

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

**S.C. Supreme Court**

ANTHONY BRITT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000634

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JOHNSON PETITION FOR WRIT OF CERTIORARI

BENJAMIN JOHN TRIPP  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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## **ISSUE PRESENTED**

Whether Counsel's performance was constitutionally deficient for failing to adequately investigate evidence against Petitioner the State claimed to have where plea counsel testified he instructed Petitioner to plead guilty based on what he "believed" the State would show without independently vetting the purported evidence.

## STATEMENT

On March 4, 2009, the Orangeburg County Grand Jury indicted Petitioner Anthony Bernard Britt for first degree burglary. App. 187-188. On August 6, 2009, Petitioner appeared at a plea hearing before The Honorable Edgar W. Dickson. Bradley Hutto represented Petitioner and Donald Sorenson represented the State. App. 1. The State alleged that on the evening of December 10, 2007, Petitioner entered the home of a local couple by breaking a pane of glass on the back door. He then allegedly took some jewelry and a number of firearms. App. 6, line 16—App. 8, line 16. Around two months later, authorities found Petitioner in possession of one of the stolen firearms. App. 157, lines 1-6.

After a routine plea colloquy, Petitioner pled guilty as charged. App. 4, line 7—App. 6, line 14. The plea judge accepted the plea and delayed sentencing. App. 12, line 12—App. 13, line 4. On August 13, 2009, the plea judge sentenced Petitioner to sixteen years' incarceration. App. 21, lines 13-17.

On August 3, 2010, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 23-29. The State filed a return on January 7, 2011. App. 31-35. On October 29, 2013, Petitioner attended an evidentiary hearing before The Honorable Diane S. Goodstein. Victor K. Li represented Petitioner and Megan E. Harrigan represented the State. App. 36.

Petitioner testified that the State took a DNA sample from him, and in two tests conducted in March of 2008 and April of 2008, compared his DNA with a sample from blood at the crime scene. The first test failed to identify Petitioner, and while the second test did identify him, the results were based on insufficient standards for use in court. App. 47, line 20—App. 50, line 6; App. 84, lines 1-10; App. 101, line 23—App. 102, line 3; App. 113-116.

Plea counsel testified that in addition to any DNA evidence, the State allegedly found a fingerprint on a jewelry box from which the jewelry was taken. App. 91, lines 20-25; App. 126, line 24—App. 127, line 11. He learned of the evidence through written correspondence from the Orangeburg Department of Public Safety. App. 172. He also understood that “there were pawned power tools—that he had pawned some power tools and that—my belief was that those were some that were taken from this house.” App. 109, lines 23-25. When asked whether he was sure, plea counsel stated, “No. I’m not. I’m just telling you. That’s what the investigator said and that’s what the notes of the officers say.” App. 110, lines 1-4.

Plea counsel also testified extensively about his advice to Petitioner to plead: “[I]n my mind there was enough evidence that if we went to trial . . . the likelihood of winning is not strong, and I wanted to convey that to him.” App. 133, line 23—App. 134, line 1. When asked whether he shared any of the specific results of the fingerprint analysis with Petitioner, plea counsel stated he did not. App. 135, lines 11-17. Indeed, he admitted he never showed Petitioner any actual evidence; he merely “made a summation of it and gave . . . [his] best advice.” App. 137, lines 9-12.

. . . I don’t think I actually showed [the evidence] to him because I was representing it to him as I understood it, as I was going to be his attorney trying to do the best I could for him, this was how I understood it and what I believed that they would show, so I don’t think I actually showed him the documents from SLED.

App. 137, lines 16-21.

On March 5, 2014, the PCR court issued its order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 175—App. 185. Specifically, the order stated that plea counsel reasonably investigated Petitioner’s case by “fully review[ing] all discovery materials” by himself and with Petitioner. App. 182.

## ARGUMENT

**THE RECORD DOES NOT SUPPORT THE PCR JUDGE'S FINDING THAT PLEA COUNSEL ADEQUATELY REVIEWED THE EVIDENCE AGAINST PETITIONER BECAUSE HE DID NOT INDEPENDENTLY INVESTIGATE ANY OF IT; RATHER, HE TOOK THE STATE'S REPRESENTATIONS ABOUT THE EVIDENCE AT FACE VALUE AND INSTRUCTED PETITIONER TO PLEAD GUILTY.**

The record does not support PCR judge's finding that plea counsel adequately reviewed the evidence against Petitioner. Instead, the record shows plea counsel took the State's representations about the evidence at face value and instructed Petitioner to plead guilty. 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. *Id.* at 687.

