

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County

The Honorable Grace Gilchrist Knie, Circuit Court Judge

2016-CP-42-02795

Manuel Antonio Marin, #343371,

PETITIONER,

v.

State of South Carolina,

RESPONDENT.

Appellate Case No.: 2018-001157

JOHNSON PETITION FOR A WRIT OF CERTIORARI

ASHLEY A. MCMAHAN
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QUESTION PRESENTED

1. DID THE PCR COURT ERR IN FINDING TRIAL COUNSEL WAS EFFECTIVE WHEN COUNSEL FAILED TO CALL AN EXPERT WITNESS REGARDING SELF-DEFENSE?

STATEMENT OF THE CASE

The Spartanburg County Grand Jury indicted Petitioner on August 25, 2008, for murder and possession of a weapon during the commission of a violent crime. (2008-GS-42-05308). (App. pp. 1035-1036). Assistant Public Defender Tanya R. Jones represented the Applicant. Assistant Solicitors Susan S. Reese and Jennifer A. J. Jordan represented the State.

On October 27, 2010, the Petitioner proceeded to trial before the Honorable J. Derham Cole. (App. pp. 1-417). Petitioner was found guilty on both counts and sentenced to life in prison for murder while the sentence for the weapons charge was not imposed due to the life sentence for murder. (App. pp. 1308-1039).

Petitioner timely filed a Notice of Appeal from his convictions and sentence and an appeal was perfected. Chief Appellate Defender Robert M. Dudek and Assistant Appellate Defender David Alexander represented the Petitioner on appeal. Petitioner's conviction and sentence was affirmed by published opinion by the SC Court of Appeals on July 3, 2013. (State v. Marin, 404 SC 615, 745 SE2d 148 (Ct. App. 2013).) (App. pp. 479-487). Petitioner filed a Petition for Rehearing on July 18, 2013, which was denied on August 21, 2013. (App. pp. 488-492).

Petitioner timely filed a Petition for a Writ of Certiorari with the SC Supreme Court on November 21, 2013. (App. pp. 495-510). The Petition was granted on October 23, 2014. (App. pp. 540-541). The Supreme Court affirmed the Court of Appeals as modified on March 23, 2016. (State v. Marin, 415 SC 475, 783 SE2d 808 (2016).) (App. pp. 586 – 598). The Remittitur was sent on April 8, 2016. (App. p.

599).

Petitioner filed his application for post-conviction relief (PCR) on July 28, 2016. (2016-CP-42-02795). (App. pp. 600-631). Petitioner amended his application on October 4, 2017 (App. pp. 632-649) and again on December 4, 2017 (App. pp. 650-656). The State filed its Return and Partial Motion to Dismiss on or about March 28, 2017, (App. pp. 657-665) requesting the Petitioner's allegations regarding judicial error be dismissed.

The PCR hearing was held on February 1, 2018, before the Honorable Grace Gilchrist Knie at the Spartanburg County Courthouse. (App. pp. 674-895). Petitioner was present and represented by James H. Price, III, Esquire. Assistant Attorney General Valerie Garcia Giovanoli represented the Respondent. On June 5, 2018, Judge Knie denied the Petitioner's PCR application by written order. (App pp. 1006-1034). This petition follows.

STANDARD OF REVIEW

The reviewing court defers to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, the reviewing court affords great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed *de novo*, and this court will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

STATEMENT OF THE FACTS

The victim and the Petitioner had been at Bongos Nightclub in Greenville earlier in the evening to celebrate Colombian independence. (App. p. 74, line 3 – p. 75, line 5). At the end of the night while closing up the bar, the Bongos staff was trying to find a ride home for the victim because he was heavily intoxicated. (App. p. 83, lines 11-23). One of the staff members testified that he had “cut off” the victim from buying more alcohol. (App. p. 81, lines 15-18.) This same staff member also noted that the victim couldn’t walk every well and was stumbling around (App. p. 81, lines 10-22).

