

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County

**S.C. Supreme Court**

R. Lawton McIntosh, Circuit Court Judge  
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JEFFREY SCOTT EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002585  
\_\_\_\_\_

JOHNSON PETITION FOR WRIT OF CERTIORARI  
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The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the admission of out-of-court statements of non-testifying witnesses during the testimony of Detective Matheson where the admission of such out-of-court statements violated the Confrontation Clause of the Sixth Amendment. .... 6

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**ISSUE PRESENTED**

Whether the PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the admission of out-of-court statements of non-testifying witnesses during the testimony of Detective Matheson where the admission of such out-of-court statements violated the Confrontation Clause of the Sixth Amendment?

## STATEMENT

### **Indictments**

On August 28, 2007, Petitioner Jeffrey Scott Evans was indicted by the Anderson County Grand Jury for (1) armed robbery; and (2) possession of a knife during the commission of a violent crime. App. 312-313.

### **Trial and Guilty Verdicts**

Petitioner was tried before the Honorable Alexander S. Macauley and a jury on August 4-5, 2008. App. 1. Petitioner was represented by Andrew T. Potter, and the State was represented by Assistant Solicitors Catherine T. Huey and Jan Byford. Id.

The jury found Petitioner guilty on both counts. App. 239, l. 17 – 240, l. 1. Judge Macauley sentenced Petitioner to life without the possibility of parole (LWOP) as required by S.C. CODE ANN. § 17-25-45 where Petitioner had prior convictions for armed robbery and first degree burglary. App. 243, l. 10 – 244, l. 4; 246, l. 18 – 247, l. 10; 314-315.

### **Direct Appeal**

Petitioner filed a direct appeal to the South Carolina Court of Appeals. He was represented by LaNelle C. DuRant of the Office of Appellate Defense who argued on appeal that the Trial Court erred in denying Petitioner's motions for a mistrial and directed verdict. On October 25, 2010, the Court of Appeals affirmed Petitioner's convictions. App. 249-250. After initially granting Petitioner's writ of certiorari to review the decision of the Court of Appeals, the South Carolina Supreme Court dismissed the writ as improvidently granted on October 10, 2012. App. 251-252.

## **Application for Post-Conviction Relief and Evidentiary Hearing**

Petitioner filed his application for post-conviction relief (“PCR”) on March 1, 2013, alleging in part that his trial counsel was ineffective in failing to object to out-of-court statements of non-testifying witnesses at trial which violated the Confrontation Clause of the Sixth Amendment. App. 253-260. The State filed its Return on August 6, 2013. App. 261-266.

An evidentiary hearing was held before the Honorable R. Lawton McIntosh on September 17, 2013. App. 267-298. Petitioner was represented by Hugh W. Welborn, and the State was represented by Assistant Attorney General John W. Whitmire. App. 267. Petitioner and his trial counsel testified at the hearing. App. 272-294.

Petitioner testified that his trial counsel failed to object to certain hearsay testimony by Detective Kevin Matheson where such testimony violated Petitioner’s Sixth Amendment right to confrontation. The witnesses who made these statements were not present at Petitioner’s trial and Petitioner had not been given a prior opportunity to cross-examine them. App. 272, l. 23 – 277, l. 8; 283, l. 3 – 284, l. 7.

Judge McIntosh orally denied Petitioner’s PCR application at the conclusion of the hearing. Judge McIntosh agreed Detective Matheson’s testimony contained some hearsay, but found there was overwhelming evidence of Petitioner’s guilt. Judge McIntosh further orally ruled that Petitioner’s failure to bring the witnesses whose out-of-court statements were used at trial to the PCR evidentiary hearing precluded relief to Petitioner. App. 295, l. 4 – 297, l. 3.

## **Order of Dismissal**

Judge McIntosh filed his written Order of Dismissal on December 3, 2013. App. 300-309. In this written order, Judge McIntosh once again denied Petitioner's claim that trial counsel was ineffective for failing to object to certain hearsay testimony of Detective Matheson based on the violation of Petitioner's Confrontation Clause rights under the Sixth Amendment. App. 305.

