STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Edgefield County

R. Lawton McIntosh, Circuit Court Judge

GEORGE A. JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001000

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

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ISSUE PRESENTED

Did trial counsel render ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to advise him of the potential detriments of testifying and in failing to prepare Petitioner to testify in his defense where Petitioner's testimony damaged his case and permitted the prosecutor impeach him with a prior inconsistent statement?

STATEMENT

On April 8, 2008, Dr. Elizabeth Gordineer was working in the local emergency room when Minor arrived complaining of painful urination. App. 118, ll. 3-9; App. 132, l. 23 – App. 133, l. 2. Minor had been treated recently for a urinary tract infection. App. 118, ll. 9-11. When the doctor examined Minor's genitals, she found ulcers that appeared to be herpes. App. 118, ll. 14-17. Subsequent testing revealed Minor had genital herpes or type two herpes. App. 119, ll. 16-21. According to Dr. Gordineer, genital herpes is "extremely contagious" and "as long as there's some sort of contact, sexual contact, you can transmit that virus." App. 121, ll. 16-21. There has to be "touching of some sort where there is some exposure to the virus." App. 121, ll. 21-23. She was emphatic that it is not necessary for there to be contact between genitals. App. 121, l. 25 – App. 122, l. 1. The state's infectious diseases expert explained that transmission of herpes requires "close contact." App. 222, ll. 3-4. Nevertheless, the expert opined that Minor's genital infection of herpes type two virus "suggests that she's had genital contact with someone who also has type [two] herpes who infected her through some close sexual contact." App. 248, ll. 12-18.

Dr. Gordineer contacted DSS to report that Minor had herpes. App. 120, ll. 4-5. DSS referred the case to Lamaz Robinson with the Johnston Police Department. App. 155, ll. 3-19. When Minor was initially questioned, she denied any sexual contact. App. 146, l. 19 – App. 147, l. 3; App. 328, ll. 14-24; App. 330, ll. 4-8. However, when Minor's story changed and upon learning the allegations were against Minor's father, Petitioner, Robinson placed Minor into emergency protective custody with DSS. App. 128, ll. 4-18; App. 157, ll. 1-4.

Ultimately, Minor claimed that when she was between the ages of seven and nine, Petitioner did not live with her, but he would stay overnight during occasional visits. App. 130,

ll. 7-11; App. 139, ll. 12-18. Minor claimed that Petitioner would get her from her bedroom, which she shared with her brother, and take her into the living room. App. 135, ll. 4-9. She further claimed that Petitioner would tell her to lie on the couch and put a pillow on her head. App. 135, ll. 14-19. After she would put the pillow over her face, Petitioner, she alleged, would tell her to pull down her pants. App. 136, ll. 7-9. Minor claimed she would then "feel, like a finger or something in [her] wrong spot." App. 137, ll. 10-11. Other times, according to Minor, Petitioner would only "[l]ike rub on the outside of [her] private spot." App. 138, ll. 16-18. Minor explained that she thought Petitioner had his clothes on "when all of this was happening." App. 148, ll. 5-9. Minor never felt anything wet, and Petitioner never had to clean up any liquids. App. 148, ll. 14-19.

On April 11, 2008, Robinson interrogated Petitioner. App. 157, ll. 16-20. Petitioner denied the allegations made by Minor. App. 172, l. 24 – App. 173, l. 1.

Subsequently, Robinson also obtained a court order to test Petitioner for herpes. App. 169, l. 22 – App. 170, l. 3. On July 17, 2009, Petitioner's blood was drawn for testing. App. 170, ll. 4-13; App. 179, ll. 17-20. Testing conducted by Mullins Laboratory showed Petitioner's blood was positive for herpes. App. 192, ll. 16-24. However, the blood test did not distinguish between the two types of herpes. App. 194, ll. 20-25; App. 236, ll. 20-25; App. 239, ll. 10-16. Therefore, it was unknown whether Petitioner had herpes one or herpes two. App. 194, ll. 20-25. Concerning the blood test, the expert opined that "70, 80, 90 percent of people will have a positive test" for herpes because the disease is very common. App. 244, ll. 12-20. The state's expert explained that type one "causes infections usually around the mouth, around the lips and the tongue, sometimes inside the mouth and the cheek." App. 216, ll. 21-24. On the other hand,

type two shows infection "in the genital area." App. 217, ll. 10-13. The expert put it simply: "[T]ype 1 is above the belt and type 2 is really below the belt." App. 217, ll. 19-20.

