

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 ORIGINAL

—————
Certiorari to Horry County

Honorable Michael G. Nettles, Circuit Court Judge

MICHAEL BRENTON WILSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000192

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JOHNSON PETITION FOR WRIT OF CERTIORARI
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding that petitioner adequately waived a conflict of interest?

STATEMENT

On December 3, 1998, petitioner was indicted for first-degree criminal sexual conduct and kidnapping. App. 175. Petitioner was tried *in absentia* and Judge Cottingham pronounced sentence on sentencing sheets which were sealed on December 5, 2001. App. 178-79. Russell B. Long represented petitioner at the trial. App. 102, l. 9 – 103, l. 22.

On October 3, 2010, petitioner appeared before the Honorable Steven H. John for pronouncement of sentence. App. 1. Mr. Long again represented petitioner and Judge John entered Judge Cottingham's sentence of concurrent terms of thirty years' imprisonment. App. 3, l. 13 – 4, l. 5. App. 13, ll. 18 – 24. The court reporter destroyed the tapes of the trial and the Court of Appeals dismissed petitioner's appeal pursuant to the fugitive disentitlement doctrine. App. 158. App. 15.

On January 23, 2013, petitioner filed a PCR application. App. 16. After surviving a motion to dismiss from the State, the Honorable Michael G. Nettles held a hearing on the merits of petitioner's application. App. 57-61. James K. Falk represented petitioner and Valerie Giovanoli represented the State. App. 60. On May 4, 2017, Judge Nettles denied petitioner's application and subsequently denied petitioner's Rule 59(e) motion. App. 157. App. 174. This petition follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. The Court reviews questions of law without deference to trial courts. Id. See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in finding petitioner adequately waived a conflict of interest.

Petitioner was accused of raping a stripper who worked at Fantails in Myrtle Beach and charged with first-degree criminal sexual conduct and kidnapping. App. 2, l. 3 – 3, l. 24. App. 102, l. 9 – 108, l. 15. Petitioner planned to present a defense of consent. App. 64, ll. 18 – 25. Petitioner was originally represented by trial counsel’s elderly father, but when the father became too ill to continue handling the case, trial counsel assumed the defense. App. 102, l. 9 – 108, l. 15.

Just days before petitioner’s trial was to begin, trial counsel realized he had created an LLC for the owners of Fantails. App. 102, l. 9 – 108, l. 15. On November 28, 2001, trial counsel sent a letter to Judge Cottingham telling the court that “shareholders of Fantails Nightclub, former clients of mine, are potential witnesses for the State in this matter.” App. 156. Trial counsel stated in the letter he informed petitioner and the Fantails shareholders and obtained their consent to continue representing petitioner. App. 156. Petitioner’s signature is at the bottom of the letter indicating his consent (but the Fantails witnesses’ signatures are not on the document). App. 156. Seven days later, on December 5, 2001, Judge Cottingham sentenced petitioner to concurrent thirty-year terms of imprisonment. App. 178-79.

As petitioner explained at the PCR hearing, “every single witness against me was either an owner, principal or employee of that club.” App. 78, ll. 7 – 15. Petitioner did not want to waive the conflict because he assumed that strip clubs “generate ongoing business” for attorneys. App. 78, ll. 7 – 15. Petitioner testified that trial counsel told him his “only choice was to either waive the conflict, or the judge was going to revoke my bond and lock me up.” App. 78, ll. 16 –

21. Trial counsel testified that petitioner's testimony on this point was "outrageous" and said "there's no way I would tell somebody that." App. 130, ll. 6 – 21.

The PCR court erred in finding that petitioner's waiver was valid because it was not given voluntarily. See Boykin v. Alabama, 395 U.S. 238 (1969) ("Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."); Hill v. Lockhart, 474 U.S. 52, 59 (1985) (holding that an applicant proves prejudice by showing that counsel's constitutionally deficient performance affected the outcome of the plea); Gonzales v. State, 419 S.C. 2, 9, 795 S.E.2d 835, 839 (2017).

