

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Fairfield County

Honorable R. Markley Dennis, Circuit Court Judge
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MICHAEL D. WILLIAMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000565
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JOHNSON PETITION FOR WRIT OF CERTIORARI
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S.C. SUPREME COURT

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ISSUE PRESENTED

Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when counsel failed to present any evidence in Petitioner's defense despite having subpoenaed twenty-two potential witnesses, and where Petitioner was prejudiced because if counsel had presented evidence in Petitioner's defense, there is a reasonable probability the outcome of Petitioner's trial would have been different?

STATEMENT OF THE CASE

The state alleged Petitioner sexually abused Minor 1 and Minor 2, who were half-sisters, between 2004 and 2008 while the children attended an in home daycare ran by Appellant's wife, Dorothy Williams. The children began attending the Williams' daycare in 2003. App. 40, ll. 8-14. Minor 2 was eleven years old at the time of trial. App. 67, ll. 1-2. Minor 1 was seventeen years old at the time of trial. App. 116, ll. 22-23. Minor 1 and Minor 2 both testified that they had a close relationship with the Williams and loved attending their daycare. App. 135, ll. 13-25; App. 86, l. 17 – 87, l. 20. Both children testified that the Williams treated them like grandchildren. App. 135, ll. 24-25; App. 96, ll. 12-14. In 2006, their mother placed them in a cheaper daycare ran by Donna McManus. When McManus died, Minor 2 returned to the Williams' daycare. App. 41, l. 20 – 43, l. 3; App. 94, l. 3 – 96, l. 11. When Minor 2 returned, her close relationship with the Williams continued. App. 96, ll. 9-14. Minor 1 continued to visit the Williams after enrolling in the cheaper daycare. App. 143, l. 23 – 144, l. 15. The abuse allegedly occurred before the children left and continued when they returned to the Williams' daycare. App. 105, ll. 7-20.

Minor 2 did not report the alleged abuse to her parents when she returned to the Williams' daycare. App. 105, ll. 23-25. Instead, she testified she was happy to return to the Williams' daycare and looked forward to having fun there. App. 105, ll. 17-22. After her return, Minor 2 attended the Williams' daycare for over a year before the allegations arose. App. 60, ll. 15-21.

The testimony about how and when the allegations of abuse arose was contradictory. The children's parents divorced in 2004. App. 40, l. 21 – 41, l. 1. Jeffrey Rowles, Minor 2's father, filed a report with the Fairfield County Sheriff's Office on Monday, September 15, 2008. App. 185, ll. 3 – 24. Rowles claimed he received a phone call from his ex-wife, Susan Rowles, the previous

Wednesday. App. 185, l. 25 – 186, l. 19. That Friday, Jeffrey Rowles claimed he spoke with Minor 2 about the allegations. App. 186, ll. 7-24.

Susan Rowles, mother of both children, claimed that Minor 2 was the first to tell her about the alleged abuse. App. 43, ll. 5-13. Susan Rowles said she contacted her ex-husband and did not ask her children further questions about the alleged abuse. App. 44, l. 12 – 45, l. 11; App. 62, ll. 7-16. Susan Rowles said she never did any “in-depth questioning” of her children about the abuse. App. 63, ll. 5-11.

Susan Rowles’ testimony was contradicted by that of her children. Minor 2 claimed that Minor 1 asked her if Petitioner had ever touched her and she responded “yes.” App. 82, ll. 6-10. Minor 2 testified that Minor 1 then told her parents about the allegations. App. 82, ll. 11-18. Minor 2 testified that she “talked to [her] mom a lot of times about” the alleged abuse. App. 108, ll. 2 -3. She said her mom was “curious as to what happened.” App. 108, ll. 11-13. Minor 2 also testified that she talked to her father “a lot of times” about the alleged abuse. App. 108, ll. 4-5. Minor 2 claimed she had not discussed the abuse very often with Minor 1. App. 107, l. 1 – 108, l. 1.

Minor 1’s testimony about when and how the alleged abuse was disclosed was even more confusing. When questioned by the solicitor, Minor 1 stated she first disclosed the alleged abuse to her counselor. App. 125, ll. 9-14. She said this disclosure was made after Minor 2 told her about the alleged abuse. App. 125, ll. 5-8. Minor 1 then stated that after her discussion with Minor 2, she told her mother about the allegations. App. 126, l. 17 – 127, l. 8.

