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S.C. Supreme Court

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Charleston County

Stephanie P. McDonald, Circuit Court Judge

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TERRANCE JOHNSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000146

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the trial judge err by finding trial counsel provided effective representation where counsel failed to object and move for a mistrial when the trial judge improperly entered the jury room during trial to release the jury for lunch?

## STATEMENT OF THE FACTS

On June 7, 2004, the Berkeley County Grand Jury indicted Petitioner for trafficking in cocaine and possession of a firearm during commission of a violent crime. App. 348. On March 9, 2006, Petitioner's case proceeded to a jury trial before the Honorable Deidre L. Jefferson. App. 1. Melissa Gay represented Petitioner. Nick Bianchi and Ed Knisley represented the State. App. 1.

After a two-day trial, the jury found Petitioner guilty. Judge Jefferson sentenced Petitioner to life imprisonment. App. 277. Petitioner appealed his convictions and sentence.

On August 29, 2011, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentence. See State v. Johnson, Op. No. 2011-UP-411 (S.C. Ct. App. August 29, 2011). The remittitur was sent on September 14, 2011. Robert M. Dudek represented Petitioner. App. 287.

On December 13, 2011, Petitioner filed a PCR application. App. 280. On June 20, 2012, Respondent filed its return requesting an evidentiary hearing. App. 287. On November 21, 2013, a PCR hearing was held before the Honorable Stephanie P. McDonald. App. 293. Christopher L. Murphy represented Petitioner. Ashleigh R. Wilson represented the State. App. 293.

On November 24, 2014, Judge McDonald issued an order of dismissal. App. 338. Petitioner appealed the judge's order. This petition for writ of certiorari follows.

## ARGUMENT

The trial judge erred by finding trial counsel provided effective representation where counsel failed to object and move for a mistrial when the trial judge improperly entered the jury room during trial to release the jury for lunch.

### **Facts at Trial**

On January 28, 2004, Petitioner was driving on Rivers Avenue “going towards Charleston city” in Berkeley County, South Carolina. App. 5. An officer with the North Charleston Police Department K-9 Division initiated a traffic stop of Petitioner’s Jaguar claiming a “license tag obstruction” on Petitioner’s vehicle. Petitioner then pulled his car into the parking lot of a flower shop on Rivers Avenue. App. 5 – 7.

The officer requested Petitioner’s driver’s license and called for a “backup” officer to assist with the traffic stop. App. 8, lines 1 – 23. The officer also allowed his drug dog to sniff around Petitioner’s car for narcotics. App. 10. After he determined that Petitioner had no active warrants and the dog did not discover drugs, the officer issued a verbal warning to Petitioner for the license tag obstruction. App. 11.

However, as Petitioner walked into the flower shop where he had stopped, the backup officer looked into Petitioner’s car and claimed to see a gun lying underneath the driver’s seat. App. 12, lines 13 – 25. Petitioner was placed under arrest for unlawful carrying of a pistol. App. 13, line 16 – 17. Upon searching Petitioner’s vehicle after placing him under arrest, officers found 71.25 grams of cocaine inside the center console for which Petitioner was charged. App. 119, lines 2 – 6.

### **PCR Hearing**

Petitioner testified during the PCR hearing. Petitioner recalled that during trial, defense counsel “allowed the judge to go into the jury room.” App. 312, lines 6 – 7. Petitioner indicated

that the judge went into the jury room to tell the jurors that they could go to lunch. App. 312, lines 10 – 11. Petitioner contended he “didn’t feel that the judge should have went back there by [herself]” and defense counsel failed to object when the judge entered the jury room. App. 312, lines 15 – 18.

Defense counsel could not recall the judge entering the jury room during trial. App. 8 – 13. Counsel stated that if she “felt like the judge had done something inappropriate with the jury panel, [she] would have objected.” App. 323, lines 8 – 13. However, she did not “distinctly remember that one.” App. 323, lines 15 – 16.

### **Order of Dismissal**

The PCR judge dismissed Petitioner’s application. App. 347. The judge found that Petitioner’s claim had no merit. App. 346. The judge also wrote that Petitioner “failed to carry his burden of proving counsel ineffective in this regard.” App. 346.

### **Discussion**

The trial judge erred by finding trial counsel provided effective representation where counsel failed to object and move for a mistrial when the trial judge improperly entered into the jury room during trial to release the jury for lunch.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, a court will

conduct a two-prong test when determining whether trial counsel's assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. *Id.* 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 (quoting Strickland, 466 U.S. at 688).

Second, the applicant must show that counsel's "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.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

A criminal defendant is constitutionally guaranteed a fair trial by an impartial jury. U.S. Const. amend. VI; U.S. Const. amend. XIV. To fully safeguard this protection, the jury must "render its verdict free from outside influences." State v. Cameron, 311 S.C. 204, 428 S.E.2d 10 (Ct. App. 1993). In addition to a fair trial, a criminal defendant is entitled to be present at **all** stages of trial. State v. Ravenell, 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010). See State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) (holding that the trial judge's entering the jury room regardless of whether counsel is present is "reversible error"), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Here, counsel should have objected to the trial judge entering the jury room during trial. The judge's presence in the jury room no doubt intimidated the jury. Because the trial judge entered the jury room without counsel present, there is nothing in the record which reveals the actual

communication between the judge and the jury. Petitioner had no knowledge of what was said in the jury room.

Had trial counsel objected to the judge entering the jury room and moved for a mistrial, the issue of whether it was improper for the trial judge to enter the jury room without counsel or Petitioner present would have been preserved for appellate review. See Wigington v. State, Op. No. 5340 (S.C. Ct. App. filed Aug. 12, 2015) (Shearouse Adv. Sh. No. 31) (reversing the PCR judge's finding that trial counsel was not ineffective where Petitioner was entitled to jury instruction on involuntary manslaughter but counsel failed to properly preserve that issue for appellate review). If counsel had objected, the judge would have asked the jury to return to the courtroom where she could have addressed the jurors in the presence of counsel and Petitioner. There is a reasonable probability that the jury would not have been intimidated and influenced by the trial judge's appearance in the jury room and the result of Petitioner's trial would have been different.

CONCLUSION

For the reasons argued above, Petitioner Terrance Johnson respectfully requests this Court to grant his petition for writ of certiorari with the ultimate relief of a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Butler', written over a horizontal line.

Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of August, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO CHARLESTON COUNTY  
STEPHANIE P. MCDONALD, CIRCUIT COURT JUDGE

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TERRANCE JOHNSON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT

APPELLATE CASE NO. 2015-000146

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PETITION TO BE RELIEVED AS COUNSEL

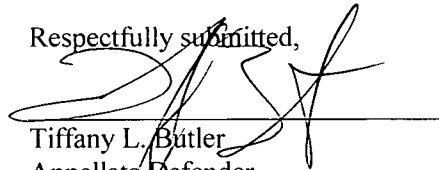
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Counsel for Terrance Johnson states:

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 November 21, 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 Terrance Johnson.

Respectfully submitted,



Tiffany L. Butler  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 26th day of August, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Charleston County

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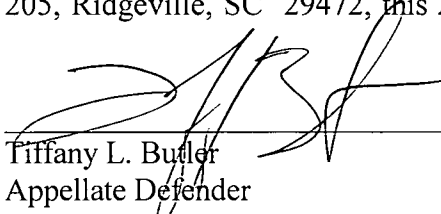
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CERTIFICATE OF SERVICE

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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 J. Rutledge Johnson, Esquire at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Terrance Johnson, # 156066, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of August, 2015.

  
Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day  
of August, 2015.

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

My Commission Expires: October 30, 2022.