On July 29, 2009, an Edgefield County grand jury indicted Petitioner for lewd act with a minor (2009-GS-19-349). App. 689-690. On November 10, 2009, an Edgefield County grand jury indicted Petitioner for criminal sexual conduct with a minor (CSCM) in the first degree (2009-GS-19-409). App. 692-693. On February 2-5, 2010, the state, represented by Ervin J. Maye and H. Franklin Young, III, called the case to trial before the Honorable William P. Keesley and a jury. App. 1. Adrian Falgione represented Petitioner. App. 1.

During the trial, Lamaz Robinson testified without objection that he learned that Minor had disclosed that her father was the perpetrator. App. 156, ll. 19-22.[1] Raymond Olszewski, an employee at the Assessment and Resource Center, was qualified as an expert in forensic interviewing of child sexual abuse victims and child sexual abuse. App. 299, ll. 17-22; App. 302, ll. 8-16.[2] Olszewski interviewed Minor on April 14, 2008. App. 304, ll. 4-9. He explained that what he and other forensic interviewers do is conduct "sort of the *expert* interview of the alleged victim." App. 307, ll. 18-21 (emphasis added). Without objection, Olszewski testified that he saw no "red flags" indicating Minor had been coached or had a motive to fabricate the

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[1] See Rule 801(d)(1)(D), SCRE (providing that a prior statement by a witness that is "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident" is not hearsay); State v. Simmons, 423 S.C. 552, 816 S.E.2d 566 (2018); State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985).

[2] When the judge qualified Olszewski as an expert in front of the jury, trial counsel indicated he was preserving his previous objections. App. 302, ll. 14-16. However, when the court conducted an in camera hearing concerning the admissibility of the recording of the forensic interview, trial counsel put forward no objection to or argument against his qualification as an expert. App. 282, ll. 1-3; App. 294, ll. 6-23. The qualification of Olszewski was clearly objectionable. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013).

allegations. App. 314, l. 17 – App. 316, l. 12.[3] He also testified, without objection, that he found Minor's story was consistent. App. 316, ll. 13-22.[4] On cross-examination, trial counsel elicited that Olszewski recommended counseling for Minor. App. 326, ll. 20-25.[5] Most disturbingly, the solicitor questioned Olszewski about conducting the forensic interview in a "neutral fashion" and whether the "purpose" of "doing so [is] to search for the truth." App. 333, ll. 22-25.[6] Olszewski responded affirmatively, stating, he was "just as interested in finding out if nothing happened as" in "if something happened." App. 334, ll. 1-2.

Petitioner, testifying in his own defense, denied any sexual contact with Minor. App. 391, l. 22- App. 392, l. 15. Petitioner also informed the jury that he lived at the residence with Minor, her mother, and her brother. App. 383, l. 19 – App. 384, l. 6; App. 385, ll. 16-22. Petitioner's testimony was corroborated by James Calliham, who owned and operated a local furniture and appliance business. App. 377, ll. 12-21. Calliham was familiar with Petitioner because he had sold Petitioner a number of items over the years. App. 377, l. 22 – App. 378, l. 2. Calliham detailed numerous purchases, including air conditioners and a washing machine, made

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[3] It is elementary that a witness may not comment on the credibility of another witness; therefore, this testimony was objectionable because Olszewski indicated that Minor was credible because he saw no "red flags" suggesting she had been coached. See State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011).

[4] Olszewski's testimony that Minor's story was consistent was given to explain why he believed Minor's story and why he determined there were no "red flags" suggesting Minor had been coached. Thus, this testimony was objectionable. See Jennings, supra.

[5] Trial counsel elicited inadmissible and improper vouching testimony by asking Olszewski if he recommended counseling for Minor because such a recommendation carries with it an implicit understanding that he believed Minor. See State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015).