This petition for writ of certiorari follows.

## ARGUMENT

**The PCR court erred in finding that trial counsel provided effective assistance of counsel where trial counsel failed to object to the admission of out-of-court statements of non-testifying witnesses during the testimony of Detective Matheson where the admission of such out-of-court statements violated the Confrontation Clause of the Sixth Amendment.**

### **Relevant Facts of Trial**

On May 24, 2007, Paula Ayers was working at the Goodwill Store on South Main Street in Anderson as the cashier. Several customers were still in the store as it was near closing time. As she was checking out a customer, a man who she could not identify put a knife to her side and demanded the money from the cash register. The man then dropped the knife and ran from the store with the money. App. 102, l. 16 – 105, l. 3; 109, l. 11 – 110, l. 9. Ayers testified that she was not able to get a good look at the man who robbed her. App. 110, ll. 16-18; 114, ll. 7-11. Ayers could not pick Petitioner out of a photo line-up as being the person who robbed the store. App. 109, ll. 11-14; 115, ll. 14-17; 116, ll. 3-5. She also testified that about \$200.00 was missing from the register after the incident. App. 113, ll. 19-21.

Other witnesses in the store that night, including employee Patricia French, customer Barbara Cooley, and customer Suzanne Shirley, also could not identify Petitioner as the person who robbed the store that night or pick Petitioner out of a photo line-up. App. 117, l. 10 – 122, l. 10; App. 125, l. 1 – 128, l. 8; App. 132, l. 7 – 134, l. 15; 164, ll. 4-7.

Detective Kevin Matheson, investigator for the Sheriff's Department, was assigned to this case. He obtained information through other investigators that the robber's name was "Scott" and that he was at the Sunrise Motel. A witness provided a partial tag number for the

car the robber was driving. As result of the investigation and looking at the surveillance video from the store, he focused on Petitioner. App. 154, l. 7 – 172, l. 5.

Petitioner was picked up and brought in for questioning, where Petitioner gave a statement allegedly admitting the robbery. App 170, l. 16 – 192, l. 1. During the pretrial hearing, Petitioner testified that he only gave a statement because Detective Matheson told him that the most time he would probably get would be ten years. Petitioner also said he had been up six days smoking crack and ice at the time of the statement. App. 73, l. 23 – 74, l. 7, ll. 11-25; 75, ll. 14-22.

During Detective Matheson’s testimony, Petitioner’s trial counsel did not object to certain out-of-court statements of other witnesses who did not testify at trial. In particular, Detective Matheson testified that another detective had obtained some information that the possible perpetrator’s name was “Scott” and also possibly stayed at the Sunrise Motel in Room 2. App. 166, l. 22 – 167, l. 7. Neither this detective nor the person who gave this detective information on the perpetrator’s name and whereabouts testified at trial, and Petitioner had not been given a prior opportunity to cross-examine these witnesses.

Detective Matheson also testified that when law enforcement arrived on the scene at the Goodwill after the robbery, a witness had given law enforcement a “possible tag number.” App. 168, l. 23 – 169, l. 8. More specifically, Detective Matheson testified:

When we first arrived on the scene that night, that evening, we actually had a witness who had given us a possible tag number. The reason I say “possible” is because this stuff is happening fast, a lot of things are going on, and sometimes witnesses are looking at things they’re not sure they’re gonna have to testify to later or tell anyone about.

But she was able to actually give us a tag number. And it was interesting because as a result of the motel, the tag number, part of the tag number actually matched from that information, as well. So we were ready to kind

of look and say, well, this is kind of credible information, it's starting to look better and better.

App. 168, l. 25 – 169, l. 13.

The witness who was able to provide law enforcement with a license tag number following the robbery did not testify at trial and was not made available to Petitioner for cross-examination prior to trial.

Finally, Detective Matheson said that while looking for Petitioner, law enforcement “actually located a person who knew him and said that they were pretty sure he was on George Albert Lake Road.” App. 168, ll. 13-18. This person also did not testify at trial and also was not made available for cross-examination prior to trial.