The pathologist testified that the victim was “knee-walking drunk” with a blood alcohol level of 0.323. (App. p. 236, lines 8-13). It’s not in dispute that the Petitioner drove while his friend Alfredo Jimenez rode in the front seat and the victim was in the back seat. (App. p. 292, lines 13-14; p. 298, lines 22-24).

Larry Gory was going home early that morning when he saw the Petitioner and Jimenez standing beside the road. (App. p. 102, lines 12-15). He also stated that it appeared the two were trying to get away from each other and one of them asked Gory to call the police because “he just shot him.” (App. p. 102, lines 17-24).

Officer Powell from the Spartanburg Police testified that he arrived at the scene and saw both the Petitioner and Jimenez there at the intersection of Daniel Morgan Avenue and West Main Street. (App. p. 112, lines 15-21). Powell noted that one of them was very upset and the other one was very calm. (App. p. 113, lines 1-13). He also noted that he saw a gun lying on the sidewalk and he picked it up and

put in the trunk of his police car. (App. p. 114, lines 15 – p. 115; line 7). Powell also asked where the incident occurred and they would just say Wal-Mart and that the victim was grabbing hold of the steering wheel trying to wreck the car. (App. p. 119, lines 9-18).

Powell further testified that Jimenez told him that they had been in Greenville earlier and were taking the victim home. When they passed what the victim thought was his road, the victim got upset and was trying to get the Petitioner to stop the car and that's when the victim started fighting with the Petitioner. (App. p. 122, lines 2-21). Jimenez never testified at the trial. It is unclear from the record if he returned to Mexico or why he was not called as a witness.

The Petitioner later testified in his own defense. He stated he went to the Colombian festival that evening in Greenville at Bongos when he was asked to give the victim a ride home. (App. p. 288, line 4 – p. 289, line 20; p. 290, line 5 - p. 291, line 9). Petitioner got the victim's address from his driver's license and put the address into the GPS. (App. p. 293, line 12 – p. 294, line 20).

Petitioner further testified that the victim jumped up from the backseat and put the Petitioner in a headlock. It was at that point the Petitioner hit the brakes and the car went into the oncoming lane and headed towards a telephone pole, but he got the car back onto the road. (App. p. 295, line 11 – p. 296, line 12). Petitioner noted that at this point he was scared and decided he wasn't going to take the victim him. He tried to find a public place where he could pull over, get out of the

car, and get some help. (App. p. 297, lines 8-14). Petitioner stated that all of a sudden the victim jumped from the back seat, grabbed the steering wheel, and tried to run the car off the road. Petitioner said he tried to push him back and continued to come after him, and that was when the Petitioner opened the glove box, got the pouch out with the gun, pulled out the gun, and shot the victim. (App. p. 297, line 5 – p. 299, line 11).

Crime scene forensics corroborated the Petitioner's testimony. A Greer police officer confirmed that there were fresh skid marks in the road where the incident occurred. (App. p. 140, lines 16-25). Also in the road was debris that was consistent with front end damage on the car. (App. p. 140, lines 16-25). The bumper of the car was also missing. (App. p. 188, lines 1-4). The victim's body was found between the front seats on the console with his upper body in the front area of the car. (App. p. 190, lines 8-21).

Petitioner also noted in his testimony that he and Jimenez were talking after the shooting wondering why the victim was trying to kill them and run them off the road. (App. p. 301, lines 6-9). On cross, the Petitioner explained that it was very dark that night and that he was trying to keep the victim from killing them by wrecking the SUV. (App. p. 311, line 1 – p. 314, line 4.)

ARGUMENT

The PCR court erred in finding trial counsel was effective when counsel failed to call an expert witness regarding self-defense.

In this matter, trial counsel was deficient for failing to call an expert witness to testify about the crime scene. When reviewing a claim for ineffective assistance of counsel, the "court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (*quoting* Strickland v. Washington, 466 U.S. 668, 690 (1984)). To rebut this presumption and succeed on an ineffective assistance claim, a PCR applicant must show (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced the outcome of the trial. Strickland, 466 U.S. at 687.

