

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

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MAY 13 2015

S.C. Supreme Court

TRAVAUGHN THOMAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001870

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PETITION FOR WRIT OF CERTIORARI  
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**INDEX**

INDEX.....1

ISSUE PRESENTED .....2

STATEMENT .....3

ARGUMENT .....6

CONCLUSION .....9

### ISSUE PRESENTED

Whether the PCR court erred in concluding Petitioner did not establish ineffective assistance of trial counsel based on her failure to preserve for appellate review the issue of the propriety under the Sixth Amendment of the trial court's exclusion of Petitioner's relatives and neighbors and where the trial court excluded them based merely on the Solicitor's hearsay allegation that some of them threatened a witness.

## STATEMENT

On December 15, 2009, the Greenville County Grand Jury indicted Petitioner Travaughn Thomas for armed robbery. App. 247-248. On September 13, 2010, Petitioner proceeded to trial before The Honorable C. Victor Pyle, Jr. and a jury. Dorothy A. Manigault represented Petitioner and Julie J. Anders represented the State. App. 1.

The State alleged that on October 20, 2008, Petitioner and a codefendant, cloaked in hooded sweatshirts and ski masks, robbed a local convenience store using a handgun. App. 26, lines 10—App. 27, line 16. The State only called to identify Petitioner two witnesses, although both of their credibilities suffered considerably from impeachment evidence.

The State called Jerry Tyrone Morehead, a resident of the neighborhood around the convenience store who claimed to know Petitioner. App. 81, lines 4-25. But before he testified, the State moved to exclude Petitioner's family from the courtroom:

THE COURT: . . . I was informed by the Solicitor . . . the relatives of this Defendant have been saying or making threats to Jerry Tyrone Morehead. Now, I don't know whether that's true or not. But I need for you to understand that if that is true, then that constitutes threatening a witness in the case and is a very serious felony and is punishable by a long prison term. And I hope you understand that.

Now, for that reason, I'm going to take this witness' testimony out of your presence. So at this time, you can excuse yourself and wait out in the hallway.

App. 74, line 22—App. 75, line 9. Counsel for Petitioner objected that no sworn affidavits supported the allegation of threats. App. 75, line 14—App. 76, line 1. Judge Pyle responded, "I understand," but stood by his decision. App. 76, line 2. Moments later, the State moved to exclude "[Petitioner's] neighbors, this nice couple in the back." App. 79, lines 21-23. Counsel for Petitioner again objected that no evidence showed the couple made any threats against Morehead. Nevertheless, Judge Pyle ordered them out of the courtroom. App. 80, lines 2-6.

Morehead then appeared to testify. He had convictions from 1984 to 2009 for around sixty forgery charges, for a charge of obtaining goods under false pretenses, and for two charges of shoplifting. App. 99, line 22—App. 101, line 4. Morehead claimed he was familiar with the younger male residents of the neighborhood: “I got a little niece around their age. And all of them be trying to talk to her—.” App. 102, lines 21-22. He said he was driving near the store shortly after the robbery when Petitioner, clad in a hooded sweatshirt and out of breath, got in his car. He also claimed Petitioner said he just robbed the store. App. 84, lines 14-25. He admitted his testimony on direct that he was driving to the convenience store that was robbed conflicted with an earlier statement that he gave police. He also admitted that his testimony of where he dropped Petitioner off conflicted with his earlier statement to police. App. 93, line 10—App. 94, line 2; App. 94, line 25—App. 95, line 9.

The State also called a store clerk working during the robbery, who testified she knew Petitioner was behind the mask because she knew his voice from attending high school together and because during the robbery he grabbed grape cigarillos, which she had repeatedly seen Petitioner do previously. App. 32, line 2—App. 33, line 11; App. 41, line 12—App. 43, line 15. However, on cross-examination, the clerk admitted she had already wrongly told police she recognized the voice of the codefendant as that of another student from her high school, which turned out to be impossible. App. 48, line 21—App. 49, line 6. She also admitted the store only carried plain and grape cigarillos, and other men came in the store to purchase them. App. 50, lines 11-23.

At the conclusion of the trial the jury found Petitioner guilty. App. 159, lines 21-24. Judge Pyle sentenced him to twelve years’ incarceration. App. 162, lines 17-23. Petitioner timely appealed, arguing Judge Pyle’s excluding Petitioner’s family and friends violated his Sixth Amendment right to trial. App. 165—App. 175. On June 13, 2012, the South Carolina Court of

Appeals issued an unpublished opinion affirming the conviction on grounds that trial counsel did not specifically argue to Judge Pyle a violation of Petitioner's Sixth Amendment right to an open trial. App. 192—App. 193.

On June 10, 2013, Petitioner filed an application for post-conviction relief (PCR) arguing ineffective assistance of counsel. App. 194—App. 201. The State filed a return on December 3, 2013. App. 202—App. 206. On June 17, 2014, Petitioner appeared at an evidentiary hearing before The Honorable Robin B. Stilwell. Caroline M. Holbeck represented Petitioner and Karen C. Ratigan represented the State. App. 207.

