

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Jasper County

S.C. Supreme Court

Perry M. Buckner, Circuit Court Judge  
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ALJAQUON R. DRAKE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-0001077  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel provided ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights by failing to ask for a bifurcated burglary trial which would have prevented the jury from hearing evidence of petitioner's prior convictions before determining his guilt on the instant charge?

## STATEMENT

On September 23, 2008, petitioner was indicted by a Jasper County grand jury for two counts of first-degree burglary. App. 270-76. On December 1, 2008, petitioner was tried before the Honorable Carmen Mullen and a jury. App. 1. Angela Tanner and Jim Bannon represented the State. App. 1. Stephen Plexico represented petitioner. App. 1. The jury convicted petitioner on both counts. App. 178, ll. 12 – 22. Judge Mullen sentenced Drake to concurrent terms of sixteen years' imprisonment. App. 192, l. 21 – 193, l. 4. On August 15, 2011, the Court of Appeals affirmed petitioner's convictions. State v. Drake, No. 2011-UP-388 (S.C. Ct. App. Aug. 15, 2011).

On January 10, 2012, petitioner filed a PCR application. App. 195. On April 1, 2013, a hearing was held before the Honorable Perry M. Buckner. App. 210. Ashleigh R. Wilson represented the State. App. 210. Gerald A. Kelly represented petitioner. App. 210. On May 2, 2013, Judge Buckner denied petitioner's application. App. 260. This petition follows.

## ARGUMENT

Trial counsel provided ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights by failing to ask for a bifurcated burglary trial which would have prevented the jury from hearing evidence of petitioner's prior convictions before determining his guilt on the instant charge.

Trial counsel failed to protect petitioner from the prejudicial impact of the jury hearing that he had prior burglary convictions. The solicitor told the jury about petitioner's prior burglary convictions during his opening statement. App. 47, ll. 2 – 7. Before the State called its first witness, it introduced evidence of petitioner's two prior burglary convictions to the jury. App. 56, ll. 17 – 25. Trial counsel told the jury in his opening statement to “put out of your mind that the defendant has two prior burglaries.” App. 49, ll. 9 – 16.

At PCR, petitioner alleged that trial counsel failed to move to bifurcate the trial into two parts: (1) a determination as to his guilt or innocence of the crimes alleged in the indictment; and (2) if found guilty, a determination whether he was guilty of first-degree burglary at which point evidence of his prior convictions could be presented to the jury. App. 250, l. 24 – 251, l. 18 (Judge Buckner granted petitioner's motion to conform the pleadings to the evidence presented at the hearing). At the PCR hearing, trial counsel admitted that he should have made a motion to bifurcate petitioner's trial. App. 246, l. 21 – 248, l. 6. Trial counsel claimed that he did not make such a motion because he believed it would be unsuccessful. App. 246, ll. 5 – 15. Trial counsel stated that if a motion were to be granted, it would take “away from the State the advantage the legislature has determined to give them in cases involving defendants with past burglary histories.” App. 246, ll. 7 – 15. He agreed it would make this “legislative advantage” a nullity. App. 246, ll. 7 – 15.

Trial counsel's refusal to attempt to take away what he correctly realized is a "legislative advantage" for the State constitutes ineffective assistance. See Strickland v. Washington, 466 U.S. 668 (1984). The first-degree burglary statute includes as an element of the crime that "the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2).

This Court has held that admission of a defendant's prior convictions pursuant to this statute does not violate due process. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). Because the prior convictions are considered an element of the crime, they are admissible. Id. In Benton, this Court rejected a due process challenge to the admission of prior convictions. Id.

However, in Benton, this Court recognized the prejudicial effect of prior crimes' admission. Id. at 155-56, 526 S.E.2d at 230. The Benton Court held that while prejudicial, the probative value outweighed its effect. Id.

The procedure advocated by petitioner at PCR would eliminate any prejudice to the defendant from the jury hearing about prior crimes before considering the evidence of the instant crime. It would also address the concern of the State by allowing the jury to consider the element of prior convictions when making a determination of first-degree burglary. A bifurcated trial would accomplish the goal of ensuring that a defendant was not convicted because of the prejudice of his prior record and, then, allowing for the State to present such evidence when seeking a determination of guilt as to first-degree burglary.

