

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

AUG 26 2015

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Certiorari to Greenville County

**S.C. Supreme Court**

Daniel D. Hall, Circuit Court Judge  
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KENDRICK LITTLEJOHN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000~~772~~ 773

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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BENJAMIN JOHN TRIPP  
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Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether the record supports the PCR court's conclusion that trial counsel was not deficient for failing to adequately prepare Petitioner's case and call a witness to support his defense.

## STATEMENT

On August 24, 2010, the Greenville County Grand Jury indicted Petitioner Kendrick D. Littlejohn for assault and battery with intent to kill and second degree lynching. App. 317—App. 320. On April 26, 2011, Petitioner proceeded to trial before The Honorable Edward Miller and a jury. Darren Haley represented Petitioner and Katryna Salisbury represented the State. App. 1.

The State alleged that in April of 2009, a federal ATF agent attempting an undercover gun transaction in the Dixie Estates neighborhood was attacked by a number of men including Petitioner. App. 53, line 24—App. 54, line 20. The agent testified that although he had previously discussed making such a transaction with Petitioner in the area, he could not specifically remember the attack itself or aver that Petitioner actually attacked him. App. 59, line 20—App. 76, lines 19. After the State presented its case, trial counsel rested Petitioner's case without presenting any evidence. App. 162, lines 14-16. The jury found Petitioner guilty, and the trial judge sentenced him to twenty years' incarceration suspended to the service of fourteen years with five years of probation for the assault and battery charge and ten years' consecutive incarceration suspended to five years of probation for the lynching charge. App. 214, lines 9-15; App. 222, line 16—App. 223, line 4.

On May 2, 2014, Petitioner filed an application for post-conviction relief (PCR) claiming ineffective assistance of counsel. App. 225—App. 235. The State filed a return on October 21, 2014. App. 236—App. 240. On February 17, 2015, Petitioner appeared at an evidentiary hearing before The Honorable Daniel D. Hall. Daren C. Ratigan represented Petitioner and R. Mills Ariail, Jr. represented the State. App. 241.

Petitioner testified that while he was present in Dixie Heights at the time of the attack, a large number of people were at the scene, and he was not with the perpetrators. App. 272, lines 2-

10. He also discussed trial counsel's shortcomings in investigating his case. He explained that trial counsel was appointed late in his case after another attorney was relieved. The first attorney only met with Petitioner to turn over discovery materials. Thereafter, trial counsel only visited Petitioner in jail to discuss the case one time. App. 253, lines 5-13; App. 254, lines 11-13; App. 255, lines 2-9. Petitioner moved into evidence a copy of an ATF report that he received in his discovery materials. App. 248, lines 4-10; App. 303—App. 308. The report discussed a second ATF agent had witnessed Petitioner in the Dixie Estates area around the time of the attack. App. 307. Petitioner testified that he asked trial counsel to subpoena the second agent “[b]ecause he could have showed . . . that [Petitioner] never assaulted this individual.” App. 261, lines 5-12. However, trial counsel never did. App. 260, lines 11-25. Trial counsel testified and confirmed Petitioner's contention all along had been that he was not involved with the attack. App. 278, lines 21-25. When asked about a second ATF agent, trial counsel did not recollect whether of the discovery materials referred to one. App. 279, lines 14-19.

On March 4, 2015, the PCR court issued an order dismissing Petitioner's application. App. 309—App. 316. The court noted that Petitioner did not know the informant's name; trial counsel did not recall discussing the informant; no witnesses corroborated Petitioner's account of the attack; and trial counsel stated he would have advised against calling any witness at trial. Based thereon, the order stated trial counsel articulated a valid reason for failing to call the witness and was not deficient. App. 313-314.

## ARGUMENT

**Counsel's performance was deficient due to his failure to investigate and call the second ATF agent to testify, which was unreasonable based on the record.**

Counsel's performance was deficient due to his failure to investigate and call the second ATF agent to testify, which was unreasonable based on the record. "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)). Counsel must be found deficient when "the trial transcript and . . . PCR testimony inescapably point to the conclusion that [counsel] simply had not adequately prepared the defense case." *Lounds* at 462, 670 S.E.2d at 650.

In this case, trial counsel's failure to investigate and call the second ATF agent was unreasonable. Trial counsel should have understood the substantial evidentiary value in investigating and calling the agent. Trial counsel testified he understood Petitioner's explanation that a large number of people were at the location of the attack and Petitioner was not involved. Considering in addition that the first agent could not specifically remember the attack itself or aver that Petitioner actually attacked him, arguing that the State's case was based on mistaken observations of Petitioner's participation was the best defense. Indeed, Petitioner testified that he

specifically asked trial counsel to subpoena the agent “[b]ecause he could have showed . . . that [Petitioner] never assaulted this individual.”

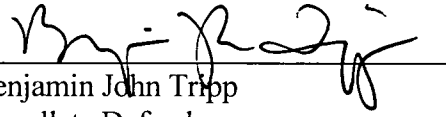
Nevertheless, the record shows trial counsel never made an affirmative, reasoned decision not to investigate or call the second agent. At the PCR hearing trial counsel admitted he did not even recollect that the ATF report referred to the second agent. The record shows he failed to investigate the second agent because he was appointed late in Petitioner’s case and only visited Petitioner in jail to discuss the case one time.

Thus, the PCR court’s reliance on, inter alia, trial counsel’s failure to recollect the second agent as evidence that counsel reasonably chose not to call him as a witness was nonsensical. Similarly, Petitioner’s inability specifically to provide the agent’s name was irrelevant to whether trial counsel’s decision was reasonable. Further, the court’s reliance on the finding that trial counsel believed no witnesses corroborated Petitioner’s account of the attack was misplaced because trial counsel failed to investigate the one person Petitioner asserted could verify his account. In this manner the evidence in the record uniformly supports the conclusion that trial counsel was not reasonable in failing to investigate and call the second agent contrary to the order dismissing Petitioner’s application.

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that the Court grant his 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 26th day of August, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO GREENVILLE COUNTY  
DANIEL D. HALL, CIRCUIT COURT JUDGE

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KENDRICK LITTLEJOHN,

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STATE OF SOUTH CAROLINA,

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APPELLATE CASE NO. 2015-000772

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PETITION TO BE RELIEVED AS COUNSEL

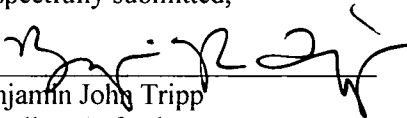
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Counsel for Kendrick Littlejohn states:

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 February 17, 2015. 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 Kendrick Littlejohn.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 26th day of August, 2015

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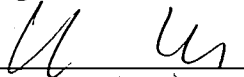
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CERTIFICATE OF SERVICE  
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire and Kendrick Littlejohn, #346082, at Perry Correctional Institution this 26th day of August, 2015.

  
Benjamin John Tripp  
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: May 12, 2025.