

STATE OF SOUTH CAROLINA  
County of SPARTANBURG

THE SUPREME COURT OF SOUTH CAROLINA

David Roy Lynch

Appellate Case No. 2015-001874

**RECEIVED**  
Appellant,

vs

FEB 12 2016 APPELLANT OBJECTION TO

JOHNSON PETITION TO BE

STATE OF SOUTH CAROLINA **S.C. SUPREME COURT** RELIEVE OF COUNSEL

Respondent.

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This matter comes before the Court as an Objection to JOHNSON brief filed January 8, 2016 by Appellate defender Benjamin John Tripp, esq., of the South Carolina Commission on Indigent Defense. Applicant asserts that the appellate defender should be held ineffective, more importantly, his petition to be relieve as counsel should be denied.

#### STATEMENT OF THE CASE

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the August 2005 term of General Sessions for assault and battery with intent to kill (ASWIK) (05-GS-42-3565), and murder (05-GS-42-3566). In January 2006, the Applicant was indicted for one count of armed robbery (06-GS-42-3826). The Applicant was represented by Scott D. Robinson, esq., On January 10, 2007, the Applicant proceeded to trial and was found guilty of all charges as indicted. The Applicant was sentenced by the Honorable J. Derham Cole to

confinement for a period of life for murder, and concurrent terms of thirty (30) years for armed robbery and twenty (20) year for ABWIK.

A timely Notice of Appeal was filed on Applicant's behalf and an Anders brief was filed by Joseph K. Savitz, III, esq. The South Carolina Court of Appeals dismissed Applicant's appeal, State v. Lynch, Op. No. 2011-UP-251 (S.C. Ct. App. filed May 24, 2011). The Remittitur was issued on June 10, 2011.

The Applicant filed an application for post-conviction relief on December 12, 2011. The Respondent made its return on September 11, 2012. An evidentiary hearing was held on March 25, 2015 at the Spartanburg County Courthouse. The Applicant was present and represented by Leah Moody, esq. Suzanne H. White, esq., of the South Carolina Office of the Attorney General represented the Respondent.

## II.

Appellant objects to Tripp's petition to be relieved as counsel of record, and that the granting of Tripp's petition would deny Appellant's right to effective assistance of appellate counsel on his last appeal of right.

Benjamin John Tripp, esq. was appointed to represent Appellant on Collateral appeal. On January 8, 2016, Tripp filed a no merit appeal pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) claiming the appeal is without legal merit sufficient to warrant a new trial while subsequently motioning this Court to

be relieved of counsel.

Appellant objects to Tripp's petition to be relieved as appellate counsel on the grounds that there is meritorious and substantive issues available and unbriefed that was properly preserved for appellate review from post-conviction hearing.

Appellant asserts he has a right to the effective assistance of appellate counsel on his collateral appeal as a matter of right. Tripp should not be relieved as counsel and this court should order Tripp to brief the substantive issues Appellant has raised and ruled on in the PCR order.

Appellant believes Tripp's petition to be relieve of counsel should be denied and Tripp should be ordered to redraft Appellant's brief to contain the underlying substantive issues.

### III.

Accordingly, the Sixth Amendment as applied to the States through the Fourteenth Amendment, guarantees a criminal defendant the right to counsel on his first appeal as of right. See Douglas v. California 372 U.S. 353, 356, 83 S.Ct. 814 (1963). It also, guarantees effective assistance of counsel, Lucy v. Ewitts, 469 U.S. 396, 105 S.Ct 830 (1985).

In Jones v. Barnes 463 U.S. 745, 103 S.Ct 3308, 3311, the Court held that since Anders v. California 386 U.S. 738,

87 S.Ct 1396 (1967) the court has held that since, Anders bars counsel from abandoning a non-frivolous appeal, it also bars counsel from abandoning a non-frivolous issue on appeal. Moreover, the Court held that an appointed attorney must advocate his clients cause vigorously and may not withdraw from a non-frivolous appeal... appointed counsel must present on appeal [all] non-frivolous arguments requested by his client.

#### IV

The Supreme Court of South Carolina entered a Order January 11, 2016, and undeniably advised Applicant that he "may, within forty-five (45) days of the date of this letter, file with this Court a pro-se response to the petition filed by your counsel."

Further this Court should reconsider and due to the fact that any issues the applicant draft would be rejected because it will be "hybrid representation". Moreover, the majority of the issue raised at PCR and in the order would be dismissed on procedural grounds (procedural default for failure to exhaust) and while the pro-se brief would be rejected by any other court, The United States Supreme Court decided Martinez v. Ryan, \_\_\_ S.Ct. \_\_\_, 2012 WL 912950 (U.S) articulating that the AEDPA did not bar petitioner from using ineffectiveness of Martinez's post-conviction relief counsel to establish "cause" for his procedural default and in that case remand was necessary to determine where Martinez's attorney in his first state

collateral proceeding was trial counsel claims were substantial and whether Martinez was prejudiced.

