

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Newberry County

Eugene C. Griffith, Jr., Circuit Court Judge  
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APR 24 2014

S.C. Supreme Court

ROY JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001617  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Did the PCR court err in holding Petitioner failed to show prejudice by not calling his favorable witness at the PCR hearing where the witness had already testified at Petitioner's first trial that resulted in a hung jury?

## STATEMENT

On April 25, 2008, the Newberry County Grand Jury indicted Petitioner Roy Johnson, Jr. on counts of burglary, armed robbery, kidnapping, assault and battery of a high and aggravated nature, and possession of a firearm during the commission of a violent crime. App. 388-397. On June 15, 2009,<sup>1</sup> Petitioner proceeded to trial before The Honorable Garrison Hill and a Jury. Chad Jenkins represented Petitioner and Mindy Zimmerman represented the State. App. 1.

The State alleged that on the evening of January 7, 2008, Petitioner and two codefendants kicked in the door of a Newberry residence. One defendant struck a male victim inside and held him on the ground. Two of the defendants then held down their daughter in her room and bound her with duct tape. The victim's wife escaped out of the back door and ran across the street for help. App. 47, ln. 11—App. 49, ln. 20.

The State called the codefendants to testify. Chauncey Partlow testified that his cousin, Austin Partlow, and Petitioner, with whom Petitioner was loosely acquainted, had a "conversation about some money" before the three left Gastonia, North Carolina to drive down to Newberry. He said upon reaching Newberry, he, Petitioner, and Austin, armed with a pistol, broke into a random residence looking for drugs and money. He admitted to attacking and binding the girl in the residence with Austin's assistance. He fled when a man came to the back of the residence with a shotgun. App. 76, ln. 3—App. 82, ln. 23.

Austin Partlow testified that Chauncey contacted him looking to pay for a ride for him and Petitioner to South Carolina. The three drove down to the residence with a deliberate plan to steal drugs and money from the residence. Chauncey and Petitioner entered front and Chauncey struck the man inside. Austin then took the gun from Chauncey and held it on the man to keep him at bay.

The three recovered no money or drugs, and they fled when another man appeared with a shotgun. App. 156, ln. 9—165, ln. 13. Austin also testified that he was hoping to have his sentence on charges stemming from the robbery reduced by six months in exchange for his testimony. App. 168, ll. 12-16.

The State also offered into evidence Petitioner’s testimony from his previous trial. App. 115, ln. 23—App. 116, ln. 6. Petitioner stated he knew Chauncey previously and on the day of the robbery, met with him, Austin, and another individual named Shorty in Gastonia. App. 119, ll. 22-25. Petitioner was only catching a ride to Newberry to visit his girlfriend and her sick grandfather in the hospital. Chauncey intended to go to the residence for a drug deal. App. 121, ll. 5-21.

The group arrived in Newberry at the residence first. Shorty suggested that they rob the residence. Petitioner protested: “I told him I didn’t want nothing to do with. He got mad a pulled out a gun. . . . I said, man, this ain’t even cool. Shorty take my money, take my wallet, . . . take my phone out of my pocket.” App. 126, ln. 1—App. 127, ln. 17. However, Shorty held Petitioner at gunpoint and forced him to the front door. Trying to resist Shorty, Petitioner fell through the door, and the others ran inside. “I jumped off the steps and I took off running.” App. 128, ln. 5—App. 129, ln. 25.

The jury found Petitioner guilty on all counts. App. 287, ln. 21—App. 288, ln. 9. The judge sentenced Petitioner to concurrent sentences of twenty-five years for the burglary and armed robbery charges; twenty years for the kidnapping charge; ten years for the assault and battery charge; and five years for the weapons charge. App. 293, ll. 4-14.

On April 10, 2012, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 301-320. The State filed a return on July 19, 2012. App.

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<sup>1</sup> Petitioner was previously tried on the same charges, and the result was a hung jury. App. 333,

321-326. On June 4, 2012, Petitioner attended a hearing before The Honorable Eugene C. Griffeth, Jr. Nicole Singletary represented Petitioner and Rutledge Johnson represented the State. App. 327.