[6] No witness may comment on the credibility of another witness. Olszewski's testimony that the purpose of the forensic interview was to "search for the truth," was a direct comment on Minor's credibility. See Jennings, supra.

by Petitioner dating back to June 14, 2002, and ending on August 28, 2007. App. 378, l. 3 – App. 380, l. 21. According to Calliham, the items purchased by Petitioner were delivered to his home – the one he shared with Minor, her mother, and her brother. App. 378, l. 3 – App. 380, l. 21. Additionally, Petitioner contradicted Minor's testimony regarding the sleeping arrangements. Petitioner explained that he slept in the bed with Minor's mother, who was his girlfriend and the mother of his children. App. 385, ll. 19-25.

The jury found Petitioner guilty as charged. App. 477, ll. 2-13. Judge Keesley sentenced Petitioner to thirty years in prison for CSCM and to fifteen years in prison for lewd act. App. 485, ll. 9-14; App. 691; App. 694. He ordered the sentences to be served concurrently. App. 485, l. 15; App. 691; App. 694.

Petitioner filed a notice of appeal, which was perfected by Wanda Carter by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 488-499. The issue raised on appeal concerned the trial court's denial of the directed verdict motion concerning the CSCM charge due to the failure of the state to present evidence of penetration. App. 488-499. On February 29, 2012, the Court of Appeals dismissed the appeal. App. 500-501; State v. Jones, 2012-UP-120 (S.C. Ct. App. filed Feb. 29, 2012). Remittitur was sent on March 16, 2012. App. 502.

On April 18, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 503-525. The application was assigned case number 2012-CP-19-100. App. 503-525. An evidentiary hearing convened before the Honorable R. Lawton McIntosh on November 14, 2013. App. 532. Walt Whitmire represented the state, and Courtney Clyburn-Pope represented Petitioner. App. 532. On November 21, 2013, Judge McIntosh filed a Form 4 Judgment stating the decision of the court was to deny the application and directing the state to prepare a proposed

order. App. 673-674. Petitioner sent a letter to the Edgefield County Clerk of Court requesting his counsel file a notice of appeal. App. 671. The Clerk forwarded a copy of the letter to Clyburn-Pope on April 21, 2014. App. 672. Nevertheless, Clyburn-Pope did not file a notice of appeal.

On October 27, 2017, Petitioner filed a second PCR application. App. 604-632. This application was assigned case number 2017-CP-19-367. App. 604-632. The matter proceeded to a hearing before the Honorable William A. McKinnon on April 18, 2018. App. 645. Kristy Goldberg represented Petitioner, and Al Simon represented the state. App. 645.

At the PCR hearing, Petitioner explained that Clyburn-Pope did not provide him with her contact information over the course of her representation of him. App. 653, ll. 8-10. At the conclusion of the hearing, the judge announced that he was denying relief to Petitioner. App. 653, ll. 13-18. Petitioner informed Clyburn-Pope that he wanted to appeal the judge's decision. App. 653, ll. 24-25. Clyburn-Pope responded that she would be in touch with him. App. 654, ll. 1-2. Petitioner never saw the judge's order from April 1, 2014. App. 654, ll. 3-5. On April 14, 2014, Petitioner sent a letter to the Clerk of Court requesting an appeal. App. 654, ll. 10-20. Petitioner did not have Clyburn-Pope's contact information; therefore, he sent his request to the Clerk. App. 654, ll. 17-20. Petitioner wrote to the Supreme Court inquiring about the status of his appeal. App. 656, ll. 1-7; App. 675. He learned that the Court had no record of his appeal. App. 656, ll. 8-16; App. 675. As a result, Petitioner filed a second application for PCR. App. 604-632; App. 657, ll. 4-5.

PCR counsel remembered receiving the order of dismissal in Petitioner's case. App. 663, l. 24 – App. 664, l. 1. She did not recall having any contact with Petitioner about the order. App. 664, ll. 2-4. She explained her "firm's practice was was [sic] that when [she] received

those orders, [her] paralegal would mail those orders out." App. 664, ll. 4-5. She could not "confirm whether or not that was done." App. 664, l. 6. She did not have any documentation to show that the order was sent to Petitioner. App. 664, ll. 6-7; App. 665, ll. 7-10. While it was PCR counsel's practice to meet with her PCR clients after the hearing, she did not recall if she met with Petitioner after his hearing. App. 664, ll. 8-15. Importantly, she could not recall if she had any discussions with Petitioner regarding his appeal. App. 664, ll. 16-20.

