

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Lexington County

Honorable Perry H. Gravely, Circuit Court Judge

JEFFREY D. CROMER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001959

JOHNSON PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether this Court should remand because the PCR court refused to allow testimony from an alibi witness on petitioner's claim of after-discovered evidence?

STATEMENT OF THE CASE

Petitioner Jeffrey Cromer was indicted in Lexington County for first-degree burglary and was tried on March 12, 2001, before the Honorable J.C. Nicholson, Jr. and a jury. App. 1 – 11. A. Tav Swarat represented the State and Michael W. Chesser represented petitioner. App. 1. Petitioner was convicted and Judge Nicholson sentenced him to twenty-five years' imprisonment. App. 603. Petitioner's first PCR application was denied in 2007 and the petition for certiorari was denied in 2009. App. 894-95.

Petitioner filed the current PCR application on May 29, 2012. App. 692. On March 5, 2018, the Honorable R. Knox McMahon ruled petitioner was entitled to an evidentiary hearing and appointed counsel. App. 869. The Honorable Perry H. Gravely held a hearing on July 30, 2018. App. 877. Kelly Oppenheimer represented the State and Kristy Goldberg represented petitioner. App. 877. Judge Gravely dismissed petitioner's application and denied petitioner's Rule 59(e), SCRPC motion. App. 893. App. 912. This petition follows.

STANDARD OF REVIEW

When the PCR court summarily dismisses an application without conducting a true evidentiary hearing, this Court assumes the facts put forward by petitioner were true and views those facts in the light most favorable to petitioner. Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).

ARGUMENT

This Court should remand because the PCR court refused to allow testimony from an alibi witness on petitioner's claim of after-discovered evidence.

Petitioner filed this second PCR application seeking relief based on the discovery of new information from an alibi witness, Yolanda Watlington ("Watlington"). App. 881, l. 23 – 882, l. 16. Petitioner lived with Watlington at her apartment for approximately four months before the burglary which was the subject of petitioner's conviction. App. 94, ll. 1 – 6. At a hearing held before petitioner's burglary trial, Watlington testified that she came home from making a phone call to find the police at her house. App. 94, ll. 7 – 18. She gave the police permission to search her apartment. App. 96, ll. 2 – 9.

The solicitor showed Watlington pictures of tools found at the apartment and she said they were not her's and she did not know how they got to her apartment. App. 99, l. 20 – 100, l. 18. The police told Watlington to write a statement. App. 96, l. 25 – 97, l. 21. They told her she needed to write a statement saying she knew nothing about items found by the police so she would not go to jail and lose her kids. App. 96, l. 25 – 97, l. 21. The police specifically threatened jail and taking away her children. App. 96, l. 25 – 97, l. 21. Watlington was scared and wrote the statement. App. 97, l. 20 – 98, l. 6. At the end of Watlington's testimony, defense counsel asked for her to be excused, but noted a possibility that he might need her during the trial. App. 103, ll. 13 – 19.

After his unsuccessful appeal, PCR, and federal habeas, petitioner learned that Watlington had additional information that could give him an alibi. App. 693-94. App. 764-70. App. 792-793. Petitioner filed two letters from Watlington. App. 764-70. App. 792-793. In these letters, Watlington disclosed that on the night of the burglary, she secretly followed

petitioner to a gas station hoping to catch him cheating on her. App. 765. She only saw him playing a video game. App. 765. When petitioner got up to leave, Watlington beat him back home. App. 765.

Petitioner came home and sat on the back porch smoking a cigarette. App. 765. A dark pick-up truck came to her apartment. App. 765. A black man and two white men got out of the truck and smoked and talked with petitioner. App. 766. The men left and then petitioner got in Watlington's car and left. App. 766. Petitioner could not have gone far because Watlington purposefully left almost no gasoline in the car so petitioner could not use her car to meet a paramour. App. 766. Petitioner was not gone long and returned home and fell asleep on the couch. App. 766. Watlington got mad at petitioner and threw a beer can at him, but petitioner went right back to sleep. App. 767.

Watlington then heard the truck return. App. 767. The men called for petitioner, but Watlington would not let him go outside. App. 767. Petitioner was still asleep on the couch the next morning. App. 767. Watlington left to use the phone and when she returned, the police were at her apartment and petitioner was arrested. App. 768-69. As Watlington testified at the pre-trial hearing, the police threatened her with jail and losing her kids. App. 768-69. In her second letter, Watlington said she began communicating with petitioner in October 2012. App. 792-93. She told petitioner about following him to the gas station and that she saw the truck. App. 793.

The State moved to dismiss petitioner's PCR application as successive and not meeting the requirements for after-discovered evidence. App. 784-91. The Honorable R. Knox McMahon appointed counsel and ordered that a hearing be held on the State's motion. App. 883, ll. 1 – 8. Counsel explained at the hearing what Watlington had seen, that she had never

told petitioner about this until 2011, and that Watlington was at the hearing and ready to testify. App. 884, ll. 1 – 20. Counsel stated that petitioner filed his PCR application within one year of learning about Watlington’s new information. App. 884, ll. 21 – 25. When Judge Gravely clarified that Watlington had testified in petitioner’s trial, counsel replied that, “Nothing that she is saying in her new statement is contained within that, so it is new substantially.” App. 885, l. 18 – 886, l. 4.

