

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable Steven H. John, Circuit Court Judge

RECEIVED  
DEC 17 2018  
S.C. SUPREME COURT

BILLY L. ALFORD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000731

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Victor R. Seeger  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did trial counsel provide ineffective assistance of counsel when he failed to argue that the Virginia statute, under which Petitioner had a prior conviction, was inapplicable for sentence enhancement purposes for Petitioner's current South Carolina charges because it had different elements than the South Carolina statute?

## STATEMENT

During the April 2014 term, the Horry County Grand Jury indicted Petitioner for a sex offender registry violation. App. 327.

On May 14 – 15, 2014, in Horry County, Petitioner proceeded to trial before the Honorable Edward B. Cottingham, and a jury. App. 1. Kenneth R. Moss represented Petitioner. Id. J. Scott Hucks and M. Travis Hyman represented the state. Id.

During a pretrial hearing, trial counsel Moss moved to quash the indictment against Petitioner, which alleged Petitioner failed to register as a sex offender, third offense. App. 7, ll. 13 – 17; S.C. Code Ann. 23-3-470(B)(2)(3). The judge denied trial counsel’s motion because it was the legislature’s intent, “that out-of-state convictions will be registered with the Sheriff of the county.” App. 13, l. 19 – 14, l. 1.

The jury found Petitioner guilty as indicted. App. 241, ll. 18 – 21. Judge Cottingham sentenced Petitioner to five years’ imprisonment. App. 247, ll. 15 – 21. After Petitioner serves four years of his sentence, the remaining one year of imprisonment is suspended upon three years’ probation. Id.

Petitioner filed a direct appeal of his conviction that raised the issue of whether Petitioner’s conviction was valid because it relied on an out-of-state conviction for enhancement purposes. App. 277, ll. 2 – 6. The Court of Appeals affirmed Petitioner’s conviction in an unpublished opinion on July 20, 2016 and remittitur was filed on August 8, 2016. App. 277, ll. 6 – 9; State v. Alford, No. 2014-001202 (S.C. Ct. App. Filed July 20, 2016).

Petitioner filed an application for post-conviction relief (PCR) on January 30, 2017. App. 257 – 263. Petitioner alleged that his attorney was ineffective when he failed to properly argue that Petitioner could not be convicted of failure to register, third offense, because his prior

Virginia conviction could not properly be considered a failure to register to the sex offender registry, second offense. Id. The state filed its return on December 15, 2017. App. 264 – 269.

Petitioner’s evidentiary hearing was held on February 22, 2018, before the Honorable Steven H. John. App. 271. Daniel A. Selwa represented Petitioner. Id. Johnny E. James represented the state. Id.

An order of dismissal was issued on March 21, 2018. App. 317 – 326. The judge found that trial counsel did not provide deficient performance. App 320 – 322. He wrote: “Trial counsel argued... that the indictment charging [Petitioner] with a third offense was invalid as a matter of law. Id.” He concluded, “counsel clearly and completely raised [Petitioner’s] arguments to the trial court.” Id.

This Petition for Writ of Certiorari follows.

## ARGUMENT

Trial counsel provide ineffective assistance of counsel when he failed to argue that the Virginia statute, under which Petitioner had a prior conviction, was inapplicable for sentence enhancement purposes for Petitioner's current South Carolina charges because it had different elements than the South Carolina statute.

### **Relevant Facts**

The facts alleged by the state are as follows. Petitioner was convicted of a lewd act on a minor on February 6, 1998 in Horry County. App. 71, ll. 1 – 9; App. 72, ll. 16 – 18. That conviction required Petitioner to register with the sex offender registry. App. 72, ll. 10 – 13.

In a pretrial motion, trial counsel moved to quash the indictment against Petitioner for failure to register, third offense based on an interpretation of S.C. Code Ann. 23-3-470(B)(2)(3). App. 10, ll. 11 – 25. He stated specifically, “[M]y position is [Petitioner] can’t be charged with a third offense in South Carolina.” App. 10, ll. 24 – 25. Trial counsel argued that the South Carolina statute, “regulates what has to happen in South Carolina, and it defined what’s criminal in South Carolina,” and that, “our State has no business defining what’s required in other states.” App. 11, l. 2 – 12, l. 15.

Trial counsel furthered, “Virginia laws are different than South Carolina laws, and whether or not he violated the law in Virginia is for Virginia to prosecute and punish... What [S.C. Code Ann. 23-3-470(B)(2)(3)] requires... is what you have to do in South Carolina, and it’s clear you have to register in South Carolina if you have an out-of-state conviction, not failure to register, but an out of state conviction of one of the laundry list of sex offenses. That’s what the South Carolina Statute regulates.” App. 12, ll. 14 – 25.