By an order filed May 21, 2018, Judge McKinnon dismissed Petitioner's second PCR application with the exception of granting him a belated appeal of his first PCR case pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 676-688. Judge McKinnon found Petitioner requested appellate review of his first PCR application. App. 680. Additionally, Judge McKinnon found Petitioner was denied an opportunity to seek appellate review from the denial of PCR relief in his first PCR action due to Clyburn-Pope's failure to file a notice of appeal. App. 680. Judge McKinnon found Petitioner's testimony that he orally requested PCR counsel file a notice of appeal was credible. App. 680. He also found Petitioner's testimony that he wrote a letter to the Clerk of Court, which was forwarded to Clyburn-Pope, requesting an appeal was credible. App. 680. Judge McKinnon found Petitioner proved he was entitled to a belated appeal of his first PCR action. App. 680-681.

On May 29, 2018, Petitioner served his notice of appeal. This petition for writ of certiorari pursuant to Austin follows.[7]

[7] Petitioner is filing a petition for writ of certiorari along with this petition for writ of certiorari pursuant Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

ARGUMENT

Trial counsel rendered ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to advise him of the potential detriments of testifying and in failing to prepare Petitioner to testify in his defense where Petitioner's testimony damaged his case and permitted the prosecutor impeach him with a prior inconsistent statement.

Relevant facts

At the close of the state's case, the trial judge engaged in a colloquy with Petitioner regarding his right to testify. App. 341, l. 7 – App. 348, l. 3. At that time, Petitioner did not indicate whether he would testify. After defense counsel presented a couple of witnesses, he requested ten minutes to discuss with Petitioner whether he would testify. App. 381, l. 23 – App. 382, l. 4. The judge permitted the brief recess. App. 382, l. 5. Following the break, defense counsel announced that Petitioner would testify, and Petitioner confirmed to the judge that he wanted to testify. App. 382, ll. 9-13. Thereafter, Petitioner immediately took the stand. App. 382, ll. 14-22.

In response to questions from trial counsel, Petitioner denied the charges against him. App. 391, l. 22 – App. 392, l. 15. However, the solicitor's cross-examination was devastating to his defense. The solicitor immediately impeached Petitioner regarding his claim that he lived in the same house as Minor. App. 392, l. 22 – App. 393, l. 6. The solicitor used the waiver of rights form signed by Petitioner on April 11, 2008, to show that Petitioner provided a different address. App. 392, l. 25 – App. 393, l. 4. Petitioner claimed he provided that address to the police because it was made clear to him that he could not "go back to the house." App. 393, ll. 5-6. Nevertheless, the damage was done.

Additionally, the solicitor elicited testimony from Petitioner that when the DSS worker informed him that his daughter, Minor, had been diagnosed with genital herpes, Petitioner left the residence. App. 394, l. 15 – App. 396, l. 16. Petitioner learning of the diagnosis and his reaction was not presented to the jury from any other witness. The solicitor phrased the questions regarding Petitioner's reaction to show that he was not a good father. App. 394, l. 15 – App. 396, l. 16.

Regarding Petitioner's testimony that when he was released from prison on February 6, 2001, he was not diagnosed with anything, such as genital herpes, the solicitor moved to impeach Petitioner with a prior inconsistent statement. App. 397, ll. 21-24; App. 400, ll. 17-19; App. 401, ll. 9-12. The judge ruled the solicitor could question Petitioner regarding his prior inconsistent statement to Robinson about not remembering if he had herpes. App. 405, l. 25 – App. 406, l. 1. The solicitor then requested to impeach Petitioner with a statement he allegedly made to his boss, Monty Kneece, about having herpes. App. 406, ll. 206. During the in camera hearing, Petitioner stated that he told Kneece that he had herpes. App. 406, l. 21 – App. 407, l. 17. The judge ruled the prosecutor could ask Petitioner about these prior inconsistent statements in front of the jury. App. 413, ll. 1-2. When the jury returned to the courtroom, the solicitor asked Petitioner if he told Kneece that he had herpes. App. 415, ll. 3-4. Petitioner responded that he told Kneece he was being *accused* of having herpes. App. 415, ll. 3-6. The solicitor then used the transcript from the in camera hearing to impeach Petitioner with the testimony he had provided only moments prior to his statement to the jury. App. 415, l. 7 – App. 420, l. 10.