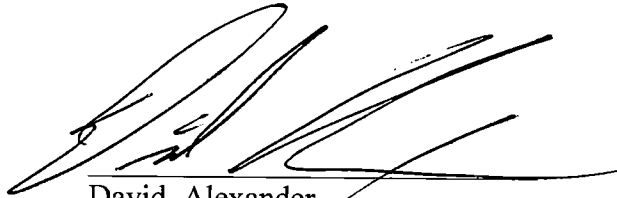
The Sixth Amendment guarantees the right to conflict-free counsel where the conflict affects the attorney's performance. See Glasser v. United States, 315 U.S. 60, 70 (1942) ("[S]o are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

As trial counsel testified, Judge Cottingham "was famous at getting cases moved on the docket." App. 110, ll. 16 – 19. Even if this Court accepts the PCR judge's adverse credibility finding against petitioner and in favor of trial counsel, it is undisputed that petitioner was asked to waive the conflict just days before his case would be called. Petitioner would have no time to find new counsel. The Fantails witnesses' signatures are not on the waiver that appears in the record. The lateness of the waiver also calls into question the preparation of trial counsel and why the conflict was discovered so late. Because of the late timing of the waiver, this Court

should find petitioner did not receive conflict-free counsel under the Sixth Amendment, reverse his convictions, and grant him a new trial.

CONCLUSION

For the foregoing reasons, the judgment of the PCR court should be reversed and petitioner granted a new trial.

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of November, 2018.

STATE OF SOUTH CAROLINA

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Certiorari to Horry County

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MICHAEL BRENTON WILSON,

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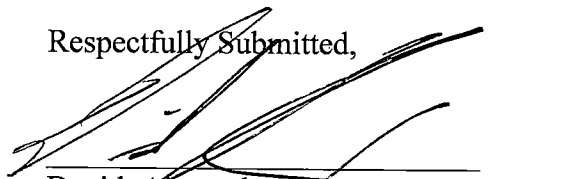
RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Brenton Wilson states:

1. He is an 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 post-conviction relief hearing before Judge Michael G. Nettles, which was held on February 7, 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 Michael Brenton Wilson.

Respectfully Submitted,

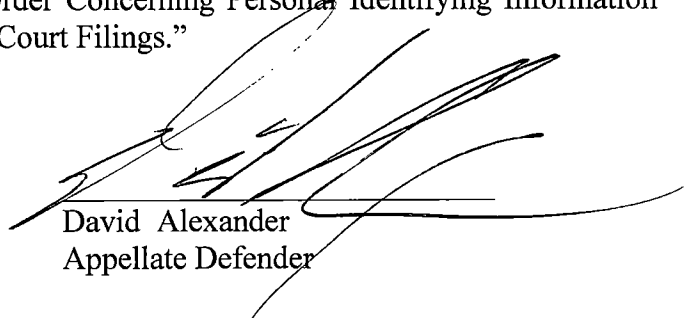


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 5th day of November, 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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This 5th day of November, 2018.

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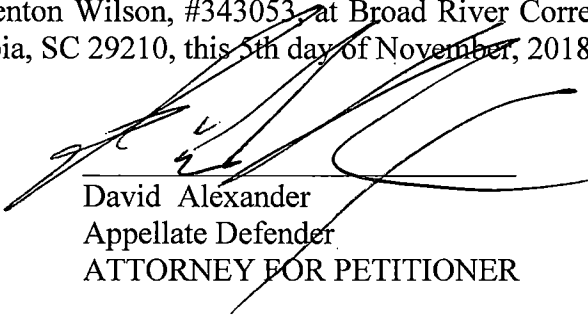
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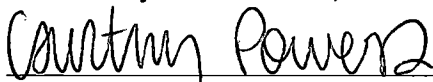
CERTIFICATE OF SERVICE

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 Michael Brenton Wilson, #343053, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of November, 2018.



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of November, 2018.

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