

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**S.C. Supreme Court**

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Certiorari to Bamberg County  
Edgar W. Dickson, Circuit Court Judge  
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JAMES GUNNELLS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001890

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel because he failed to move to suppress evidence from a container that was searched without a warrant and in violation of petitioner's Fourth Amendment rights?

## STATEMENT

In March 2004, a Bamberg County grand jury indicted petitioner for criminal conspiracy, three counts of kidnapping, grand larceny, grand larceny of a motor vehicle, armed robbery, assault and battery with intent to kill, first degree burglary, and a related weapons charge. App. 783 - 820. On October 12-15, 2004, petitioner was tried before the Honorable J. C. Nicholson and a jury. App. 1. Barbara Morgan and Grant Gibbons represented the State. App. 1. Christopher Wilson and Steve Chandler represented petitioner. App. 1. The jury acquitted petitioner of the larceny charges, assault and battery with intent to kill, and one of the kidnapping charges. App. 487, l. 2 – 488, l. 19. The jury convicted petitioner of conspiracy, armed robbery, burglary, two counts of kidnapping, first degree burglary, and the weapons charge. App. 487, l. 2 – 488, l. 19. Judge Nicholson sentenced petitioner to life imprisonment for first degree burglary and concurrent terms of thirty years' imprisonment for both kidnapping charges and five years' imprisonment for both conspiracy and the weapons charge. App. 501, ll. 3 – 23. Judge Nicholson sentenced petitioner to a consecutive term of thirty years' imprisonment for armed robbery. App. 501, ll. 3 – 23. Petitioner was represented on appeal by LaNelle C. DuRant. App. 834-845. On January 14, 2009, the Court of Appeals affirmed petitioner's conviction. App. 870; State v. Gunnells, 2009-UP-035 (Ct. App. Jan. 14, 2009). Ms. DuRant filed a petition for certiorari with the Supreme Court which was denied on October 7, 2009. App. 872.

On April 5, 2010, petitioner filed a PCR application. App. 505. On January 27, 2008, a hearing was held before the Honorable Edgar W. Dickson. App. 517. Tricia Blanchette represented petitioner. App. 517. Mary S. Williams represented the State. App. 517. Aaron Walsh represented a witness, Tivo Lee. App. 517. On January 13, 2012, petitioner filed an amendment to his PCR

application. App. 822. On March 8, 2012, petitioner filed a memorandum of law. App. 825. On August 13, 2013, Judge Dickson denied petitioner's application. App. 769. This petition follows.

## ARGUMENT

Trial counsel was ineffective in derogation of petitioner's Sixth Amendment right to counsel because he failed to move to suppress evidence from a container that was searched without a warrant and in violation of petitioner's Fourth Amendment rights.

Petitioner was arrested in the parking lot of his girlfriend's apartment. App. 90, l. 17 – 91, l. 11. Petitioner was living with his girlfriend. App. 134, ll. 10 – 20. When he was arrested, his girlfriend gave the police consent to search her apartment. App. 91, ll. 12 – 22. The officer that searched the apartment admitted that petitioner's clothing was within a plastic container. App. 91, ll. 12 – 22. The officer stated that petitioner "already had his stuff, clothing and stuff, put in a plastic container and we confiscated the whole container with the clothes." App. 91, ll. 18 – 22. At the time of the seizure, petitioner had been arrested, was in "handcuffs, black box, [ankle] chains." App. 350, ll. 20 – 21.

At the scene, and without a warrant, the police looked through the container of clothes. App. 353, ll. 13 – 21. In the container were red pants, a bandana, and "Shaq" shoes. App. 353, ll. 13 – 21. These items had been described by the victims to the police as being worn by one of the assailants in a home invasion. App. 353, ll. 13 – 21. The police took these clothes to one of the victims. App. 312, l. 6 – 313, l. 23. The police told the victim that the clothing had been taken from petitioner when he was arrested—mentioning him by name. App. 313, ll. 17 – 23. The victim identified the clothing and then was permitted to identify petitioner despite the police giving them his name when they displayed the clothing. App. 313, l. 17 – 314, l. 16.