Trial counsel made no effort to rehabilitate Petitioner or to clarify any of his testimony. App. 420, l. 16.

In closing, the solicitor asked the jury to judge Petitioner's credibility. He encouraged the jurors to disbelieve Petitioner because he could not "tell the truth ten minutes apart from outside this courtroom and inside this courtroom, he can't tell it the same way. And there's a certain amount of arrogance that goes along with that." App. 442, ll. 9-13. The solicitor returned to this theme, informing the jurors that Petitioner told Kneece that he had herpes and remarking that Petitioner "can't tell it twice ten minutes apart, asked him up here, have to play it back what he said under oath here." App. 445, ll. 5-10. The defense had relied upon the fact that the state could not show whether Petitioner had type two or type one, and the state argued to the jury that the defense's argument in this regard was eliminated by Petitioner's testimony that he had herpes. App. 446, ll. 16-22. According to the solicitor:

> Any talk about that went out the window because what's on his mind when he finds out that she's got herpes is he's on the road wanting to get money and telling his employer that he's got herpes. Any doubt about whether or not he had it was removed with the last bit of testimony that you heard in this case.
>
> He's got it and he gave it to her.

App. 446, ll. 16-23. In the final moments of his summation, the solicitor reminded the jurors that Petitioner could not be believed because he could not "tell it right from minute to minute let alone from year to year. And there's a certain amount of arrogance." App. 448, ll. 13-18. He asked the jurors to reach a verdict "that speaks the truth and does justice for everybody here in Edgefield County." App. 449, ll. 17-21.

During the PCR hearing, Petitioner explained that trial counsel failed to prepare him to testify in his defense. App. 547, ll. 2-11. Petitioner did not know what to say and had not developed a strategy for his testimony with trial counsel prior to taking the stand. App. 547, ll. 2-11. According to Petitioner, he and trial counsel did not go over his trial testimony. App. 548, ll. 9-10. In fact, trial counsel did not review with him what evidence would be presented during

the trial. App. 548, ll. 11-13. Petitioner explained that his lack of preparation to testify impacted the outcome of his trial. App. 548, ll. 14-20. Petitioner admitted, however, that trial counsel warned him that the solicitor would go "at [him] with both barrels." App. 566, ll. 19-21; App. 571, ll. 1-2. The state asked Petitioner if the solicitor "caught [him] in a lie." App. 570, l. 7. Petitioner denied that he had been caught in a lie and explained that the solicitor had tripped him up. App. 570, ll. 9-21.

Trial counsel claimed he "strongly advised [Petitioner] not to take the witness stand." App. 576, l. 25 – App. 577, l. 1. He further claimed that Petitioner indicated he did not wish to testify during their pre-trial discussions. App. 577, ll. 1-2. However, when the trial judge questioned Petitioner regarding his right to testify, Petitioner "changed his mind" and said he wanted to testify. App. 577, ll. 2-8. Thus, it was during the trial that trial counsel learned that Petitioner wanted to testify and first began to prepare Petitioner during the trial. App. 577, ll. 2-9. Trial counsel claimed that he and his investigator "spent a fair amount of time" with Petitioner relaying their feelings about his testimony "and the potential hazards that he might encounter in doing so." App. 577, ll. 9-14. When Petitioner decided he wanted to testify, trial counsel and his investigator met with Petitioner "in the witness room privately" at the courthouse. App. 577, ll. 21-24. He estimated he spent approximately one hour preparing Petitioner to testify. App. 577, l. 25 – App. 578, l. 4.

According to trial counsel, his strategy would have been different had he known Petitioner would testify. App. 583, ll. 19-21. He explained he would have spent "a great deal of time" with Petitioner "attempting to reinforce the necessity of being very consistent with a true story." App. 583, l. 22 – App. 584, l. 3. Trial counsel believed Petitioner's testimony hurt his

case, particularly when the solicitor impeached him with a prior inconsistent statement. App. 584, ll. 12-17.