When questioned by defense counsel, Minor 1 testified that Minor 2 was there when she discussed the abuse allegations with her mother. App. 131, ll. 12-17. She said Minor 2 had “a number of discussions” about the allegations with their mother. App. 131, ll. 18-20. Minor 1 also claimed that during her original enrollment at the Williams’ daycare, she told her mother that

Williams' granddaughter said that Williams "touched her butt." App. 145, l. 23 – 146, l. 25. Minor 1 admitted this claim about the granddaughter was a lie. App. 146, ll. 1-5. She claimed she made up the story about the granddaughter because she "wanted to see how my mom would act." App. 146, ll. 1-25. Minor 1 said she never told her mother the allegation about the granddaughter was not true "until recently." App. 148, ll. 13-14.

Minor 1 also repeated the false allegation about the granddaughter to the Department of Social Services. App. 161, l. 16 – 162, l. 14. She did not tell DSS the allegation about the granddaughter was a lie. App. 161, l. 20 – 162, l. 14. Minor 1 claimed the reason she repeated the lie to DSS was because she "thought it would make a difference." App. 162, ll. 8-14. Backtracking, Minor 1 then said that she thought her statement "might have said it was a lie." App. 162, ll. 11-14. The statement to DSS said, "The last time he touched me I told my mom [that Williams' granddaughter] told me that he touched on her. I basically told her everything he did to me, then Donna [McManus] died." App. 167, l. 13 – 172, l. 19. If the timing of this claimed disclosure in the DSS statement was correct, that meant that Minor 1 told her mother about the alleged abuse before the mother returned Minor 2 to the Williams' daycare and almost two years before the allegations were reported to the police.

The statement to DSS was written approximately one week after Minor 2 made the allegations of abuse to her mother. App. 168, ll. 20-24. The DSS investigator who took the statement testified that Minor 1 never told her the allegation regarding the granddaughter was a lie or that Minor 1 had transposed granddaughter's name with her own. App. 219, l. 24 – 220, l. 5.

The particulars of the alleged abuse were also contradictory. Both children testified they did not remember exactly when the alleged abused occurred. App. 71, ll. 5-8; App. 119, ll. 13-14. Interestingly, both children kept journals after reporting the abuse at the suggestion of their

counselors. App. 100, ll. 1-22; App. 127, l. 24 – 129, l. 8. Both children wrote about the allegations in their journals. App. 101, l. 19 – 102, l. 8; App. 129, ll. 2-5; App. 164, ll. 14-20. Despite being subpoenaed, neither journal made its way to trial or was ever viewed by the defense. Minor 1 claimed her journal was lost. App. 128, l. 1 – 129, l. 8. Minor 2 said her father ripped the pages containing the details of the abuse out of her journal and threw them away. App. 100, l. 25 – 101, l. 5. Jeffrey Rowles unapologetically admitted to removing these pages and telling his daughter not to write anything else down about the alleged abuse. App. 195, l. 5 – 197, l. 4.

Minor 2 claimed Petitioner touched her vagina several times. App. 70, l. 22 – 71, l. 4. She claimed Petitioner “mostly did it outside, there was only a few times when he did it inside.” App. 72, ll. 21-24. Usually Dorothy Williams was in the house when the events allegedly happened. App. 81, ll. 9-10. The house was small. App. 91, ll. 16-17. The doors to the rooms where the abuse allegedly occurred were never closed or locked. App. 92, ll. 5 – 12. Dorothy Williams would come and go throughout the house. App. 92, l. 9 – 93, l. 4. Minor 2 never told anyone that Petitioner digitally penetrated her until her forensic interview. App. 112, ll. 10-21. She also testified in a way that contradicted her forensic interview. In the interview, Minor 2 claimed she put her hands on Williams’ penis. In her trial testimony, Younger Sister denied ever touching Williams’ penis. App. 84, ll. 2-16.

