

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

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Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

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KENNETH MURRAY,

RECEIVED

JUN 17 2018  
PETITIONER  
S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-002209

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Taylor D Gilliam  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the PCR court erred in denying relief, where trial counsel failed to provide Petitioner with his complete discovery materials under Rule 5, SCRCrimP, where trial counsel was unable to confirm that Petitioner had been given a copy of evidence subject to disclosure?

## STATEMENT

Petitioner was indicted on the charge of armed robbery by a Charleston County grand jury on April 9, 2012. App. 591 – 592. He proceed to trial on October 30, 2013 before the Honorable R. Knox McMahon and a jury. App. 1. Petitioner was represented by Alicia Penn and Megan Ehrlich, and Jennifer Shealy and Alexander J. Ziegler appeared on behalf of the state. After a three-day trial, the jury found Petitioner guilty as indicted. App. 478 l. 24 – App. 479 l. 5. Judge McMahon sentenced Petitioner to twenty-eight years' incarceration. App. 487 ll. 20 – 24.

Petitioner's conviction was affirmed. State v. Murray, 2016-UP-409 (Ct. App. filed September 14, 2016). Petitioner then filed an application for post-conviction relief on October 10, 2017. App. 491. It contained allegations of ineffective assistance of counsel. App. 493. The state made its Return and Motion for More Definite Statement on or about January 16, 2018. App. 498 – 504.

An evidentiary hearing took place before the Honorable Deadra L. Jefferson on July 25, 2018. Christopher L. Murphy represented Petitioner, and Megan Jameson appeared on behalf of the state. Petitioner and trial counsel testified at the hearing. The PCR judge took the matter under advisement. App. 579 ll. 6 – 14. An Order of Dismissal was filed on November 15, 2018. App. 581 – 590. Judge Jefferson found that Petitioner failed to meet his burden and denied relief.

This petition follows.

## ARGUMENT

**The PCR court erred in denying relief, where trial counsel failed to provide Petitioner with his complete discovery materials under Rule 5, SCRCrimP, where trial counsel was unable to confirm that Petitioner had been given a copy of evidence subject to disclosure.**

### Relevant facts

Petitioner proceeded with four claims of ineffective assistance of counsel at the PCR hearing: failure to request a jury instruction on spoliation of evidence, failure to request a preliminary hearing, failure to properly challenge the search warrant, and failure to provide Petitioner with discovery. Regarding the final claim, Petitioner alleged that law enforcement tampered with evidence. App. 547 ll. 2 – 5; App. 550 ll. 5 – 25. As a result, he requested that counsel provide him with materials under Rule 5, SCRCrimP. Id. He indicated that the two members of his trial team did not provide him with police reports and SLED reports. App. 547 ll. 2 – 21. This information was withheld from him without a reason being given. Id. He was allowed to look at the police reports only but was not advised about the scope of evidence the state was going to use against him. App. 547 l. 22 – App. 549 l. 3. Because he did not have access to the evidence in his case, he was unable to confer with his trial team about the facts and evidence in his case. App. 556 ll. 6 – 10.

As a result of not having the Rule 5 materials, Petitioner was unable to formulate or even discuss applicable defenses with counsel. App. 549 l. 23 – App. 550 l. 4. Petitioner was in jail when counsel was appointed in his case; he never made bond on the armed robbery charge. App. 554 ll. 1 – 5. Although he provided the names of witnesses who would be helpful in his case,

counsel never contacted them. App. 555 ll. 20 – 25; App. 561 ll. 14 – 21. Petitioner never spoke with counsel regarding any specific investigation that was completed in his case; in fact, he was unaware whether counsel even performed an investigation. App. 556 ll. 1 – 5.

Alicia Penn, the only member of Petitioner’s trial counsel duo who testified at the evidentiary hearing, was unable to locate in her file a note indicating that she provided discovery to Petitioner. App. 566 ll. 1 – 9. As part of her representation, she never asked Petitioner whether he was present at the alleged robbery. App. 571 ll. 8 – 13. She also admitted that she did not call the witness whose name Petitioner provided to her. Id.