Petitioner testified that in his first trial, he called Hastings Moore, an inmate at the Newberry County detention center, to testify. Moore shared a cell with Chauncey Partlow. App. 339, ln. 11—App. 341, ln. 23. When Petitioner arrived at the center, Moore mistook Petitioner for Chauncey’s cousin, Austin.

So he said, well, your cousin said y’all want to see the day of light [sic] put it all on [Petitioner] because, you know, he just came off down so the best thing for us to do is put it all on him. And at that time he was telling me . . . put the gun on him, put everything on him because . . . we got to get out of this.

App. 341, ln. 4—App. 341, ln. 13. Counsel testified at the hearing and confirmed Petitioner’s account:

He did mention, I think it was three people. . . . [T]he fellow that testified at the first trial, Hastings, I do remember him. I was unable to meet with him ahead of the first trial but did subpoena him and get him to the court house for the first trial . . . .

App. 356, ln. 23—App. 357, ln. 4.

In a closing argument, Appellant argued to the PCR judge that credibility was a crucial issue in the criminal case:

[T]here were some issues about [the Partlow’s] credibility based on the conversation that [Petitioner] had with Hastings Moore who actually testified at the first trial in which a hung jury actually resulted but with the absence of Hastings Moore being at the second trial he actually got convicted.

App. 374, ll. 13-25.

On July 22, 2013, the PCR judge issued an order of dismissal. App. 380-387. Stating that at the PCR hearing, Petitioner “testified Counsel failed to interview and/or subpoena witnesses on

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ll. 4-9; App. 374, ll. 13-25.

his behalf,” the order then stated that Petitioner did not establish ineffective assistance because he “failed to produce any testimony or evidence at the PCR hearing to show what [Hastings] would have testified to at trial or how [his] testimony would have altered the outcome of his trial.” App. 383-384.

### ARGUMENT

#### **The PCR court erred in holding Petitioner failed to show prejudice by not calling his favorable witness at the PCR hearing.**

The PCR court erred in holding Petitioner failed to show prejudice by not calling his favorable witness at the PCR hearing. 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 created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

With issues of trial strategy, trial counsel must articulate a valid reason for the decision in question. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)). Additionally, “a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.” *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). “The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.” *Glover v. State*, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995).

In this case, trial counsel’s failure to call Moore during the second trial was plainly deficient. Petitioner also sufficiently produced Moore’s testimony at the PCR hearing to establish prejudice.

Petitioner testified under oath that Moore had conversations with Chauncey Partlow revealing the Partlows' plan to frame Petitioner. Further, Moore had already testified at Petitioner's first trial. Trial counsel confirmed as much at the PCR hearing. Finally, the State adduced no evidence to contradict the properly admitted evidence of Moore's testimony. Accordingly, Petitioner provided more than a basis for mere speculation as to Moore's testimony. He provided affirmative, admissible, and uncontradicted evidence of his testimony. This evidence was sufficient to establish prejudice from trial counsel's failure to call him at the second trial, and the PCR erred in dismissing Petitioner's claim.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of April, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO NEWBERRY COUNTY  
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

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ROY JOHNSON,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2013-001617

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PETITION TO BE RELIEVED AS COUNSEL

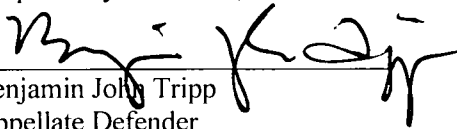
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Counsel for Roy Johnson, Jr. states:

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 June 4, 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 Roy Johnson, Jr..

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 24th day of April, 2014

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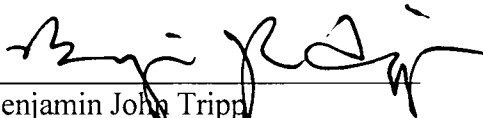
RESPONDENT

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CERTIFICATE OF SERVICE

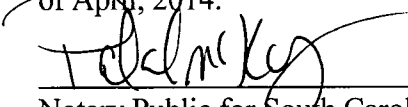
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Roy Johnson, Jr., #335360, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of April, 2014.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day  
of April, 2014.

  
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(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.