsel had done so, his credibility before the jury would have been severely damaged. It is unlikely the jury could have heard about the alleged facts giving rise to Petitioner’s arrest without seriously questioning the credibility of everything McCray said.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges 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 11th day of June, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Georgetown County

Honorable Roger E. Henderson, Circuit Court Judge

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RONDELL LEON CARTER,

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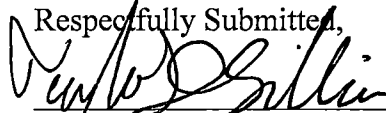
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Rondell Leon Carter 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 Roger E. Henderson, which was held on May 23, 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 Rondell Leon Carter.

Respectfully Submitted,



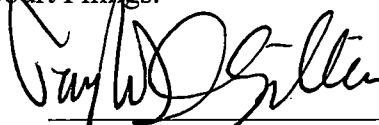
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Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 11th day of June, 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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South Carolina Commission on Indigent  
Defense  
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ATTORNEY FOR PETITIONER

This 11th day of June, 2018.

STATE OF SOUTH CAROLINA

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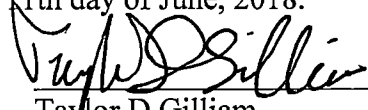
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STATE OF SOUTH CAROLINA,

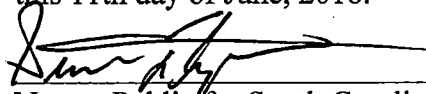
RESPONDENT

\_\_\_\_\_  
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 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 Rondell Leon Carter, #238244, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 11th day of June, 2018.

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

SUBSCRIBED AND SWORN TO before me  
this 11th day of June, 2018.

  
\_\_\_\_\_  
(L.S)  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022