Minor 1 claimed Petitioner digitally penetrated her three times: once in the swimming pool, once in the computer room, and once in the master bedroom while Petitioner’s granddaughter was also present. App. 120, ll. 20-25; App. 122, ll. 2-18; App. 123, ll. 6-21. When questioned by defense counsel, Minor 1 admitted she did not put anything in her prior statement about Petitioner digitally penetrating her while they were in the pool. App. 154, ll. 2-20. As for the incident in the bedroom, Minor 1 could not remember why she was spending the night at the Williams’ house,

what anyone was wearing when the incident occurred, or where Dorothy Williams was at the time. App. 156, l. 19 – 160, l. 1. In her handwritten statement, she never mentioned digital penetration. App. 175, ll. 4-7. She admitted she told a DSS investigator that Petitioner left his finger in her vagina for over an hour. App. 174, l. 15 – 175, l. 7; App. 176, ll. 8-11. Minor 1 also admitted Minor 2 never mentioned digital penetration to her. App. 176, ll. 12 – 17.

A Fairfield County Grand Jury indicted Petitioner on May 29, 2012 for two counts of first degree criminal sexual conduct (CSC) with a minor and five counts of lewd act upon a child. App. 485-498. His case was called to trial on July 9, 2012 before the Honorable Brooks P. Goldsmith. App. 1. Assistant Solicitors Sandra Sutton and Curtisha Mingo represented the state. App. 1. Jack Swerling represented Petitioner. App. 1.

On July 12, 2012, the jury found Petitioner guilty as indicted. App. 322, l. 7 – 323, l. 13. He was sentenced to twenty-five years on each count of first degree CSC with a minor and fifteen years on each count of lewd act. All sentences were ordered to be served concurrently. App. 341, ll. 2-10.

The Court of Appeals affirmed Petitioner's convictions and sentence. State v. Williams, 409 S.C. 455, 761 S.E.2d 770 (Ct. App. 2014); App. 389-401.

On August 20, 2014, Petitioner filed an application for post-conviction relief (PCR). App. 402-409. The state filed a return to this application dated October 28, 2014. App. 410-415. An evidentiary hearing was convened on July 13, 2016 before the Honorable R. Markley Dennis. App. 416. Assistant Attorney General Johanna Valenzuela represented the state. App. 416. Shawn Campbell represented Petitioner. App. 416.

Petitioner testified at the evidentiary hearing that trial counsel had conducted a thorough pretrial investigation but “during the trial he didn't use any of it.” App. 426, ll. 8-12. After the

second day of trial, counsel called Petitioner and asked for permission to rest their case without presenting any evidence. Counsel told Petitioner he believed the state had failed to prove Petitioner's guilt beyond a reasonable doubt and, consequently, presenting evidence was unnecessary. App. 427, l. 19 – 428, l. 6. Petitioner said the "only reason" counsel wanted to rest without presenting evidence was "so he could go last before the jury instead of first" in regard to closing arguments. App. 428, ll. 7-15. Petitioner agreed with counsel's strategy and, during the phone call, gave counsel permission to rest without presenting evidence. App. 427, l. 22 – 428, l. 6; App. 433, ll. 14-17.

Petitioner testified that if counsel had presented the testimony of the witnesses he had subpoenaed, some of whom included medical experts, the outcome of his trial would have been different. App. 430, ll. 2-20.

Jack Swerling, Petitioner's trial counsel, testified that he hired two investigators to help him investigate Petitioner's case. The three interviewed thirty-four people and, of those thirty-four people, Swerling subpoenaed twenty-two to come to trial. App. 437, l. 25 – 438, l. 15. Swerling also retained three experts: a forensic computer specialist, a psychologist, and a psychiatrist. App. 437, ll. 4-25. He believed he was prepared for trial.

Swerling chose not to present any evidence for a number of reasons. First, he testified there were a lot of inconsistencies between the children's testimony before the jury and their prior statements. He was able to point out these inconsistencies during cross-examination and use them during his closing argument. App. 444, l. 20 – 445, l. 12. Second, Swerling was concerned that if he had presented witnesses, the state would have elicited evidence from these witnesses that Petitioner had an uncircumcised penis, which would have corroborated one of the children's description during her forensic interview. App. 440, l. 4 – 441, l. 20.