The trial judge “disagreed” with trial counsel’s interpretation of the South Carolina statute and denied Petitioner’s motion to quash the indictment. App. 13, l. 19 – 14, l. 1.

During Petitioner’s trial, Loraine Hardee Avant from the Horry County Sheriff’s Department testified at Petitioner’s trial that Petitioner met with her to be put on the South Carolina sex offender registry, “in the early 2000s.” App. 62, ll. 4 – 7. Avant testified that her standard practice is to go over each registration requirement with individuals required to register as sex offenders. App. 66, ll. 3 – 6.

Avant testified that she went over this packet with Petitioner. App. 67, ll. 9 – 17. One of the sections of the sex offender registration packet that Petitioner signed stated that he was aware he had to provide written notification, in person, within three days of a change of address to a new jurisdiction, to the county sheriff with whom the person last registered. Id.

Avant testified that on or around September 6-7, 2012, the Horry County Sheriff’s Office was notified by a police officer in Florida that Petitioner no longer lived in South Carolina. App. 68, ll. 18 – 23; App. 74, ll. 10 – 17. She then went to the registered address where Petitioner lived in South Carolina and testified, “it did not appear that anyone was home.” App. 68, l. 23 – 69, l. 25. Avant contacted the property owner and, “as a result of her investigation [she] determined that [Petitioner] did not live at [the registered address].” Id.

During cross examination, Avant testified that Petitioner contacted the Horry County Sheriff’s Office and advised them that he moved to Florida, and that, “at some point... [Petitioner] registered in Florida.” App. 85, l. 11 – 86, l. 10. However, Petitioner did not provide written notice prior to leaving the jurisdiction. App. 103, ll. 11 – 13.

After the state rested, defense counsel renewed his motion to quash the indictment, “on the fact that [Petitioner] should not be charged with third offense.” App. 148, l. 23 – 149, l. 1. The trial judge again denied the motion. App. 149, ll. 4 – 6.

At the end of Petitioner’s trial, defense counsel again renewed the motion to quash the indictment for the aforementioned reasons, and again the judge denied the motion. App. 199, l. 2 – 199, l. 6.

Petitioner was found guilty as indicted. App. 241, ll. 18 – 21. Before the trial judge sentenced Petitioner, defense counsel spoke in mitigation regarding the impropriety of charging Petitioner with a third offense for failure to register, “One of those [failure to register charges] was in Virginia. The requirements in Virginia are different. *I don’t even know what they are.*” App. 247, ll. 10 – 14 (emphasis added).

Petitioner was sentenced to five years’ imprisonment, upon service of four years’ imprisonment, the remaining balance is suspended upon three years’ probation. App. 247, ll. 15 – 21.

Petitioner had his PCR hearing on February 22, 2018. App. 271. During Petitioner’s hearing, he alleged his attorney was ineffective for failure to properly move to quash the indictment. App. 279, 15 – 21. Petitioner testified, that trial counsel failed to argue that, “the law in Virginia... is different from the... South Carolina failure to register.” Id.

Defense counsel also testified at Petitioner’s PCR hearing. App. 303, l. 8. He said that in all of his motions to quash the indictment he did not, “develop an argument...based on the elements of the [Virginia statute].” App. 306, l. 22 – 307, l. 9. Defense counsel only argued that the South Carolina statute was not like other statutes in South Carolina that actually provided for enhancement based on offenses in out-of-state jurisdictions. Id.

The PCR judge denied Petitioner's PCR allegation because, "[Petitioner's] arguments to this Court are... no more compelling than those offered by Counsel at trial." App. 322.

### **Discussion**

Petitioner was not provided effective assistance of counsel. Trial counsel had a duty to investigate into whether Va. Code Ann. § 18.2-472.1, under which Petitioner had a prior conviction, had significantly different elements from South Carolina's failure to register as a sex offender statute, S.C. Code Ann. 23-3-470(B)(2)(3), such that it could not be used to enhance Petitioner's conviction on his current charges. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360; See Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878. (2006). Had trial counsel conducted a proper investigation into the Virginia statute he would have found that it and the South Carolina statute have different elements where a prior conviction under the Virginia statute could not be used to enhance his current South Carolina charges because the Virginia statute requiring registration with the state applied to non-sex offenders as well.

To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Next Petitioner must show, "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." Id. at 118, 386 S.E.2d at 625. Therefore, where ineffective assistance of counsel is alleged, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 692.

The United States Supreme Court has held that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691; See Wiggins v. Smith, 539 U.S. 510, 527 (2003) In Wiggins, the United States Supreme Court noted “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”. Id.

