

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAY 28 2014

**S.C. Supreme Court**

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Certiorari to Chesterfield County  
Ralph F. Cothran, Circuit Court Judge  
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TONY MOORE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002330

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

BENJAMIN JOHN TRIPP  
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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Whether the record supported the PCR court's conclusion that Petitioner did not establish ineffective assistance of counsel for failing to act on a conflict of interest by the solicitor's office where the alleged victims of Petitioner's crimes were family members of another solicitor in the same office; where the two solicitors had lengthy discussions about the pain suffered by the family; where at the plea hearing the prosecuting solicitor stated he was there advocating on the family's behalf; and where he told the court he was seeking consecutive sentencing, which was different from what he normally did?

## STATEMENT

During its July 2011 term, the Chesterfield County Grand Jury indicted Petitioner Tony Moore on three counts of second degree burglary, one count of first degree burglary, and four counts of grand larceny. App. 3, lines 2-9; App. 90-96. On October 5, 2011, Petitioner appeared at a plea hearing before The Honorable Paul M. Burch. Daniel Jordan represented Petitioner and Kernard R. Redmond represented the State. App. 1. Based on a plea bargain, Petitioner pled guilty to four counts of second degree burglary and four counts grand larceny. App. 6, line 7—App. 9, line 5.

At the hearing, Solicitor Redmond introduced the case to the Court by explaining that it was taking an unusually harsh position about the proper sentence for Petitioner:

The State's recommendation in this case is a little different than what we normally do. We want some consecutive time since the statute reduced the penalties to ten years. And we have discussed it at length, and we do want some consecutive time for the defendant. However, Mr. Foard is here to speak on behalf of the victims.

App. 4, lines 10-15.

Mr. Foard was an assistant solicitor in Chesterfield County. App. 11, lines 14-16. His in-laws were victims of the thefts. App. 5, lines 8-11; App. 11, lines 17-21. He did not see the discovery materials, and a "Chinese wall [had] been put up around him with regards to the facts of the case." Solicitor Redmond concurred that "as it relates to the prosecutorial decisions that have been made and the handling of this file that has strictly been with me." App. 4, lines 17-25.

In recommending a sentence to the court, Solicitor Redmond stated, "While I'm here today advocating on their behalf, and I will tell you, Your Honor, that we absolutely want a prison sentence. We believe that consecutive sentences are appropriate in this case, and we would ask for that." App. 12, lines 9-13. Solicitor Foard addressed court and talked about how the thefts

“shattered [his family’s] world as far as the safety they felt.” The family “would ask Your Honor to consider the consecutive jail sentence that the Solicitor has recommended.” App. 11, line 10—App. 14, line 1.

The trial court sentenced Petitioner to concurrent sentences of ten years imprisonment for each of the burglary charges, five years concurrent for three of the larceny charges, and three years consecutive for the remaining larceny charge for a total sentence of thirteen years. App. 20, line 8—App. 21, line 14.

On September 31, 2012, Petitioner filed an application for post-conviction relief alleging ineffective assistance of counsel. App. 23-29. On January 18, 2013, the State filed a return. App. 30-33. On February 5, 2013, Petitioner filed a supplemental application alleging plea counsel was ineffective for failing to challenge the prosecution of his case by the solicitor’s office from Chesterfield County based on a conflict of interest. App. 34-39.

On July 17, 2013, Petitioner appeared at a hearing before The Honorable R. Ferrell Cothran, Jr. Karen C. Ratigan represented the State and Matthew S. Swilley represented Petitioner. App. 40. Petitioner testified that prior to the plea, he was aware the victims were related to an assistant solicitor in the Chesterfield office. Accordingly, he asked plea counsel to seek a change in venue. App. 50, lines 8-19. Plea counsel never heeded the request. And when Foard addressed the court during the guilty plea, Petitioner leaned in and told counsel he was not comfortable with Foard’s appearance. “He said it didn’t matter.” App. 53, line 25—App. 54, line 9.

Plea counsel testified that after he met with Petitioner for the first time, he then met with the Deputy Solicitor at his office in Chesterfield County and learned that Mr. Foard would not be prosecuting the case because of his relationship to the victims. App. 68, line 22—App. 69, line 13. Plea counsel then spoke about the family with Mr. Foard, who said his family members were very

upset and felt violated. App. 69, lines 19-25. He also expected the Solicitor's office to seek consecutive sentences. App. 73, lines 11-18. He also testified he did not think Mr. Foard's relationship would prejudice Petitioner because "at that point [he] had become a part-time solicitor [and he] was in the office one day a week." His only involvement was to speak for the victims, and "Mr. Redmond had done an excellent job of putting up some sort of Chinese wall." App. 70, lines 7-16; App. 74, lines 6-21.

On August 26, 2013, the PCR court issued its order of dismissal concluding that Petitioner failed to establish ineffective assistance of counsel. The court cited evidence that Mr. Foard had no access to the prosecution file and that he had no involvement in decision-making in the case. Thus, Petitioner "failed to present any compelling evidence or testimony either that there was a conflict of interest or that any alleged conflict prejudiced his case." App. 87.