Judicial efficiency and finality are important values, however, in the instant matter, Tripp has abandoned substantive meritorious issues, that in granting Tripp's petition to be relieved as counsel will result in a denial of effective assistance of counsel on collateral appeal and a denial of due process.

### Conclusion

The attached memorandum are the substantive claims that Tripp has abandoned to raised pro-se herein the instant pro-se Johnson brief.

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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

FEB 12 2016

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Certiorari to Spartanburg Court  
Roger L. Couch, Circuit Court Judge

S.C. SUPREME COURT

David Roy Lynch,

Petitioner,

v.

State of South Carolina,

Respondent

APPELLATE CASE NO. 2015-001874

\_\_\_\_\_  
~~MEMORANDUM FOR WRIT OF CERTIORARI~~  
\_\_\_\_\_  
\_\_\_\_\_

DAVID ROY LYNCH #270223  
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Appellant objection to <u>Johnson</u> petition	

## ISSUE PRESENTED

Argument One: That the PCR Court erred when it relayed upon trial counsel testimony that the all white jury was a 'fair cross-section' of the community and 'the jury composition in this case was fair.'

Argument Two: That the PCR Court erred when the State's closing argument did infringe upon Petitioner's right to a fair trial.

Argument Three:

I. That the jury instruction upon each Indictment stood, was given an alternative; such instruction rendered the jury of its ability to hesitate to act upon the facts

II. Did the Petitioner have fair notice of the charge against him?

## STATEMENT

On August 25, 2005, the Spartanburg County Grand Jury indicted Petitioner David Roy Lynch for murder, assault and battery with intent to kill, and armed robbery. App. 499 - App. 504. On January 8, 2007, Petitioner proceeded to trial before The Honorable J. Derham Cole and a jury. Scott Robinson represented Petitioner and Derrick Balsa represented the State. App. I.

The State alleged that on December 30, 2004, Petitioner was riding in a car through a residential area of Greer with some friends looking for drugs. As the car approached a man parked in the street on the phone, Petitioner and a co-defendant, Antwon Salters, got out of the car, walked to the parked car, and shot the man inside while robbing him of a cell phone and ring. A bystander attempting to flee was also shot. Petitioner's defense was that he was merely present with Salters and had no intention, plan, or responsibility for the shootings. App. 453, lines 15-23. In his opening statement, Petitioner's trial counsel told the jury that Salters was solely responsible for shooting the victims, and he had already pled guilty to the murder, robbery, and assault and battery. App. III, lines 6-13.

The State adduced no eyewitness or forensic evidence showing Petitioner fired a gun at either victim. Evidence was presented that Salters told a witness he shot the deceased victim. Evidence was also presented that Petitioner voluntarily approach the police to cooperate,

including by leading them to areas around the shooting where evidence was discarded. App. 208, lines 13-20; App. 243, lines 9-14; App. 269, line 1 - App. 270, line 11. In her closing argument, the Solicitor for the State argued to the jury that whether or not Petitioner pulled the trigger, he was guilty under the theory of hand-of-one-is-the-hand-of-all. She then told the jury, "Antwon Satters pled guilty, as Mr. Robinson told you in his opening, under the theory of the-hand-of-one-is-the-hand-of-all." Petitioner's trial counsel did not object. App. 329, line 4-18,

## Argument One:

That the PCR Court erred when it relied upon trial counsel testimony that the all white jury was a "fair cross-section" of the community and 'the jury composition in this case was fine.'

### Fact

At PCR, trial counsel responded: "just because a jury is all white does not mean he's not gonna get a fair trial. It doesn't. And the jury composition that we had reflected the composition of the, as far as racial percentage in Spartanburg county, the jury that we chose did not have any law enforcement on it." App. 465, ll. 2-7. (The incident happen in a all black community).

### Analysis

In Taylor v. Louisiana 419 U.S. 522, 92 S.Ct 692 (1975) held that the exclusion of women or other "large, distinctive groups" from the venire is unconstitutional. Equal protection under the Fourteenth Amendment is denied if the process excludes a racial or ethnic group.

The Petitioner is a African-American male, and the government use of its peremptory challenge to exclude the only black juror (on the basis of race) is an unconstitutional denial of equal protection. Batson v. Kentucky 476 U.S. 79, 106 S.Ct 1712 (1986).

## Discussion

An overarching constitutional issue in the Petitioners case is the abject failure of trial counsel to make the slightest effort to screen the jury venire pre-trial by the use of a juror investigator. This was a trial pregnant with the assurance that Petitioner would be sentenced to life - without parole, if convicted.

To incalculably magnify counsel's already - egregious failure to conduct any pre-trial investigation of potential jurors, he engaged in no individualized examination of prospective jurors following the court's traditional voir dire. Even his participation in standard voir dire was merely superficial and cursory at best. See App. 16 through App. 36.

Aside from mandatory voir dire the entire trial jury was selected in 0 minutes of individualized examination. State more clearly, the jury selection was abrogated from the trial transcript, thus, magnify the grounds of a denial of equal protection or a violation of the Sixth Amendment guarantee of a "fair cross-section" of the community and the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review. State v. Ladson No. 4232, April 9, 2007.