### Discussion

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components.” Walker v. State, 407 S.C. 400, 404, 756 S.E.2d 144, 146 (2014) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “The defendant must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice.” Id. at 404–05, 756 S.E.2d at 146. “To satisfy the first prong, a defendant must show counsel's performance ‘fell below an objective standard of reasonableness.’ ” Id. at 405, 756 S.E.2d at 146 (quoting Franklin v. Catoe, 346 S.C. 563, 570–71, 552 S.E.2d 718, 722 (2001)).

Pursuant to Strickland, supra, this Court applies the following two-pronged test when considering a claim of ineffective assistance of counsel: (1) the applicant must show his counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's error, there is a reasonable probability the result at trial would have been different. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Id.

In PCR proceedings, the applicant has the burden of establishing his entitlement to relief. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where allegations of ineffective assistance of counsel are made, the question becomes, whether 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. Id.

“The requirements of Rule 5 ... are judicially created discovery mechanisms for use in criminal proceedings.” State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct.App.1998), aff'd, 337 S.C. 617, 524 S.E.2d 837 (1999). Under Rule 5, the state should disclose to the defendant “any relevant written or recorded statements made by the defendant ... within the possession, custody or control of the prosecution...” Rule 5(a)(1)(A), SCRCrimP. Rule 5, SCRCrimP, requires disclosure of evidence by the state, including statements by the defendant:

Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution....


Rule 5(a)(1)(A), SCRCrimP. “The rule, of course, is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him at trial.” United States v. Gleason, 616 F.2d 2, 24 (1979) (discussing the underlying purpose of the similar federal rule). The remainder of the rule lists documents and tangible objects, reports of examinations and tests, and defendant’s prior record as information subject to disclosure. Rule 5(a)(1), SCRCrimP.

The facts giving rise to Petitioner's indictment were as follows: Petitioner was arrested for possession of cocaine on July 28, 2011. App. 53 l. 18 – App. 54 l. 2. While being interrogated, he purportedly confessed to an armed robbery; the confession was deemed admissible in the early stages of his trial. App. 148 ll. 2 – 6.

Petitioner could not recall when trial counsel was appointed in his case; he remembered that he was jailed at the time. App. 553 l. 23 – App. 554 l. 3. Counsel testified that her appointment was in 2012 and followed another attorney who was leaving the office. App. 570 ll. 3 – 7. Even assuming that the appointment did not take place until November 2012, around the time of counsel's first visit to see Petitioner, a period of almost one year existed for trial counsel to turn over Petitioner's discovery. However, he never received a full and complete copy of his discovery under Rule 5, SCRCrimP. As a result, he received ineffective assistance of counsel, was prejudiced, and is entitled to a new trial. The PCR court erred in denying relief.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charge against him, and remand the case for a new trial.



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Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of June, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

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KENNETH MURRAY,

PETITIONER

V.

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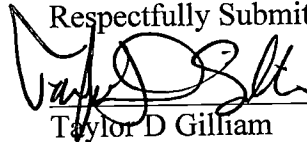
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Kenneth Murray 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 Deadra L. Jefferson, which was held on July 25, 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 him as counsel for Kenneth Murray.

Respectfully Submitted,



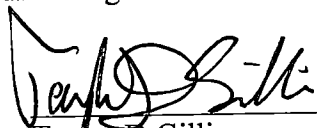
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Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 17th day of June, 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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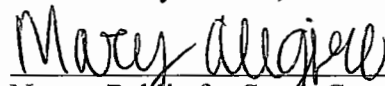
RESPONDENT

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CERTIFICATE OF SERVICE  
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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 Megan Harrigan Jameson, 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 Kenneth Murray, #294286, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 17th day of June, 2019.

  
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Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of June, 2019.

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