"To prove trial counsel's performance was deficient, a [PCR] applicant must show '[trial] counsel's representation fell below an objective standard of reasonableness.'" Smalls, 422 S.C. at 181, 810 S.E.2d at 840 (*quoting* Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)). Thus, this court will find trial counsel's failure to call an expert as deficient performance only if it was unreasonable under the prevailing professional norms at the time of trial. Strickland, 466 U.S. at 688

Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). In order to show

prejudice from the failure to contact an allegedly favorable witness, a PCR applicant must present the testimony of that witness at the PCR hearing. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

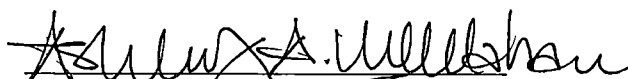
Petitioner called expert witness Donald Girndt, a forensic consultant, to testify at his PCR hearing. He specializes in crime scene analysis, blood stain pattern interpretation, and fingerprint identification. (App. p. 703, line 25 – p. 704, line 2). Mr. Girndt testified that after reviewing the photographs of the scene and the autopsy records, that the scene was consistent with Petitioner's testimony. (App. p. 711, lines1-7).

Mr. Girndt's testimony would have helped show that Petitioner's testimony was consistent with the crime scene. Petitioner was put in a position where he was the only one who could testify that it was self-defense since Jimenez was not available for trial. The expert witness would have been essential to verify the Petitioner's version of events and rebut the State's assertion that the Petitioner was unreasonable in his action. Trial counsel's actions in not calling an expert to testify to this was deficient. Had trial counsel called an expert witness like Mr. Girdnt, the outcome of the trial would have been different because Petitioner would have been found not guilty.

CONCLUSION

For the foregoing reasons, Petitioner submits this Court should grant the Petition for Writ of Certiorari and the convictions and sentence reversed and the case remanded for a new trial.

Respectfully submitted,



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Jan. 3rd, 2019

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
The Honorable Grace Gilchrist Knie, Circuit Court Judge
2016-CP-42-02795

Manuel Antonio Marin, #343371,

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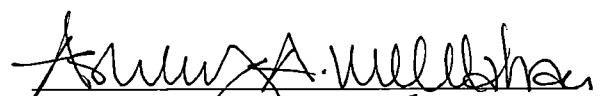
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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Manuel Antonio Marin states:

1. She is a member of the South Carolina Bar and was appointed to represent the Petitioner.
 2. She has reviewed the records and transcripts of Petitioner's post-conviction relief hearing which was held on February 1, 2018. In her opinion seeking certiorari from the Order of Dismissal is without merit.
 3. She has, pursuant to Johnson v. State, 294 SC 310, 364 SE2d 201 (1998), briefed the one arguable legal issue which arose during the post-conviction relief process.
- Therefore, counsel requests that the Court relieve her as counsel for Mr. Marin.

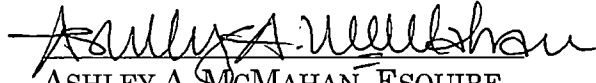
Respectfully submitted,


ASHLEY A. MCMAHAN, ESQUIRE
ATTORNEY FOR PETITIONER

This 3rd day of January, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Johnson Petition for a Writ of Certiorari complies with SCACR 11(b) 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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January 31st, 2020

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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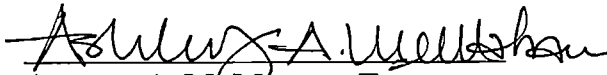
PROOF OF SERVICE

I, Ashley A. McMahan, certify that I have served the within Petition for a Writ of Certiorari and accompanying Appendix on Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Johnny E. James, Jr.
Assistant Attorney General
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PO Box 1154
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I further certify that all parties required by Rule to be served have been served.
This 3rd day of January, 2020.


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