Such a bifurcated procedure would certainly be within a trial court's discretion. California uses bifurcated trials in several contexts, including burglary trials. See People v. Calderon, 885 P.2d 83 (Cal. 1994). In Calderon, the defendant was charged with second-degree burglary. Id. at 86. The prosecution sought to introduce evidence of a prior conviction for armed robbery. Id. The

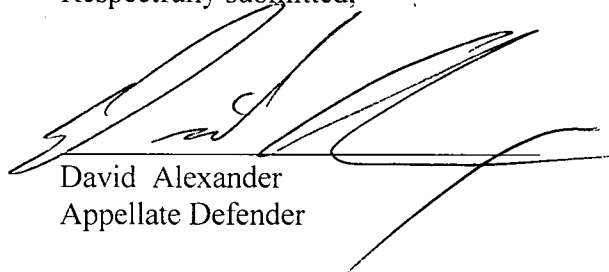
defendant moved to bifurcate the trial and his motion was denied. Id. The California Supreme Court ruled that bifurcating trials was within the discretion of the trial court. The court held that the state's interest in conserving judicial resources was insufficient to overcome a defendant's request to bifurcate a trial when it would, in part, "pose a substantial risk of undue prejudice to the defendant." Id. at 90. The Calderon court collected statutes from other states that provided for bifurcated trials. See id. at 77, n.2 and 3. Trial counsel's failure to ask for a bifurcated trial as is used in California constituted deficient performance.

Petitioner was prejudiced by this failure. The PCR court made no adverse finding regarding prejudice on this ground. App. 266. The PCR court only found that trial counsel was not deficient. As recognized in Benton, defendants suffer prejudice when evidence of their prior crimes are admitted. Trial counsel admitted that the "but for using the statute in aggravating circumstances that they did, or, and/or the combination of both, they never would have gotten a conviction." App. 242. The evidence that petitioner committed these robberies was, at best, slight. For one burglary, petitioner was identified only by a backpack that allegedly belonged to one of the victims. App. 64, ll. 2 – 14. For the other, petitioner was identified as cashing coins after one of the victims claimed that five to ten dollars in change was stolen, however the amount of coins cashed in was approximately one hundred dollars. App. 78, ll. 2 – 14. App. 127, ll. 7 – 8. The coins were not unique. The victim also claimed some binoculars were missing. App. 79, ll. 9 – 14. The State never introduced any evidence connecting petitioner to the binoculars. Given the dearth of evidence, had the trial been bifurcated and the jury not heard the prejudicial evidence of petitioner's prior record, there is little chance he would have been convicted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of a new, bifurcated trial for petitioner.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line. The signature is stylized and extends above and below the line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of December, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO JASPER COUNTY  
PERRY M. BUCKNER, CIRCUIT COURT JUDGE

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ALJAQUON R. DRAKE,

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APPELLATE CASE NO. 2013-0001077

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PETITION TO BE RELIEVED AS COUNSEL

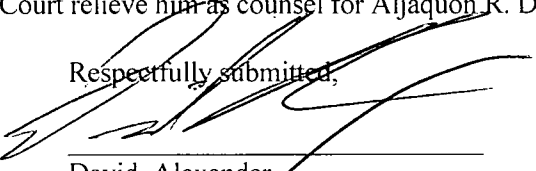
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Counsel for Aljaquon R. Drake states:

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 records and transcript of petitioner's post-conviction relief hearing which was held on April 1, 2013. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Aljaquon R. Drake.

Respectfully submitted,



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David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 27th day of December, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Jasper County  
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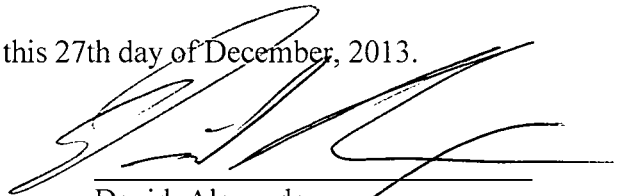
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CERTIFICATE OF SERVICE

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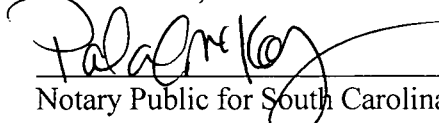
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Ashleigh R Wilson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Aljaquon R. Drake, #332148, at Allendale Correctional Institution this 27th day of December, 2013.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day  
of December, 2013.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.