Trial counsel made no pre-trial motion to suppress the clothing taken from the container without a warrant. App. 665, l. 11 – 666, l. 8. Trial counsel described the clothes as not a "big

issue.” App. 666, ll. 4 – 8. The only reason he gave was that petitioner’s girlfriend consented to the search. App. 665, l. 11 – 666, l. 8.

The PCR court essentially ruled that petitioner could not show prejudice flowing from trial counsel’s failure to move to suppress the clothing. App. 777. The PCR court held, “Applicant failed to show an argument not advanced by counsel in the suppression of evidence would have any likelihood of success at trial.” App. 777. The PCR court characterized its finding as a failure of petitioner to meet the burden of proof under Strickland v. Washington, 466 U.S. 668 (1984).

The PCR court erred because the Fourth Amendment required the police to obtain a warrant before searching a container seized from petitioner. “[A] seizure of personal property [is] *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized.” United States v. Place, 462 U.S. 696, 701 (1983). “Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.” Id.

The police may seize an object in plain view. Horton v. California, 496 U.S. 128, 141 (1990). But they may not open it without a warrant. Id. at 142 n.11. “Even if the item is a container, its seizure does not compromise the interest in preserving the privacy of its contents **because it may only be opened pursuant to either a warrant** or one of the well-delineated exceptions to the warrant requirement.” Id. (emphasis added).

In this case, it is undisputed that the police were in the apartment lawfully pursuant to the consent of petitioner's girlfriend. However, her consent could not extend to containers belonging to petitioner. While the police could seize these containers, they could not open them without a warrant. It is undisputed from the police testimony that they opened the containers on the scene without obtaining a warrant.

No exception to the warrant requirement applies. No evidence of exigent circumstances existed. The search-incident-to-arrest exception did not apply. Petitioner was fully restrained, in shackles, and in leg irons. He could not access the items in the container or destroy any evidence. Arizona v. Gant, 556 U.S. 332 (2009). Finally, the inventory search exception does not apply. The police opened the container and searched its contents on the scene. They did not testify they searched it pursuant to their established inventory procedures.

Trial counsel failed to recognize the important Fourth Amendment principles implicated by the warrantless search of petitioner's container. He failed to make any motion to suppress, which satisfies the deficient performance prong of Strickland. As shown above, a motion to suppress would have been successful pursuant to longstanding principles of Fourth Amendment law.

Petitioner can demonstrate prejudice under Strickland. Had the evidence in the container been suppressed, the jury would never have seen the clothing used to link petitioner to the robbery. Furthermore, the identification of petitioner—which was based on use of the seized clothing—would have been suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 485-86 (1963). Had the clothing and the identification been suppressed, there is a substantial probability that the outcome of this trial would have been different. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of March, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO BAMBERG COUNTY  
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

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JAMES GUNNELLS,

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STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001890

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for James Gunnells 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 January 27, 2012. 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 James Gunnells.

Respectfully submitted,



David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 5th day of March, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Bamberg County  
Edgar W. Dickson, Circuit Court Judge

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JAMES GUNNELLS,

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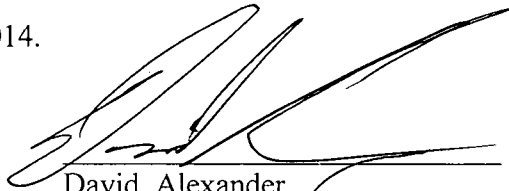
APPELLATE CASE NO. 2013-001890

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CERTIFICATE OF SERVICE

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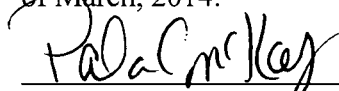
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Daniel Gourley, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and James Gunnells, #305475, at Perry Correctional Institution this 5th day of March, 2014.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day  
of March, 2014.

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