## ARGUMENT

**THE RECORD DOES NOT SUPPORT THE PCR COURT'S FINDING THAT NO EVIDENCE ESTABLISHED A CONFLICT OF INTEREST ON THE PART OF SOLICITOR REDMOND; THE RECORD PLAINLY SHOWS HE WAS INFLUENCED BY A PERSONAL ATTACHMENT TO SOLICITOR FOARD IN REQUESTING CONSECUTIVE SENTENCING.**

The record does not support the PCR court's finding that no evidence established a conflict of interest on the part of Solicitor Redmond. The record plainly shows he was influenced by personal attachment to Solicitor Foard in requesting consecutive sentencing. 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.

In the context of a guilty plea, by showing that "counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty," a defendant sufficiently undermines the required voluntary and intelligent character of a plea. *Rolen v. State*, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009); accord *State v. Hazel*, 275 S.C. 392, 271 S.E.2d 602 (1980) (holding record must reflect that defendant freely and intelligently waived constitutional trial rights and had full understanding of the consequences of the plea); *Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (holding the difference "between a valid guilty plea and an invalid guilty plea lies in the knowing and voluntary nature of the plea").

A criminal court's functions are to vindicate the public interest in enforcing criminal laws and safeguard the rights of individual defendants. *Standefer v. U.S.*, 447 U.S. 10, 25 (1980). As officers of the court, prosecutors must respect and serve these functions. Accordingly, "[t]he criminal justice system gives prosecutors, as opposed to victims, broad discretion in deciding which cases to try because prosecutors are less likely to be prejudiced by personal and emotional motives." *Ex Parte Littlefield*, 343 S.C. 212, 218, 540 S.E.2d 81, 84 (2000). Similarly, a solicitor "represents all the people, including accused, and occupies a quasi-judicial position, whose sanctions and traditions he should preserve." *State v. King*, 222 S.C. 108, 119, 71 S.E.2d 793, 798 (1952).

In this case, the PCR court's order of dismissal concluded that because Mr. Foard had no access to the prosecution file and that he had no involvement in decision-making in the case, Petitioner did not establish a conflict of interest that plea counsel could have sought to avoid. This conclusion misapprehends the very danger risked by the alleged conflict by viewing it from the perspective of Solicitor Foard instead of Solicitor Redmond. As the prosecuting attorney, Solicitor Redmond owed duties to the plea court in acting dispassionately and consistently with previous prosecutions. The risk of danger was that he would not strictly adhere to these duties based on a personal attachment to and shared interests with Solicitor Foard.

The extent of this risk was considerable based on the information in the record. Solicitor Foard's in-laws were victims of the thefts. These family members were "shattered" and felt like their very residential security was violated and compromised. Solicitor Foard and Solicitor Redmond worked in the same office and talked about these matters "at length." When addressing the plea court, Solicitor Redmond repeatedly referred to the State's position as "we," indicating himself and Solicitor Foard, and even expressly stated he was "here advocating on [the family's] behalf."

Indeed, the record shows the perceived danger actually manifested. Solicitor Redmond expressly stated on record that, based on the discussions with Solicitor Foard, he was abandoning previous practices in similar cases by asking for consecutive sentences. This evidence can lead to no other conclusion than that Solicitor Redmond subrogated the personal interests and inflamed emotions of Solicitor Foard and his family for the interests of the State. The number of days each week Solicitor Foard was scheduled to appear in a physical office with Solicitor Redmond was immaterial to assessing this danger, as was Solicitor Foard's unfamiliarity with Solicitor Redmond's physical file.

The record incontrovertibly establishes that prior to the plea, plea counsel was aware of the solicitors' and family members' relationships. He knew the family members were upset and felt violated, and he expected the State to seek consecutive sentencing. Petitioner expressed his concern and asked in vain for action from plea counsel on more than one occasion. Plea counsel was therefore deficient in incorrectly advising Petitioner that the relationship was immaterial, in failing to object to Solicitor Redmond's prosecution, and in leading Petitioner into the plea deal. These deficiencies meant Petitioner's plea was not knowing and voluntary, and it therefore was in violation of his Sixth Amendment rights.

#### CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his Petition for Writ of Certiorari to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Benjamin Joan Tripp", written over a horizontal line.

Benjamin Joan Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of May, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHESTERFIELD COUNTY  
RALPH F. COTHRAN, CIRCUIT COURT JUDGE

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TONY MOORE,

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---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Tony Moore 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 July 17, 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 Tony Moore.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 28th day of May, 2014

STATE OF SOUTH CAROLINA  
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Certiorari to Chesterfield County  
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APPELLATE CASE NO. 2013-002330

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CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Tony Moore at 7205 Taxahaw Road, Kershaw, SC 29067, this 28th day of May, 2014.

  
\_\_\_\_\_  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of May, 2014.

Bailey Reed (L.S.)  
Notary Public for South Carolina  
My Commission Expires: *October 24, 2021*