

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Pickens County

Honorable Letitia H. Verdin, Circuit Court Judge

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TAVISH DOMINIQUE YEARGIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000995

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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### **ISSUE PRESENTED**

Whether the court erred in finding trial counsel provided effective representation where there was evidence counsel failed to discuss possible defenses with petitioner, and where counsel argued petitioner's actions were in defense of others but was unable to get a jury charge on defense of others, since petitioner, who did not testify, might have testified and supplied sufficient evidence of his intent to defend another had counsel discussed possible defenses with him?

## STATEMENT

On April 17, 2012, a Pickens County Grand Jury indicted petitioner for the offenses of murder and grand larceny. App. 786 – 789. Petitioner proceeded to trial before the Honorable Robin B. Stilwell and a jury from November 18 – 20, 2013. App. 1. John DeJong represented petitioner; Doug Richardson and Brandi Hinton represented the state. App. 1.

At trial, the state alleged that petitioner shot and killed Sean Dinneon, the decedent, during a botched car theft in which petitioner's sister Nyia Utsey and her girlfriend Kayla Williams pretended to be interested in purchasing a used car from the decedent and took it for a test drive. App. 392, l. 6 – 393, l. 4; App. 78, ll. 3-4; App. 79, ll. 5-9; App. 406, ll. 1-3; App. 335, l. 2 – 336, l. 19. According to the state, petitioner told the women he planned to “knock [the decedent] out and tie him up” and steal the car. App. 316, ll. 5-22; App. 398, ll. 4-8.

On the night of his death, it was undisputed the decedent was highly intoxicated and drinking malt liquor when he got in the back seat of the car, a Pontiac Grand Prix, and let the two women test drive it. App. 84, l. 22 – 85, l. 3; App. 85, ll. 17-19; App. 416, ll. 7-14; App. 415, ll. 16-23. Petitioner followed behind in a Ford Mustang, and signaled them where to go using his turn signal. App. 416, ll. 24-25; App. 337, ll. 1-7.

The state alleged that when the cars reached an empty church parking lot, the women pulled over. App. 336, l. 17 – 337, l. 17. Petitioner pulled in behind them. App. 417, ll. 9-18. According to Utsey, the decedent began “getting suspicious” and got out of the car. App. 417, ll. 23-25; App. 418, ll. 18-22. The women said Kayla Williams attempted to drive away, but the decedent jumped on her and they started “fighting over the car.” App. 419, ll. 1-6. According to Utsey, the decedent was “laying on top of [Kayla Williams].” App. 420, ll. 11-13.

Kayla Williams told police officers the struggle left her arm bruised from the decedent grabbing her, and that when petitioner fired the shot he was “simply trying to get [the decedent] off of [her].” App. 379, ll. 2-12; App. 382, l. 15 – 383, l. 2. However, Kayla Williams’ trial testimony was that the decedent was not hitting her but just trying to get her out of the car.<sup>1</sup> App. 340, ll. 5-7.

Utsey told officers it looked like the decedent was “trying to rape” or “trying to hurt” Kayla Williams. App. 454, ll. 12-25. It appeared to Utsey as if the decedent, who was drunk, was trying to rape the other woman. App. 455, ll. 1-3.

Kayla Williams and Nyia Utsey alleged petitioner pulled up in the Mustang and told the decedent, “Get off her,” but the decedent did not and he challenged petitioner to go ahead: “Kill me.” App. 421, ll. 3-6; App. 341, ll. 1-8. Petitioner then fatally shot the decedent once in the shoulder. App. 421, ll. 7-8; App. 160, ll. 17-18; App. 529, ll. 20-22. Kayla Williams pushed the decedent out of the Grand Prix and drove off, with petitioner following in the Mustang. App. 342, ll. 2-24. The decedent was not breathing when police arrived. App. 141, l. 15 – 142, l. 3.