“[T]he court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting *Strickland* at 690). “The validity of counsel’s strategy is reviewed under ‘an objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 650 (2008) (quoting *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). “[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Lounds* at 460, 670 S.E.2d at 649 (quoting *Ard v. Catoe* at 331-32, 642 S.E.2d at 597); *see also Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir. 1982) (“To meet this standard, an attorney must at a minimum, ‘conduct appropriate investigations, both factual and legal, to determine if matters of

defense can be developed, and to allow himself enough time for reflection and preparation for trial.”) (quoting *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968)).

“[P]er-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer ‘entirely fails to subject the prosecution’s case to meaningful adversarial testing,’ thus making ‘the adversary process itself presumptively unreliable.’” *Graves v. Padula*, 773 F. Supp. 2d 611, 619 (D.S.C. 2010) (quoting *Glover v. Miro*, 262 F.3d 268, 275 (4th Cir. 2001)).

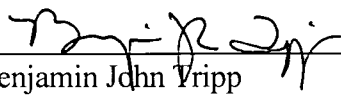
In this case, counsel in no way met his duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. The evidence against Petitioner consisted of alleged matches for DNA and a fingerprint and Petitioner’s alleged possession of a pistol and power tools taken from the home. As for the DNA evidence, the record repeatedly shows that the State’s first test could not identify Petitioner, and although the second test identified him, the test was not reliable for consideration in court based on the chain of evidence and testing procedures. Nevertheless, plea counsel took as granted that conclusive DNA evidence existed without any independent investigation. Plea counsel took the same approach with the Orangeburg Department of Public Safety’s representation that it fortuitously found a single usable fingerprint on a jewelry box from which the jewelry was taken. Finally, with regard to the items taken from the home allegedly shown to be in Petitioner’s possession, plea counsel explicitly testified his “belief” was that Appellant had the power tools based solely on “what the investigator said and that’s what the notes of the officers say.” Additionally, the record shows Petitioner was found with pistol from the home over two months after the burglary, which reasonably permits a number of hypotheses for how it came to be in Petitioner’s possession other than his involvement in the burglary. Still, plea counsel conducted no independent investigation of the evidence but took all of the State’s representations at face value.

Thus, in this case Petitioner suffered per-se prejudice through a constructive denial of counsel. Plea counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Indeed, plea counsel himself suggested he was more concerned with having Petitioner plead guilty based on the State's representations about the evidence than with actually investigating the evidence itself. He stated he advised Petitioner based on his understanding of the evidence "in his mind" rather than based on what was actually in front of him. He specifically admitted he did not review any of the specific results of the fingerprint analysis with Petitioner, and he further admitted he never showed Petitioner any of the purported, actual evidence. He merely "made a summation of it" based on the State's representations and mechanically advised Petitioner without any independent skepticism: "I was representing [the evidence] to him as I understood it . . . and [based on] what I believed that they would show." Thus, plea counsel's complete lack of skepticism and investigation into the State's purported evidence made the adversary process itself presumptively unreliable, and the record cannot support the PCR judge's finding that plea counsel provided effective assistance.

### CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his application for post-conviction relief, reverse the charge against him, and remand the case for a new trial.

Respectfully submitted,

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

ATTORNEY FOR PETITIONER

This 26th day of November, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO ORANGEBURG COUNTY  
DIANE SCHAFER GOODSTEIN, CIRCUIT COURT JUDGE

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ANTHONY BRITT,

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PETITION TO BE RELIEVED AS COUNSEL

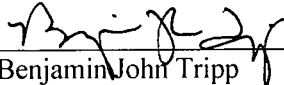
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Counsel for Anthony Britt states:

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 November 1, 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 Anthony Britt.

Respectfully submitted,

  
\_\_\_\_\_  
Benjamin John Tripp  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 26th day of November, 2014

STATE OF SOUTH CAROLINA  
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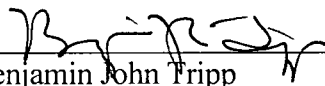
RESPONDENT

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CERTIFICATE OF SERVICE

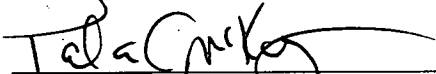
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Anthony Britt, #317524, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of November, 2014.

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

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day  
of November, 2014.

  
\_\_\_\_\_  
(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.