The Attorney General argued that Watlington’s new information could not qualify as after-discovered evidence because she was available for trial and known to trial counsel. App. 889, ll. 2 – 13. The State also argued that Watlington’s letters did not provide a full and complete alibi. App. 889, l. 14 – 890, l. 1. Judge Gravely agreed with the State and ruled that Watlington’s new statement did not rise “to the level of newly discovered evidence.” App. 890, l. 16 – 891, l. 4. The court granted the State’s motion to dismiss without ever hearing Watlington testify. App. 891, ll. 2 – 13. After the court entered a formal Order, petitioner filed a Rule 59(e), SCRPC motion objecting that the court did not allow Watlington to testify. App. 903-04. Judge Gravely denied the motion, stating only that he found “no basis for altering or amending its prior ruling.” App. 917.

The PCR court erred in not taking testimony from Watlington before ruling on whether her statements qualified as after-discovered evidence. The PCR Act specifically authorizes newly discovered evidence as a ground for relief. S.C. Code. Ann. § 17-27-20(A)(4). Section 17-27-20(A)(4) states that a ground for PCR exists when “there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” Id. When the applicant is tried instead of pleading guilty, the traditional

five-factor test for newly discovered evidence applies. See Jamison v. State, 410 S.C. 456, 469-70, 765 S.E.2d 123, 129-30 (2014).

“To obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” Clark v. State, 315 S.C. 385, 387-88, 434 S.E.2d 266, 267 (1993). Had the court heard Watlington’s testimony, it could have met all five of the Clark factors. Because the court did not hear Watlington’s testimony, the hearing was not a true evidentiary hearing and therefore the PCR judge erred in not assuming the facts put forward by petitioner were true and viewing those facts in the light most favorable to petitioner. Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005).

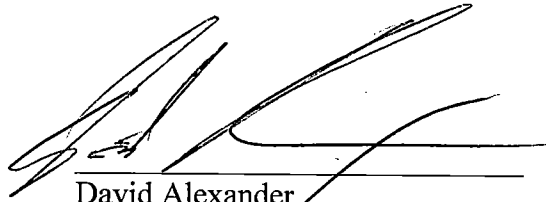
Watlington’s information could have changed the result, is material to petitioner’s guilt and is not cumulative or impeaching. She would provide an alibi. Few things are more material to guilt or innocence than an alibi as it provides a complete defense to the crime. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The State’s contention that the alibi does not account for every second of petitioner’s time during the crime is not dispositive. See Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). In Walker, even though the alibi witness was unclear on the dates she spent the night with the defendant, had the jury believed her it would have provided a complete alibi. Id. Watlington, had she been allowed to testify, would have provided enough of an alibi because of the temporal impossibilities of petitioner participating in the burglary even though petitioner was not always in her sight. Therefore, the first, fourth, and fifth prongs of the Clark test are met.

The second and third prongs also could have been met had the PCR court allowed Watlington to testify. Watlington's testimony during the trial and her written statements since the trial provide plausible reasons why her alibi could not have been discovered before the trial. First, Watlington was spying on petitioner because she suspected he was cheating on her. Petitioner did not know she was spying on him and could not have known this unless Watlington told him. Second, Watlington testified and said in her statements that the police threatened her if she helped petitioner. Police threats are enough to explain why petitioner could not have discovered this before the trial.

In McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013), this Court reversed and remanded a PCR court's summary dismissal of a second PCR application. The Court stated, "Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing." McCoy at 369, 737 S.E.2d at 626. Just like in McCoy, petitioner's claim that he could not have discovered Watlington's new information until 2011 because of the police's threats against her is not refuted by the record. As Watlington's testimony at the pre-trial hearing about these threats demonstrates, the record supports the timeliness of petitioner's claim. The PCR judge erred in not allowing Watlington to testify and assessing her credibility. See Goss v. State, 425 S.C. 101, 820 S.E.2d 373 (2018) (holding the PCR court erred in taking judicial notice of alibi witnesses' testimony instead of assessing their credibility). This Court should reverse and remand for a full evidentiary hearing.

CONCLUSION

This Court should remand petitioner's case for a full evidentiary 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 28th day of June, 2019.

STATE OF SOUTH CAROLINA
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Certiorari to Lexington County

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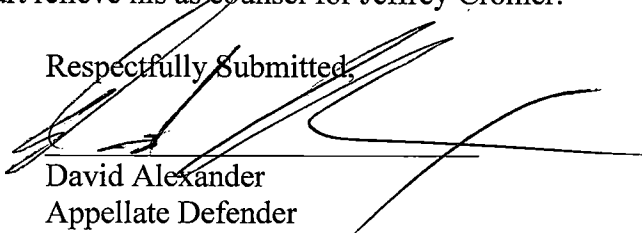
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeffrey D. Cromer 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 Perry H. Gravely, which was held on July 30, 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 his as counsel for Jeffrey Cromer.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

This 28th day of June, 2019.

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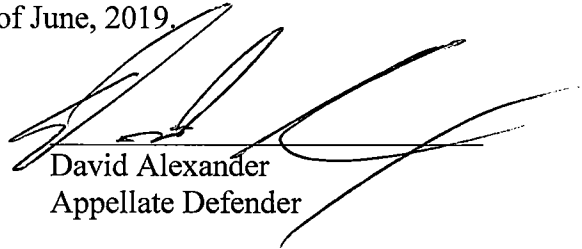
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RESPONDENT

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 Taylor Z. Smith, 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 Jeffrey Darrell Cromer, #197498, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 28th day of June, 2019.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 28th day of June, 2019.

Marcy Allgore (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.