

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

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**RECEIVED**

OCT 22 2014

**S.C. Supreme Court**

ZACHARY FOWLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000489

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether trial counsel's failure to have petitioner testify at the pretrial Jackson v. Denno, 378 U.S. 368 (1964) hearing constituted ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights?

## STATEMENT

On January 3, 2007, a Greenville County grand jury indicted petitioner for murder, armed robbery, two weapons charges, assault with intent to kill, and assault and battery with intent to kill. App. 699-708. On August 13, 2007, petitioner was tried before the Honorable D. Garrison Hill and a jury. App. 1. L. Mark Moyer represented the State. App. 1. Thomas Creech represented petitioner. App. 1. The jury convicted petitioner on all charges. App. 601, l. 11 – 602, l. 19. Judge Hill sentenced petitioner to life imprisonment for murder and current terms of years on the other charges. App. 606, l. 20 – 608, l. 3. Petitioner's appeal was denied by the Court of Appeals. State v. Fowler, Op. No. 2010-UP-372 (July 21, 2010). On October 5, 2011, the Supreme Court denied petitioner's petition for certiorari. App. 691.

On August 10, 2012, petitioner filed a PCR application. App. 610. On December 17, 2013, a hearing was held before the Honorable G. Edward Welmaker. App. 629. Karen Ratigan represented the State. App. 629. Caroline Horlbeck represented petitioner. App. 629. On February 17, 2014, Judge Welmaker denied petitioner's application. App. 690. This petition follows.

## ARGUMENT

Trial counsel's failure to have petitioner testify at the pretrial Jackson v. Denno, 378 U.S. 368 (1964) hearing constituted ineffective assistance of counsel in derogation of petitioner's Sixth Amendment rights.

### **Relevant Facts**

Petitioner testified in his own defense. At the time of the shooting, petitioner lived with Nicky Tisdale ("Tisdale") and his girlfriend, Valencia Sullivan ("Sullivan"). App. 472, l. 21 – 473, l. 9. Tisdale needed gas money. App. 473, ll. 14 – 21. Petitioner had a hydraulic jack that he offered to let her pawn for gas money. App. 473, ll. 14 – 21. Tisdale and petitioner went to a pawnshop in Greenville where petitioner was approached by woman who asked him if he had any crack. App. 475, ll. 7 – 25. After conversation in the parking lot, petitioner told her to follow him down the road. App. 476, l. 15 – 477, l. 7. The woman was in a car with two other men. App. 477, ll. 13 – 19. The man in the back seat of the car looked angry and upset. App. 478, ll. 1 – 6.

Both cars drove a few blocks away from the pawnshop. App. 478, ll. 23 – 25. Petitioner took a red bag in which he kept his flex (artificial crack) and his pistol and walked to the other car. App. 479, ll. 9 – 13. The woman asked petitioner for \$40 worth of crack. App. 479, ll. 17 – 24. The man in the back seat told petitioner he wanted \$400 worth of crack. App. 479, ll. 17 – 24.

The woman reached into her purse and began to hand petitioner the money for the crack while petitioner reached into his red bag. App. 480, ll. 7 – 12. The woman suddenly snatched her hand away and pulled it down toward her side. App. 480, l. 24 – 481, l. 2. Petitioner thought she was reaching for a gun from her pocketbook. App. 481, ll. 10 – 15. At the same time petitioner noticed the man in the back seat reaching into his pocket very suddenly and that there

was a bulge in his left pocket. App. 482, ll. 10 – 25. Petitioner thought the man was reaching for a gun. App. 483, ll. 1 – 3.

Petitioner pulled his pistol from his red bag and fired. App. 483, ll. 16 – 21. Petitioner testified that he felt he was about to be robbed and that if he had run he would have been shot in the back. App. 484, ll. 4 – 15. Petitioner testified there was no way for him to escape. App. 484, ll. 16 – 18. After firing, he jumped back in his car and they drove away. App. 484, l. 24 – 485, l. 6. The woman died from her wound.

Both of the men in the car testified for the State. Ronald Harris (“Harris”) was riding in the backseat of a car driven by Mike Powell (“Powell”). App. 233, ll. 5 – 14. Susan Galloway (“Galloway”) was sitting in the passenger seat. App. 233, ll. 5 – 11. Harris stayed in the car and watched Galloway go into the pawnshop. App. 233, ll. 5 – 14. He saw petitioner enter the pawnshop with the hydraulic jack. App. 234, ll. 2 – 18. Galloway returned and told the men she had received \$40 for a necklace. App. 234, ll. 19 – 22. Harris overheard Galloway “say something about crack” to Powell while they followed the car with petitioner. App. 235, ll. 8 – 19.

Harris claimed that petitioner walked up to their car with a gun in his hand, pointed it at them and told them that if they gave him the money, “everything will be okay.” App. 236, l. 13 – 237, l. 10. Petitioner was standing at Galloway’s window. App. 237, ll. 22 – 23. Galloway told petitioner “no.” App. 238, l. 23 – 239, l. 2. Powell tried to put their car in gear. App. 239, ll. 3 – 8. Petitioner told him, “Don’t do it.” App. 239, ll. 3 – 8. After asking again for the money, Harris claimed petitioner started shooting. App. 239, ll. 3 – 16. Harris claimed there were no guns in their car. App. 249, ll. 1 – 10. Powell claimed he did not own a gun and that .22

caliber bullets that were found on the floor of the car were there when he got the car and he had never bothered to remove them. App. 258, ll. 22 – 12.