This Court has also held that trial counsel has a duty “to discover all reasonably available mitigation evidence and reasonable available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) this Court held that Ard’s trial counsel provided ineffective assistance for failure to adequately investigate and challenge the state’s gunshot residue evidence. Id. at 335, 642 S.E.2d at 599. In Ard, trial counsel failed to conduct an independent investigation because he did not hire an independent expert to conduct the gunshot residue analysis. Id. at 332 – 333; 642 S.E.2d at 597. In holding that Ard’s trial counsel provided ineffective assistance this Court stated, “at a minimum counsel has the duty to... make an independent investigation of the facts and circumstances of the case.” Id. at 331 – 332; 642 S.E.2d at 597.

In the instant case, trial counsel failed to make an “independent investigation of the facts and circumstances of the case.” Id. In order to enhance Petitioner’s current failure to register charge to a third offense, the state had to show that Petitioner’s prior violation of the Virginia statute counted as an offense under S.C. Code Ann. § 23-3-470(B)(3). However, trial counsel

never investigated into the Virginia statute to determine if it was applicable for use by the state to enhance Petitioner's current charges to a third offense.

Petitioner's prior conviction was based on the Virginia statute titled "Providing false information or failing to provide registration information." Va. Code Ann. § 18.2-472.1. The main issue in Petitioner's trial was whether Petitioner complied with S.C. Code Ann. § 23-3-470(B)(3) and, if he did not comply, whether his prior conviction in Virginia enhances his current charges to a third offense. The statute, Va. Code Ann. § 18.2-472.1, which was used to enhance Petitioner's conviction to a third offense, differs in significant a manner from S.C. Code Ann. 23-3-470(B)(2)(3). Namely, the Virginia statute does not solely apply to sex offenders, it also applies to convictions for murder. Va. Code Ann. § 18.2-472.1(B). Whereas the South Carolina statute applies only to individuals who are required to register as sex offenders. Therefore, an individual could fail to register in Virginia after a murder conviction and have any subsequent failure to register to the sex offender registry in South Carolina enhanced, even though that individual had never been a sex offender before.

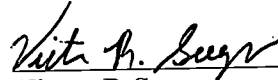
Moreover, the Virginia statute is under, "Article 6. Interference with Administration of Justice," which implied the registration requirement under Va. Code Ann. § 18.2-472.1 is applicable to a range of crimes. Whereas S.C. Code Ann. 23-3-470(B)(2)(3) is under, "Article 7. Sex Offender Registry," which showed South Carolina's legislative intent to have the registration requirement specifically for sex offenders. Therefore, the state exceeded the bounds of the South Carolina legislature's intent when it used an out-of-state statute with a general registration requirement to enhance Petitioner's current charges, which require registration specifically to the sex offender registry.

Based on the known evidence, a competent and reasonable attorney would have investigated into the nature of the out-of-state statute that the state used to enhance Petitioner's current failure to register as a sex offender charge. See Wiggins, 539 U.S. at 27. At trial, defense counsel readily admitted at trial he did not know the elements to the Virginia providing false information statute. App. 247, ll. 10 – 14. At Petitioner's PCR hearing, defense counsel admitted that he did not develop an argument, to quash the indictment against Petitioner, based on the elements of the Virginia statute. App. 306, l. 22 – 307, l. 9. Therefore, trial counsel provided deficient performance when he failed to argue that the Virginia statute was significantly different from S.C. Code Ann. 23-3-470(B)(2)(3), such that the Virginia conviction could not be used to enhance Petitioner's current charges to a third offense.

As to prejudice, there is a reasonable probability, that if the motion to quash the indictment was properly argued, Petitioner's charges would not have been enhanced to a third offense. Trial counsel's performance was deficient because the out-of-state statute, used to enhance Petitioner's conviction to a third offense, applied to non-sex offenders as well. Accordingly, trial counsel's performance prejudiced Petitioner's right to a fair trial since it "undermine[d] confidence in the outcome of [his] trial." See Strickland, 466 U.S. at 694; see also Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

**CONCLUSION**

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant certiorari and allow for full briefing on this issue.



\_\_\_\_\_  
Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of December, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable Steven H. John, Circuit Court Judge

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BILLY L. ALFORD,

PETITIONER

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RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Billy Leon Alford states:

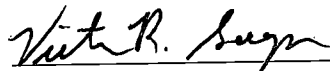
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Steven H. John, which was held on February 22, 2018, 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 Billy Leon Alford.

Respectfully Submitted,



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Victor R Seeger

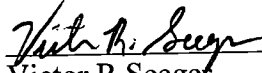
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of December, 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."



Victor R Seeget  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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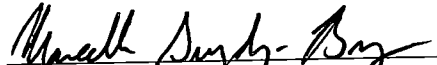
RESPONDENT

\_\_\_\_\_  
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 Billy Leon Alford, at 6157 Sweet Home Church Road, Myrtle Beach, SC 29578, this 17th day of December, 2018.

  
\_\_\_\_\_  
Victor R Seeger  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of December, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028.