~~Argument:~~

~~That the PCR Court erred when the State's closing argument did infringe upon Petitioner's right to a fair trial.~~

~~Facts:~~

~~"Anton Satters pled guilty, as Mr. Robinson told you in his opening, under the theory the hand of one is the hand of all. That's the same theory that he's being tried under."~~

~~Analysis~~

~~Analysis~~

~~In contravention of Chambers v. Mississippi 410 U.S. 754, 93 S.Ct. 1038 (1973) and the fundamental concept of Constitutional Due Process, the prosecution in the Petitioner's case deliberately compromised the integrity of the fact-binding and truth-seeking process. This justice subverting strategy deprived the Petitioner of any ability to mount a complete defense.~~

## Argument Two:

"That the PCR Court erred when the State's closing argument did infringe upon Petitioner's right to a fair trial.

## Facts

"Antwon Salters pled guilty, as Mr. Robinson told you in his opening, under the theory the-hand-oh-one-is-the-hand-oh-all. That's the same theory that he's being tried under."

## Analysis

In contravention of Chambers v. Mississippi 410 U.S. 784, 93 S.Ct 1038 (1973) and the fundamental concept of Constitutional Due Process. The prosecution in the Petitioner's case deliberately compromised the integrity of the fact-finding and truth-seeking process. This justice-subverting strategy deprived the Petitioner of any ability to mount a complete defense.

## Discussion

The State plugged the large holes in its case with the dust of distraction. The State's closing stated conclusive that Petitioner's trial counsel, in its opening statement that his client is being charge under the theory the -hand-of-one-is-the-hand-of all. The Solicitor then, without any determination by the Court of the reason that the State could justify the Petitioner's under such liability. (The Petitioner was indicted August 25, 2005 in both accounts "did in Spartanburg, . . ." and not 'along with', therefore, changing theory of the case.)

It deliberately distract the jury from the facts of the case by impugning his credibility (in which he did not testify) with the introduction that 'along with' Artwon Salters who had 'violent tendencies' and Petitioner was the 'look out.' (The Record reflects that everyone heard Salters),

It deliberately distract the jury with an allegation of 'flight' only suggests some evidence of guilt, but not necessarily of murder itself.

## Argument Three I

That the jury instruction upon each indictment stood, was given an alternative; such instruction rendered the jury of its ability to hesitate to act upon the facts

### Facts

"Now, in this case the State alleges that the defendant, David Roy Lynch, is guilty of the crimes of murder, assault and battery with intent to kill, and armed robbery either as a principal or an accomplice."

App. 370 at line 3-6.

### Discussion

The underlying indictment was inherently defective by the Court's jury instruction, in that it declares the means of the crimes charge in the alternative, making impossible for the Petitioner to prepare an adequate defense. In South Carolina trial may be had by indictment only (or waiver thereof). State v. Tabory 202 S.E.2d 852 (1974). The indictment is a notice document but the defendant must be sufficiently and particularly advised of what he is called upon to answer and whether he may later plead an acquittal

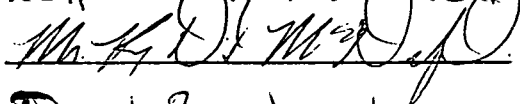
thereto. Trial counsel was ineffective for not demanding a Bill of Particulars to clarify "either as a principal or an accomplice." This was structural error, since the entire trial process depends upon the specificity of the terms of the indictment. (The indictment in this case did not allege: 'David Roy Lynch along with Antwon Salters did in Spartanburg County on or about...')

**II.** The Question is: Did the Petitioner have fair notice of the charge against him?

Even if the indictment is not fatally defective, the Court failed to charge the jury that it must unanimously decide the mean of Petitioner's culpability, so that, in case of acquittal, the defendant could not be re-indicted for murder by the other means. See U.S. v. Wiles 102 F.3d 1043, 1062 (10th Cir. 1996). The Court must instruct the jury that they must unanimously agree upon at least one means or method of Petitioner's position. Here, the Court gave two options: Principal or an accomplice to convict him,

## Conclusion

— for the foregoing reason, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,  


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STATE OF SOUTH CAROLINA  
County of SPARTANBURG

THE SUPREME COURT OF SOUTH CAROLINA

Appellant Case No. 2015-001874

David Roy Lynch  
Appellant,

CERTIFICATE OF SERVICE

v.

STATE OF SOUTH CAROLINA  
Respondent.

The undersigned hereby certifies he has served a true and correct copy of the enclosed memorandum for Writ of Certiorari and objection to Johnson Petition to be Relieved of Counsel on: Daniel E. Shearouse, Clerk, P.O. Box 11330, Columbia, South Carolina 29211

By placing a copy of the aforesaid in a properly addressed, first-class postage affixed envelope and placed in the U.S. Mail this      day of      , 2016

Respectfully Submitted,  
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