Swerling testified that he felt having the last closing argument was important so he could emphasize the inconsistencies between the children's testimony and prior statements and the state would have no "opportunity to respond." App. 444, l. 20 – 445, l. 16; App. 446, ll. 8-22. Specifically, Swerling asserted, "[B]ecause of the way the case had gone up by the state I thought we were in the best position at that point to go ahead and rest, not offer any testimony, and get the last argument." App. 446, ll. 4-7.

By order filed March 9, 2020, the PCR judge denied Petitioner relief. App. 476-484. He found Petitioner failed to show trial counsel's advice to rest without presenting any evidence was deficient. The judge determined counsel credibly testified that he advised Petitioner of the risks and benefits of presenting a defense at trial. App. 482-483. Moreover, the judge concluded counsel credibly testified that he believed presenting evidence could harm the defense because the witnesses he considered calling knew Petitioner had an uncircumcised penis and, if such evidence was elicited, it would have corroborated the children's allegations. App. 482-483.

The PCR judge further found Petitioner failed to prove any prejudice from counsel's alleged deficient performance because Petitioner did not present the testimony of any of these witnesses at the evidentiary hearing. App. 483.

Because Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to present evidence in Petitioner's defense at trial, and since there is a reasonable probability the outcome of Petitioner's trial would have been different had counsel had presented evidence, this petition for writ of certiorari follows.

ARGUMENT

The post-conviction relief (PCR) judge erred by finding trial counsel was not ineffective when counsel failed to present any evidence in Petitioner's defense despite having subpoenaed twenty-two potential witnesses, and where Petitioner was prejudiced because if counsel had presented evidence in Petitioner's defense, there is a reasonable probability the outcome of Petitioner's trial would have been different.

Trial counsel conducted a thorough pretrial investigation, which included interviewing thirty-four witnesses and hiring three experts. Yet, for whatever reason, counsel failed to utilize these witnesses during Petitioner's trial and rested without presenting a defense. This conduct constitutes deficient performance in violation of Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Petitioner was prejudiced by counsel's deficient performance because if counsel had presented evidence in Petitioner's defense, there is a reasonable probability the outcome of Petitioner's trial would have been different.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). The United States Supreme Court has established a two pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. Strickland, 466 U.S. at 687. 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.

Under the second prong, Petitioner must show "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). “A PCR applicant cannot show that he was prejudiced by counsel’s failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence.” Putnam v. State, 417 S.C. 252, 261, 789 S.E.2d 594, 599 (Ct. App. 2016) (quoting Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005)) (internal quotation marks omitted).

“A criminal defense attorney has a duty to perform a reasonable investigation.” Lounds v. State, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008) (citing Ard v. Catoe, 372 S.C.318, 331, 642 S.E.2d 590, 597 (2007)). “While the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.” Id. (quoting Ard, 372 S.C. at 331-332, 642 S.E.2d at 597) (internal quotation marks omitted) (emphasis in original).

Trial counsel was ineffective for failing to call witnesses in Petitioner’s defense. Counsel admitted he subpoenaed twenty-two witnesses for trial. Yet, he chose not to present any evidence before resting. The main reason counsel gave for not presenting evidence was because he wanted to have the last closing argument. Maintaining the right to last closing argument should not trump presenting evidence that could and would have changed the outcome of Petitioner’s trial. Counsel’s strategy was unreasonable under existing professional norms.

There is a reasonable probability Petitioner would have been acquitted of all charges if counsel had presented the numerous witnesses who were prepared to testify in Petitioner’s

defense, particularly given the inconsistencies between the children's testimony before the jury and their prior statements.

Respectfully, because of counsel's deficient performance and the resulting prejudice to Petitioner, this Court should reverse Petitioner's convictions and sentence and remand for a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. Petitioner ultimately requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of December, 2020.

STATE OF SOUTH CAROLINA
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RESPONDENT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael D. Williams 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, which was held on July 13, 2016 before the Honorable R. Markley Dennis, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She 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 her as counsel for Michael D. Williams.

Respectfully Submitted,

s/ Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of December, 2020.

RECEIVED

Dec 04 2020

CERTIFICATE OF COUNSEL

S.C. SUPREME COURT

The undersigned certifies that to the best of her 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.”

s/ Lara M. Caudy _____
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Appellate Defender

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