### **Discussion**

Petitioner's trial counsel was ineffective in failing to object to the above-referenced out-of-court statements under Crawford v. Washington, 554 U.S. 36 (2004) during Detective Matheson's testimony.

To establish ineffective assistance of counsel, Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). “First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 117-18, 386

S.E.2d at 625 (internal citations omitted).

“The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses.” State v. Holder, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009). In Crawford v. Washington, 551 U.S. 36 (2004), the United State Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness.

In Crawford, the state introduced the statement of the defendant’s wife to the police that she led the defendant to the victim’s apartment and facilitated the assault on the victim. The state argued her statement to the police after the crime was a statement against her penal interest, and therefore it was admissible against the defendant even though his wife would not -- or could not -- testify, and was consequently unavailable. Id. at 40.

The defendant argued that notwithstanding the state hearsay exception that this would violate his constitutional right to be confronted with the witnesses against him. The Supreme Court agreed and held that the admission of the wife’s statement to the police implicating the defendant, without the opportunity to cross-examine her, violated the defendant’s rights under the Confrontation Clause. Id. at 53-54, 68-69.

The Court in Crawford v. Washington noted where testimonial statements are involved, the Framers did not mean to leave the Sixth Amendment protection and guarantee of the right to confrontation to what state court rules of evidence deemed to be “reliable statements” in the absence of the right to confrontation. Id. at 61-62.

Here, the State admitted through the testimony of Detective Matheson the out-of-court statements of at least four different non-testifying witnesses:

1. the statement of a non-testifying witness who told another non-testifying detective that the possible perpetrator was named "Scott" and possibly stayed at the Sunrise motel;
2. the statement of a non-testifying witness that she was able to obtain a possible license tag number after the robbery; and
3. the statement of a non-testifying witness that she knew Petitioner and knew where he was located.

These statements were inadmissible under Crawford where Petitioner was denied the opportunity to confront and cross-examine these witnesses about what they knew of Petitioner and the robbery. Law enforcement only targeted Petitioner because of the allegations of these non-testifying witnesses, and Petitioner was entitled to confront these witnesses about the information they gave to law enforcement. The witnesses to the robbery who did testify at trial all agreed that they could not identify Petitioner as the robber. Therefore, it was critical for Petitioner to be able to confront the individuals who did implicate him in the robbery.

The PCR court ruled that to meet his burden of proof, Petitioner was required to bring these witnesses to the PCR evidentiary hearing. App. 296, ll. 1-9. Petitioner, however, does not have to prove what these witnesses said or would have said to be entitled to post-conviction relief; Petitioner only has to show that the testimony of these witnesses was erroneously admitted at trial in violation of the Confrontation Clause. Petitioner is only required to bring a witness to the PCR evidentiary hearing where the petitioner alleges that the witness's testimony should have been included at trial. Petitioner is not required to bring a witness to the evidentiary hearing where Petitioner alleges that the witness's

testimony should have been excluded at trial. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Where Petitioner did not have a prior opportunity to confront these non-testifying witnesses, their testimony was inadmissible at trial. Accordingly, trial counsel was ineffective in failing to object to these out-of-court statements under the Confrontation Clause and the principles set forth in Crawford, and Petitioner is entitled to a new trial.

**CONCLUSION**

For the foregoing reasons, Petitioner Jeffrey Scott Evans respectfully requests this Court to grant his petition for certiorari with the ultimate relief of a new trial.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO ANDERSON COUNTY  
R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

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JEFFREY SCOTT EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2013-002585

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Jeffrey S. Evans states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on September 17, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She 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 her as counsel for Jeffrey S. Evans.

Respectfully submitted,



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Carmen V. Ganjehsani  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 14th day of July, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Anderson County  
R. Lawton McIntosh, Circuit Court Judge

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JEFFREY SCOTT EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.


APPELLATE CASE NO. 2013-002585

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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 John Walt Whitmire, Esquire and Jeffrey S. Evans, #220077, at Broad River Correctional Institution this 14th day of July, 2014.

  
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Carmen V. Ganjehsani  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day  
of July, 2014.

 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: October 24, 2021.