

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Richland County

Honorable Kristi F. Curtis, Circuit Court Judge

YUSUF KARIM AQUIL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-002092

JOHNSON PETITION FOR WRIT OF CERTIORARI

Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
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INDEX

INDEX..... i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

The PCR judge erred in finding that plea counsel was not ineffective for failing to investigate an alibi witness named Christopher because Christopher was Petitioner’s only alibi witness and he could have testified that Petitioner was not present at the time of the murder.....5

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL.....9

ISSUE PRESENTED

Did the PCR judge err in finding that plea counsel was not ineffective for failing to investigate an alibi witness named Christopher where Christopher was Petitioner's only alibi witness and he could have testified that Petitioner was not present at the time of the murder?

STATEMENT

Petitioner was indicted by the Richland County grand jury in January of 2013 for murder, kidnapping, armed robbery, conspiracy, possession of a firearm by a convicted felon, and unlawful carrying of a pistol. App. 126 – 131. Petitioner was represented by Neil Lourie and the state was represented by Richard Cathcart. App. 1.

On March 16, 2015, Petitioner entered a negotiated guilty plea to murder, kidnapping and armed robbery before the Honorable DeAndrea G. Benjamin. App. 1 – 24. The conspiracy and gun charges against Petitioner were dismissed. The assistant solicitor also withdrew his notice of intent to seek a sentence of life without parole in exchange for Petitioner’s plea. App. 4, ll. 1 – 12.

At Petitioner’s guilty plea, the state alleged that the decedent had a “side job” selling marijuana to one of Petitioner’s codefendants and that Petitioner and his two codefendants conspired to rob the decedent. App. 7, ll. 2 – 15. The state claimed that, during the robbery, one of Petitioner’s codefendants hit the decedent on the head with a pistol and the other codefendant tied the decedent up with tape and rope. App. 7, ll. 16 – 20. The state further alleged that the decedent died from the blow to his head and asphyxiation from the rope. App. 7, ll. 21 – 25.

Judge Benjamin sentenced Petitioner to the negotiated sentence of thirty-years imprisonment on each count, with all sentences to run concurrently. App. 3, ll. 1 – 24; app. 23, ll. 13 – 21. Petitioner did not appeal his guilty plea.

Petitioner filed an application for post-conviction relief on March 15, 2016 and the state filed its Return on July 11, 2017. App. 31 – 41. An evidentiary hearing was held on February 20, 2019 before the Honorable Kristi Curtis. App. 42. Aimee Zmroczek represented Petitioner

and Lindsey McCallister represented the state. App. 42. Petitioner testified along with his plea counsel, Neil Lourie. App. 43.

Petitioner testified that he did not believe Lourie was prepared for trial. App. 56, ll. 20 – 25. Petitioner had given Lourie witnesses that he wanted Lourie to investigate including a man named Christopher that used to be Petitioner’s next-door neighbor. App. 57, ll. 9 – 15. Petitioner maintained that Christopher would have testified that Petitioner was not present at the crime scene. App. 57, ll. 16 – 22. Petitioner testified that he ultimately agreed to plead guilty only after Lourie told Petitioner that he did not think Petitioner could win at trial because Petitioner’s second codefendant had agreed to testify against Petitioner.¹ App. 60, l. 6 – 62, l. 3.

Lourie testified that he had two different investigators working for him on Petitioner’s case. Lourie recalled that, initially, “there was no real evidence against [Petitioner] other than one codefendant, Tomeka Moore.” App. 84, ll. 13 – 15. Moore had implicated both Petitioner and her boyfriend, Jimmy Dunbar, as being involved in the murder. App. 84, ll. 15 – 21. Lourie admitted that he believed Petitioner had a chance at winning at trial until the second codefendant, Jimmy Dunbar, implicated Petitioner in the crime. App. 85, ll. 5 – 20. Lourie further admitted that prior to Dunbar becoming a state’s witness, “we could’ve argued that he was not present since the only evidence of him being there was Tomeka Moore’s statement.” App. 90, l. 23 – 91, l. 1.

The PCR judge found that Lourie conducted a reasonable investigation because he had two investigators working on Petitioner’s case and “pushed for SLED to process and test evidence.” App. 117. The PCR judge also found credible Lourie’s testimony that Petitioner’s

¹ Petitioner had two codefendants, Jimmy Dunbar and Tomeka Moore. Initially only Moore was expected to testify against Petitioner. Approximately one week prior to the start of Petitioner’s trial, Dunbar gave a statement implicating himself and Petitioner in the murder and agreed to testify against Petitioner.

chances of winning at trial diminished after Dunbar began cooperating with the state. App. 117. Furthermore, because Petitioner did not produce the testimony of the favorable witness, the PCR judge found there was no prejudice. App. 117. Petitioner's application was denied. App. 120.

This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in finding that plea counsel was not ineffective for failing to investigate an alibi witness named Christopher because Christopher was Petitioner's only alibi witness and he could have testified that Petitioner was not present at the time of the murder.

In order to prove ineffective assistance of counsel, Petitioner must show that "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." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient," meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) citing Strickland, 466 U.S. at 668.

Lourie was deficient for failing to investigate Christopher as an alibi witness who would have testified that Petitioner was not present during the crime. Lourie admitted that he would have been able to argue Petitioner was not even present during the crime right up until days before Petitioner's trial was set to begin. Lourie apparently believed that because Petitioner's second codefendant had agreed to cooperate with the state and testify against Petitioner that Petitioner could no longer argue he was not present at the scene. However, had Lourie provided

Petitioner with effective representation, he would have spoken with Christopher and would have been prepared to present Christopher as an alibi witness to counter Dunbar's testimony. This would have significantly undermined any damaging testimony from Dunbar, who, as a codefendant, would have largely been a shaky witness in the eyes of the jury.

In Glover v. State, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540 (1995), this Court stated: "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence." However, in Martin v. State, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019), this Court clarified this rule in holding that trial counsel's candid admission at the PCR hearing that he was aware of the specific alibi timeline but failed to elicit that testimony was deficient performance, which resulted in prejudice to the petitioner. In Martin, the alibi witness did not testify at the PCR hearing. Nevertheless, the Court found that trial counsel's admission was enough. Id.

In this case, Petitioner clearly testified that he informed Lourie about his alibi witness and that his alibi witness would have testified that Petitioner was not present during the crime. App. 57, ll. 9 – 22. Therefore, Lourie should have been aware of Petitioner's alibi witness. Lourie's failure to investigate this witness in order to strengthen Petitioner's defense constituted ineffective assistance of counsel. Furthermore, Petitioner was prejudiced because he only pled guilty after Lourie informed him that Lourie did not believe he could win at trial with Dunbar testifying against him. Petitioner pled guilty because of his reliance on Lourie's assertion. However, had Lourie properly investigated Petitioner's alibi, he would not have been so quick to admit defeat based on an inherently unreliable codefendant being added to the state's witness

list. The PCR judge erred in finding that trial counsel was not ineffective. See Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of September, 2020.

STATE OF SOUTH CAROLINA

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YUSUF KARIM AQUIL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Yusuf Karim Aquil states:

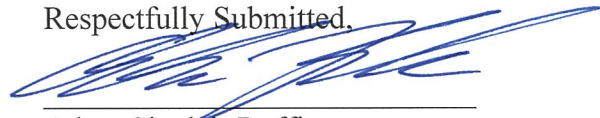
1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.

2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge Kristi F. Curtis, which was held on February 20, 2019, 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 Yusuf Karim Aquil.

Respectfully Submitted,



Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR PETITIONER

This 9th day of September, 2020.

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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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This 9th day of September, 2020.