In the order denying relief, the PCR judge found trial counsel's testimony "to be convincing." App. 598. "The fact that counsel presented a vigorous defense case while having to meander through delicate situations where any minor misstep would have opened the door for the state to present prejudicial testimony and evidence was impressive" to the PCR judge. App. 598. Additionally, the PCR judge found Petitioner's "conviction was supported by overwhelming evidence of his guilt that included the victim's trial testimony that was corroborated by the medical evidence and [Petitioner]'s inconsistent trial testimony." App. 598. Further, the PCR judge found trial "counsel's testimony credible that he discussed the relevant constitutional rights and waivers in addition to the strategic impacts of the decision well in advance of trial with [Petitioner]." App. 601. According to the PCR judge, trial counsel "testified he did everything possible to prepare [Petitioner] to testify when [Petitioner] surprised him with his late decision to at trial." App. 601. "In contrast," the PCR judge found Petitioner's "testimony irrational and unconvincing." App. 601. The judge determined that "any prejudicial impact [Petitioner] suffered as a result of his decision to testify [could not] be associated with counsel's performance." App. 601. The judge found trial counsel "worked diligently to prepare [Petitioner] to testify under the circumstances." App. 601. The court was convinced that trial counsel advised Petitioner of the potential dangers of testifying in his defense and found the trial judge conducted a thorough colloquy on the matter. App. 601.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The

benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688.

Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Specifically, on the prejudice prong, the question to ask is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. (emphasis added). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Moreover, the Court held that:

> The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696.

Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

This Court has held trial counsel ineffective for failing to call crucial witnesses during trial. For example, in Walker v. State, 407 S.C. 400, 407, 756 S.E.2d 144, 147 (2014), this Court held trial counsel rendered ineffective assistance by failing to interview Walker's girlfriend regarding Walker's whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker's girlfriend testified that when she was dating Walker, which included the time of the alleged kidnapping and sexual assault, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend's "testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Thus, "it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147. This Court held Walker was entitled to relief based upon his counsel's failure to interview his alibi witness. Id.

In another case, this Court held trial counsel was ineffective by "failing to call the medical personnel who would have cast doubt on the state's sole witness' identification of [Thomas]" as the perpetrator. Thomas v. State, 308 S.C. 123, 124, 417 S.E.2d 531, 532(1992). Thomas was charged with burglary and criminal sexual conduct. Id. The only witness to those offenses was the alleged victim. Id. Several hours after the incident, the alleged victim identified Thomas as her assailant. Id. "As the sole witness to this attack, the victim's credibility and identification of her attorney was

crucial to the state's case." Id. Further, this Court held "the omission of this witness" was prejudicial to Thomas because the alleged victim's identification was crucial to the case. Id.

This Court held counsel was ineffective in Pauling v. State, 331 S.C. 606, 607-608, 503 S.E.2d 468, 469 (1998), for failing to call a triage nurse to challenge the state's case. Pauling challenged his convictions for first degree burglary and first degree criminal sexual conduct. Id. at 607, 503 S.E.2d at 469. One of his allegations was that trial counsel failed to prepare a triage nurse as a defense witness. Id. at 607-608, 503 S.E.2d at 469. At trial, counsel questioned a doctor about notes prepared by the triage nurse. Importantly, the notes indicated the alleged victim told the triage nurse that there was no actual penetration. However, trial counsel's attempt to question the doctor about the notes drew a hearsay objection, which was sustained. Id. at 608, 503 S.E.2d at 470. At his PCR hearing, Pauling introduced the triage nurse's notes indicating the alleged victim said the assailant did not penetrate her vagina. Id. at 609, 503 S.E.2d at 470.

According to this Court, counsel's failure to call the triage nurse as a defense witness was deficient and Pauling suffered prejudice as a result of the deficiency. Id. at 610, 503 S.E.2d at 470. This Court explained "the only evidence of a sexual battery was the victim's testimony" as there "was no corroborating physical evidence of penetration or any forensic evidence of a sexual assault." Id. at 610, 503 S.E.2d at 471. As this Court detailed, "[t]he triage nurse's testimony of the victim's statement shortly after the assault would have been crucial, both as substantive evidence that a sexual battery did not occur (and therefore, there was no CSC) and as evidence to impeach the victim's credibility." Id.

Finally, this Court held counsel was ineffective in failing to call an expert witness whose testimony support the defense. McKnight v. State, 378 S.C. 33, 41, 661 S.E.2d 354, 359 (2008).