In his opening statement, petitioner’s trial counsel DeJong offered that a person’s life may be taken without the person who killed him being guilty of murder and mentioned acting in “defense of another.” App. 63, l. 14 – 64, l. 3. Petitioner did not testify at his trial. App. 562, ll. 12-14. At the conclusion of the case, trial counsel requested the court charge the jury on defense of others since there was testimony that a struggle occurred and it looked like the decedent was trying to rape Kayla Williams when he was shot. App. 563, ll. 14-24. The trial court denied the

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<sup>1</sup> Kayla Williams and Nyia Utsey were also charged with the murder and grand larceny. App. 359, ll. 9-12; App. 391, l. 20 – 392, l. 5. Kayla Williams was told the state would take her testimony into consideration, and she hoped her testimony would help her. App. 358, l. 23 – 359, l. 8. Utsey denied that she hoped to get any consideration for her testimony. App. 439, l. 21 – 440, l. 4.

request to charge the defense of others. App. 564, ll. 10-12. The court told counsel that since the defense had not entered the “[d]efendant’s testimony” “without that and standing alone on the evidence that has been presented, it just doesn’t rise to the level of a self-defense charge.” App. 564, l. 22 – 565, l. 2.

Nevertheless, trial counsel argued in closing that petitioner fired the shot only after he saw “this groping, this grabbing as though this intoxicated man was trying to rape Kayla Williams.” App. 589, ll. 16-22. Counsel continued that petitioner “kept saying, Get off of her, get off of her, get off of her. Then a shot was fired. Malice aforethought I say is not there.” App. 591, ll. 5-8.

Petitioner was convicted and sentenced to concurrent terms of sixty years for murder and five years for grand larceny. App. 790 – 791.

On direct appeal,<sup>2</sup> petitioner argued, *inter alia*, that the “trial court erred in refusing to charge the jury on ‘defense of others’ in light of testimony that at the time of the shooting the deceased was heavily intoxicated and was in the driver’s seat of a moving vehicle on top of a woman, grabbing her arm firmly enough to cause bruising and struggling with her in a manner suggesting a rape attempt.” App. 618. The Court of Appeals concluded the trial court did not abuse its discretion in refusing to charge the jury on defense of others, and cited *State v. Starnes*, 340 S.C. 312, 323, 531 S.E.2d 907, 913 (2000), for the proposition that in order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was lawfully defending others. App. 693.

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<sup>2</sup> Petitioner was represented on direct appeal by Jeffrey Dunleavy and Robert Dudek as part of the Appellate Project. App. 617. The state was represented by Alphonso Simon, Jr. App. 646.

After his convictions were affirmed on direct appeal, petitioner timely filed an application for post-conviction relief (PCR).<sup>3</sup> App. 692 – 695; App. 697 – 730. A hearing was held on the matter before the Honorable Letitia H. Verdin on October 25, 2017. App. 740. R. Mills Ariail represented petitioner and Deshawn Mitchell represented the state. App. 740.

Counsel DeJong said he was unsuccessful in getting a “defense of others” charge, although that was “pretty much all we had to work with.” App. 761, l. 19 – 762, l. 7; App. 765, ll. 6-10.

Petitioner testified at the PCR hearing that counsel did not discuss possible defenses in the case with him.<sup>4</sup> App. 754, ll. 1-5. Petitioner said counsel did not disclose his theory of the case or what he was going to assert at trial. App. 754, ll. 6-9.

The PCR court denied petitioner relief. In its order of dismissal, the court found, “Trial counsel discussed the pending charges, the State’s evidence, possible defenses and courses of action, and answered all of [petitioner’s] questions.” App. 782.

This petition for writ of certiorari follows.

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<sup>3</sup> The state made a return and partial motion to dismiss July 26, 2017. App. 731 – 739.

<sup>4</sup> According to counsel, he did speak with petitioner about possible defenses prior to trial, including defense of others and self-defense. App. 764, l. 21 – 765, l. 3.

## ARGUMENT

The court erred in finding trial counsel provided effective representation where there was evidence counsel failed to discuss possible defenses with petitioner, and where counsel argued petitioner's actions were in defense of others but was unable to get a jury charge on defense of others, since petitioner, who did not testify, might have testified and supplied sufficient evidence of his intent to defend another had counsel discussed possible defenses with him.

Petitioner said counsel never discussed possible defenses in the case with him—this deficiency prejudiced petitioner by keeping from him crucial information which should have informed his decision whether to testify in his own defense, since only petitioner, the judge reasoned, could have provided evidence sufficient to entitle him to a jury instruction on defense of others, and counsel admitted that defense of another was “pretty much all we had to work with.” App. 765, ll. 6-10.

“Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense.” *Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998). “[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others.” *Id.*

Here, there was evidence presented that petitioner may have been acting in defense of another, Kayla Williams, when he shot and killed the decedent. Utsey told police officers it looked like the decedent was “trying to rape” or “trying to hurt” Kayla Williams. App. 454, ll. 12-25. From Utsey's vantage point, it appeared as if the decedent, who was drunk, was trying to rape the other woman. App. 455, ll. 1-3. There was evidence petitioner pulled up and told the

decedent, “Get off her,” but the decedent did not and told petitioner to go ahead: “Kill me.” App. 421, ll. 3-6. However, the trial court found this was insufficient to require an instruction on defense of another. As seen, Kayla Williams did not testify that the decedent was, in fact, trying to rape her.

“A person has the right to act on appearances, even if the person’s belief is ultimately mistaken.” *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011). Absent other evidence, to warrant an instruction on defense of others, petitioner would have needed to testify that he acted on the appearance that the decedent was attempting to rape Kayla Williams, and that he was not involved in or aware of an attempted car theft. However, petitioner disastrously waived his right to testify at trial since he was unaware that additional evidence to support the defense’s theory, such as his testimony, was needed to entitle him to a favorable jury instruction on the right to defend another.

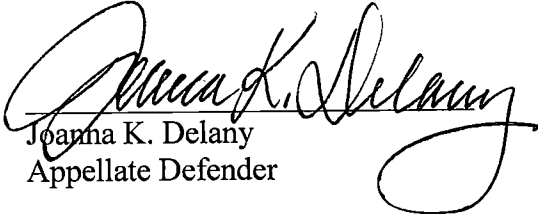
The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and the deficient performance prejudiced petitioner. *Id.* at 687. “Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.” *Id.* at 695-96.

There was evidence—petitioner’s testimony—that counsel failed to discuss possible defenses with petitioner. The failure to discuss the possible “defense of others” strategy was deficient performance. Petitioner was prejudiced because there was a reasonable probability the

jury would have acquitted petitioner had it heard petitioner testify he was acting to prevent the rape of Kayla Williams and received an instruction on defense of others. *Strickland*, 466 U.S. 688; see *Wigington v. State*, 413 S.C. 578, 589, 776 S.E.2d 407, 412 (Ct. App. 2015) (finding prejudice where counsel's deficient performance deprived the defendant of a jury charge on involuntary manslaughter in a murder case).

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany  
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of January, 2019.

STATE OF SOUTH CAROLINA

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TAVISH DOMINIQUE YEARGIN,

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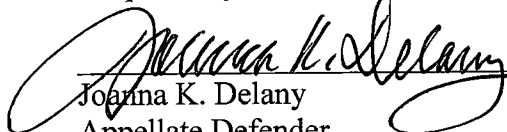
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Tavish Dominique Yeargin states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's post-conviction relief hearing before Judge Letitia H. Verdin, which was held on October 25, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Tavish Dominique Yeargin.

Respectfully Submitted,

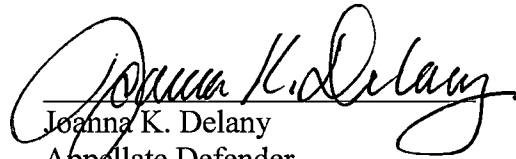


Joanna K. Delany  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 18th day of January, 2019.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her 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."

  
Joanna K. Delany  
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South Carolina Commission on Indigent  
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(803) 734-1330

ATTORNEY FOR PETITIONER

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STATE OF SOUTH CAROLINA

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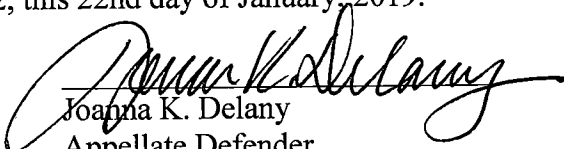
RESPONDENT

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CERTIFICATE OF SERVICE

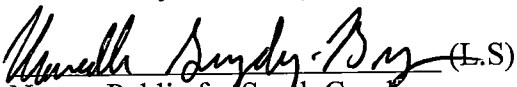
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly 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 Tavish Dominique Yeargin, #317173, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 22nd day of January, 2019.

  
Joanna K. Delany

Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 18th day of January, 2019.

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