Powell corroborated Harris’s testimony that Galloway wanted to purchase cocaine. App. 260, ll. 2 – 5. Powell did not testify that he saw petitioner approach the car with a gun in his hand. App. 260, l. 20 – 262, l. 20. Powell noticed a red bag. App. 261, ll. 8 – 10. Powell claimed petitioner came to the passenger side, reached in the bag, and “the next thing I knew he was trying to grab the money.” App. 261, ll. 3 – 7. Powell tried to put the car in gear, and noticed petitioner holding a semi-automatic gun. App. 262, ll. 11 – 16. At this point, the shooting began. App. 262, ll. 14 – 23.

Petitioner gave statements to the police that were used against him at trial. When petitioner took the stand during the trial, he testified that the police told him the only way he could help himself or help Sullivan or Tisdale from getting a life sentence “was to write a statement and show the gun, give them what they need.” App. 488, ll. 11 – 16. Trial counsel did not call petitioner to testify during the pretrial Denno hearing and the trial judge did not have this information when he ruled that petitioner’s statements were admissible.

### **Discussion**

The PCR court made a legal error in crediting trial counsel with a reasonable strategic decision for not calling petitioner to testify during the Denno hearing. In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel’s errors, the result of the proceeding would be different.

See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). A “reasonable probability” is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997).

As credited by the PCR court in its order of dismissal, trial counsel testified that he did not want to call petitioner to testify during the Denno hearing because it would give the State “a preview of his testimony. You know, the prosecution would then know exactly what he’s going to testify to at trial.” App. 644, ll. 2 – 12. App. 695. This was not a valid strategic reason because it was based neither on a correct understanding of the law nor the practicalities and facts of this case. A defendant may be called to testify during a Denno hearing for the sole purpose of whether his statement was voluntary. There would have been no need to delve into the substance of his testimony regarding the events of the shooting. Timely objections could have prevented the solicitor from asking questions outside of the scope of the Denno hearing’s inquiry.

The practicalities of the case also show this was not a reasonable strategic decision. The State already had an extensive statement from petitioner. They already knew much of what he would say at trial and had ample fodder for cross-examination if he attempted to change his story. The “preview” that supposedly worried trial counsel was a cat that had already long escaped its bag. Furthermore, trial counsel had petitioner testify about the promises made to him during his testimony. App. 487, l. 24 – 488, l. 21. The only reason for this testimony was for the jury to consider the voluntariness of petitioner’s statements. If trial counsel intended to attack the voluntariness of the statements with the jury, there could be no logical reason for preventing petitioner from testifying during the Denno hearing.

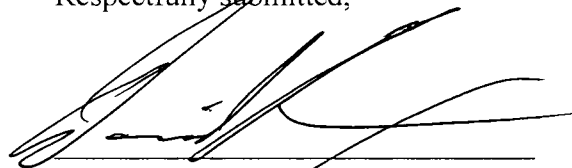
Had petitioner testified during the Denno hearing, there is a strong likelihood his statements would have been suppressed. See State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). In

Rochester, the Supreme Court held that a confession “may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence.” Rochester at 200, 391 S.E.2d at 246-47 (internal quotations omitted). See also State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001). In Hook, the defendant’s statement to his probation officer was inadmissible because the agent expressly threatened to revoke the defendant’s probationary sentence unless he told the truth. The court noted that statements given pursuant to threats or under inherently coercive circumstances are not admissible. See also Mincey v. Arizona 437 U.S. 385, 398, 399 (1978); Minnesota v. Murphy 465 U.S. 420, 427 (1984). The officers in this case made both a promise and threat regarding the sentences for Sullivan and Tisdale that coerced petitioner’s statements. Admission of petitioner’s statements prejudiced petitioner and had they been suppressed, the outcome of his trial would have been different.

CONCLUSION

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

Respectfully submitted,

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

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
G. EDWARD WELMAKER, CIRCUIT COURT JUDGE

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ZACHARY FOWLER,

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PETITION TO BE RELIEVED AS COUNSEL

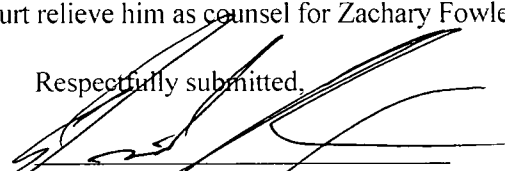
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Counsel for Zachary Fowler states:

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 December 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 Zachary Fowler.

Respectfully submitted,



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David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 22nd day of October, 2014

STATE OF SOUTH CAROLINA

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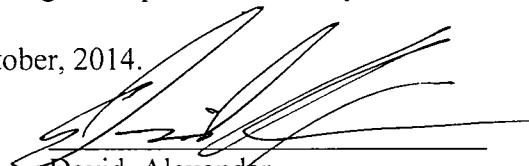
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CERTIFICATE OF SERVICE

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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 Karen Ratigan, Esquire and Zachary Fowler, # 323544, at Perry Correctional Institution this 22nd day of October, 2014.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day  
of October, 2014.

Kevin Hendon (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023