

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable William H. Seals, Circuit Court Judge

GABRIEL LEE GRATTO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001146

JOHNSON PETITION FOR WRIT OF CERTIORARI

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

Whether resentencing without withdrawal of a guilty plea is an available remedy to a PCR applicant whose attorney was ineffective in failing to present mitigating evidence at sentencing?

STATEMENT

On April 13, 2015, petitioner pled guilty in Horry County before the Honorable John C. Hayes, III, to leaving the scene of an accident, felony DUI resulting in great bodily injury, and felony DUI resulting in death. App. 80-81. App. 1 – 8. Bradley C. Richardson represented the State and John Hilliard represented petitioner. App. 1. Judge Hayes sentenced petitioner to concurrent terms of fifteen years' imprisonment on all three charges. App. 42, ll. 17 – 22.

On July 23, 2015, petitioner filed a PCR application which was subsequently amended. App. 45. App. 50. At the PCR hearing, petitioner waived his right to seek a new trial and sought only resentencing from the court. App. 70-77. The State moved to dismiss, arguing that resentencing was not an available remedy. App. 70-77. The PCR court granted the State's motion from the bench. App. 76-77. The court subsequently entered a written Order. App. 81. Petitioner moved to alter or amend pursuant to Rule 59(e). App. 87. The court denied the motion on May 17, 2018, and this petition follows. App. 99.

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

Resentencing without withdrawal of a guilty plea is an available remedy to a PCR applicant whose attorney was ineffective in failing to present mitigating evidence at sentencing.

The PCR court dismissed petitioner's PCR application because it believed it could not order resentencing as a remedy for the specific violation alleged by petitioner. App. 99-104. Petitioner's only allegation of ineffective assistance was that plea counsel failed to provide mitigating evidence to the judge during sentencing. App. 70-77. Petitioner narrowly tailored his claim at the PCR hearing such that he waived any right to withdraw his guilty plea and asked the PCR court to only order resentencing to correct this narrow, specific allegation of ineffective assistance. App. 70-77.

The PCR court held that such a remedy is unavailable. App. 99-104. The court relied on Smith v. State, 413 S.C. 194, 775 S.E.2d 696 (2015) for its holding. In Smith, the State promised to remain silent during sentencing. Id. The State breached its agreement with Smith and asked for the maximum sentence. Id. The Court of Appeals ordered resentencing. Id. This Court disagreed with the Court of Appeals and held that "the proper remedy for counsel's ineffective assistance is invalidation of the entire agreement." Id.

The PCR court interpreted the holding of Smith too broadly. Smith applies only to a breached plea agreement. Furthermore, this Court left open the availability of resentencing in a footnote stating that Smith only sought a new trial, not resentencing. Smith at n.1. Here, petitioner only seeks resentencing—the opposite of Smith. On multiple occasions, our appellate courts have remanded PCR cases for resentencing. See Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000) (remanding for resentencing); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (remanding for resentencing or a new trial); Boan v. State, 388 S.C. 272, 695 S.E.2d 850

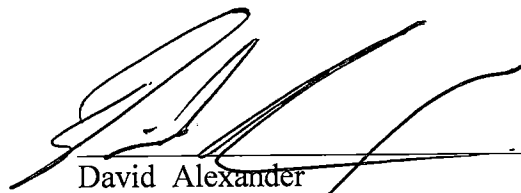
(2010) (remanded for resentencing); Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999) (remanded for resentencing); Dervin v. State, 386 S.C. 164, 687 S.E.2d 712 (2009) (remanded for sentencing).

The PCR court entirely failed to distinguish death penalty PCR cases where the ineffectiveness alleged is precisely the same as this case—failure to present mitigating evidence during sentencing. In Weik v. State, 409 S.C. 214, 238, 761 S.E.2d 757, 769 (2014), trial counsel failed to discover substantial mitigating evidence about the defendant’s background that “undermined confidence in the outcome.” The Court found that the defendant “established his entitlement to a new sentencing hearing as a result of trial counsel’s failure to present available mitigating evidence regarding his social history.” Id. at 239, 761 S.E.2d at 770. See also Wiggins v. Smith, 539 U.S. 510 (2003) (finding counsel ineffective in failing to present mitigating evidence in a death penalty case). The same Sixth Amendment that applies to capital cases applies to non-capital cases. Neither the PCR court nor the State provided any logical reason why plea counsel’s ineffective assistance for failing to present mitigating evidence at sentencing can be a ground for resentencing only in a death penalty case.

Furthermore, the PCR court relied on an improper “floodgates” reason for dismissing petitioner’s case. App. 103. The PCR court was concerned that if prisoners thought they could get a “time cut” in a PCR, then “many more would try their luck for no reason of actual injustice, but to try and get a shorter sentence.” App. 103. While this may be a concern for the Legislature who would have to fund more attorneys and judges and court staff to adjudicate PCR claims, it is of no concern to the Sixth Amendment, which guarantees effective assistance of counsel, or to our Courts, who are obliged to enforce these guaranteed rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the PCR court's Order and remand with instructions to consider whether petitioner is entitled to receive a new sentencing hearing.

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

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of February, 2019.

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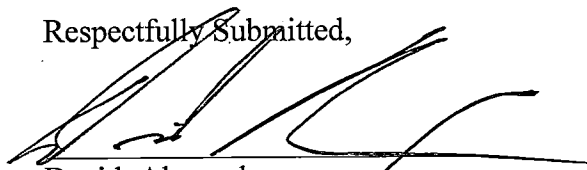
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gabriel Lee Gratto 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 the Honorable William H. Seals, which was held on November 27, 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 Gabriel Lee Gratto.

Respectfully Submitted,

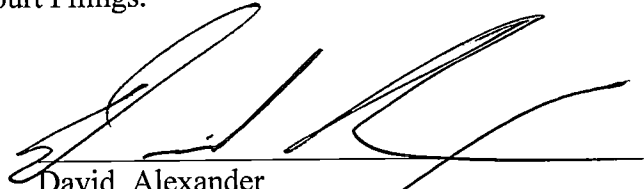


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 14th day of February, 2019.

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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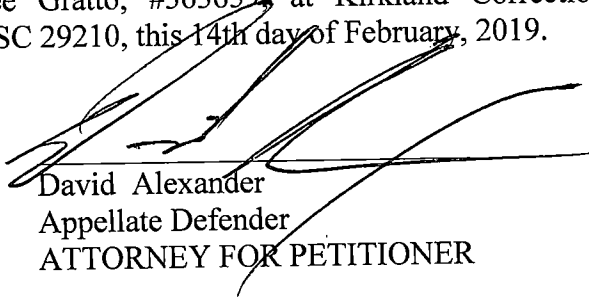
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RESPONDENT

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 Gabriel Lee Gratto, #363659, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 14th day of February, 2019.


David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of February, 2019.

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