McKnight gave birth to a stillborn child, and a subsequent autopsy revealed the presence of a by-product of cocaine. Id. at 39, 661 S.E.2d at 356. The state's pathologist concluded the child died as a result of cocaine consumption. Id. at 39, 661 S.E.2d at 357. The state charged McKnight with homicide by child abuse. Id. McKnight's first trial ended in a mistrial; the second resulted in a conviction. Id.

At the first trial, McKnight's counsel called two expert witnesses to present evidence of possible alternative causes of death. Id. at 41, 661 S.E.2d at 358. One of those experts – Dr. Karch – provided very favorable testimony for McKnight. Id. The other expert's testimony greatly assisted the state and was the centerpiece of the state's closing argument. Id. at 42, 661 S.E.2d at 358. At the first trial, defense counsel failed to call Dr. Karch because he was not available. Id. Nevertheless, counsel called the second expert whose testimony had been so detrimental to McKnight's case. Id.

At her PCR hearing, McKnight presented testimony from another expert who would have testified similarly to Dr. Karch had the witness been called. Id. at 44-45, 661 S.E.2d at 359-360. This Court held trial counsel's decision to call during the second trial the expert who had provided beneficial testimony for the state was unreasonable without calling an expert to rebut the state's expert on the cause of death. Id. at 45, 661 S.E.2d at 360. Additionally, this court held McKnight suffered prejudice as a result of counsel's deficiency. Id. "The methodology used by the *only* expert witness for the defense in determining the cause of fetal death mimicked that of the state's star expert and, in this way, [the second expert]'s testimony primarily served to bolster the state's theory of the case excluding all other potential causes of death in order to conclude that cocaine caused the stillbirth." Id. (emphasis in original). Thus, this Court concluded McKnight's counsel provided ineffective assistance. Id. at 46, 661 S.E.2d at 360.

It simply cannot be debated that trial counsel has a duty to prepare a case for trial. With that duty to prepare includes the duty to prepare the witnesses who will testify, including the defendant. In the present case, it was undisputed that prior to trial, defense counsel made no effort to prepare Petitioner to testify. In fact, trial counsel admitted that he relied solely upon Petitioner's indications that he would not testify when he decided not to prepare for Petitioner to testify. Certainly, defense counsel was aware that the right to testify was a personal right and one that Petitioner could choose to exercise at the last minute. Instead of preparing for that potentiality, counsel chose to ignore his duty to prepare Petitioner to testify. When Petitioner realized that he needed to take the stand to defend himself against the accusations, trial counsel spent at most one hour, according to his testimony, preparing Petitioner to testify. One hour of preparation was hardly sufficient to ensure Petitioner was capable of testifying during the direct examination and withstanding cross-examination from a seasoned prosecutor.

Trial counsel admitted that Petitioner's testimony damaged his defense. It was clear Petitioner was not prepared for the questions posed by the solicitor, which was the failing of trial counsel. The solicitor "caught" Petitioner "in a lie" according to the state at the PCR hearing. The transcript bore out that Petitioner admitted he told Kneece that he had herpes during the in camera hearing, but he changed his testimony to reflect that he told Kneece he had been accused of having herpes when he testified in front of the jury. This was very damaging to Petitioner's credibility, which was the crux of the entire case. The solicitor capitalized on Petitioner's inconsistent testimony in his closing argument when he told the jury not to believe Petitioner because he could not say the same thing when asked the same question ten minutes later. Trial counsel's failure to prepare Petitioner to testify prejudiced Petitioner's defense.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court reverse the PCR court, hold trial counsel provided ineffective assistance, vacate Petitioner's convictions, and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Edgefield County
R. Lawton McIntosh, Circuit Court Judge

GEORGE A. JONES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for George A. Jones states:

1. She is an 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 R. Lawton McIntosh, which was held on November 14, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), she has briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for George A. Jones.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

This 18th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Edgefield County

R. Lawton McIntosh, Circuit Court Judge

GEORGE A. JONES,

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V.

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RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson Petition for Writ of pursuant to Austin v. State and a copy of the Appendix, in this case has been served on Kelly Oppenheiner, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. George A. Jones #254442, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of January, 2019.

Susan B. Hackett
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: May 12, 2027