Petitioner testified that Judge Pyle made his family, girlfriend, and neighbors leave the courtroom while everyone else stayed. App. 214, lines 4-9. Plea counsel testified that Judge Pyle was merely told by Morehead that Petitioner's family had threatened him. App. 228, lines 17-13. Nevertheless, counsel did not "see any basis upon which to object to the partial closure of the courtroom." App. 229, lines 3-5.

On July 25, 2014, the PCR court issued its order of dismissal concluding Petitioner failed to establish ineffective assistance of counsel. App. 238—App. 246. Specifically, the order stated counsel was no deficient in arguing against the closure of the courtroom because a "substantial reason" supported the partial closure as described in *United States v. Sherlock*, 865 F.2d 1069, 1077 (9th Cir. 1989).

## ARGUMENT

**The PCR judge committed reversible error in concluding Petitioner did not establish ineffective assistance of counsel because under the proper legal analysis, no evidence could support the trial court's exclusion of Petitioner's relatives and neighbors from the courtroom during his criminal trial.**

The PCR judge committed reversible error in concluding Petitioner did not establish ineffective assistance of counsel because under the proper legal analysis, no evidence could support the trial court's exclusion of Petitioner's relatives and neighbors from the courtroom during his criminal trial. 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.

"An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge." *Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002). "[A] contemporaneous objection is required to properly preserve an error for appellate review." *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (citing *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)). Thus, trial counsel renders ineffective assistance when his failure to preserve an issue for appellate review prejudices defendant's case. *See, e.g., Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999).

"The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." *Presley v. Georgia*, 558 U.S. 209 (2010); *see also State v. Sinclair*, 275 S.C. 608, 611, 274 S.E.2d 411, 413 (1981) (acknowledging the right to an open trial under both state and federal constitutions). Further, "[t]he Court in *In re*.

*Oliver*, 333 U.S. 257 (1948), made it clear that this right extends to the States. The Sixth Amendment right, as the quoted language makes explicit, is the right of the accused.” *Presley*, 558 U.S. 209.

“In addition to ensuring that judge and prosecutor carry out their duties properly, a public trial encourages witnesses to come forward and discourages perjury.” *Waller*, 467 U.S. at 65. “And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter what the offense he may be charged.” *Oliver*, 333 U.S. at 271-72. Therefore, “[i]n view of this nation’s historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment’s guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.” *Oliver*, 333 U.S. at 273.

Although “the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information,” instances such as these “will be rare . . . and the balance of the interests must be struck with special care.” *Waller*, 467 U.S. at 45; *see also Presley*, 558 U.S. at 209. Thus, the presumption of openness may be overcome only under certain stringent circumstances: (1) “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;” (2) “the closure must be no broader than necessary to protect that interest;” (3) “the trial court must consider reasonable alternatives to closing the proceeding;” and (4) “it must make findings adequate to support the closure.” *See Presley*, 558 U.S. 209, 130 S. Ct. at 724; *see also Waller*, 467 U.S. at 48, 104 S. Ct. at 2216 (citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511-12, 104 S. Ct. 819, 824 (1984)).

In this case, the trial judge never made findings supporting closure under the foregoing analysis. Moreover, no evidence in the record could have supported the closure. With respect to the first element, the Solicitor merely made an unsworn, hearsay allegation that more than one of Petitioner's relatives had been "saying or making threats" to Morehead. The trial judge admitted he did not know if the allegations were true. Thus, unsupported in the record is whether any communications to Morehead occurred that were actual, influential threats. With regard to the second element, unsupported is who specifically was responsible for any threat and who among the relatives and neighbors was not and should not have been excluded therefor. As to the third element, the record shows the trial judge strongly admonished against any improper influence on Morehead and threatened criminal prosecution. Nothing else in the record shows this was not a reasonably sufficient alternative to excusing Petitioner's relatives and neighbors.

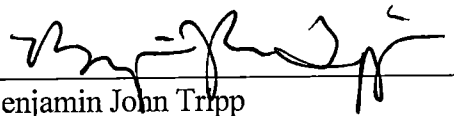
The PCR judge stated in the order of dismissal that the trial court's closure was only partial and therefore the court only needed a "substantial reason" to support the closure as described in *United States v. Sherlock*, 865 F.2d 1069, 1077 (9th Cir.). This reasoning was illogical because the requirement under *Presley* and *Waller* that any closure must be as narrow as possible means that the overriding interest analysis applies even in a situation in which the courtroom is not totally closed. Thus, any closure must be based on advancing an overriding interest.

Thus, trial judge erred in closing courtroom in violation of Petitioner's Sixth Amendment rights. Petitioner suffered prejudice because Morehead, already subject to grave credibility problems, gave testimony that constituted one-half of the evidence identifying Petitioner and that was unchecked by confrontation with the public. Accordingly, the PCR court committed reversible error in concluding Petitioner failed to establish ineffective assistance of counsel.

**CONCLUSION**

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

Respectfully submitted,

  
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Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of May, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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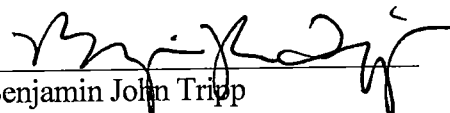
APPELLATE CASE NO. 2014-001870

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire this 13th day of May, 2015.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day  
of May, 2015.

  
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(L.S.)  
Notary Public for South Carolina

My Commission Expires: October 30, 2022