

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County

Honorable George C. James, Circuit Court Judge

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RALPH BEVERLY HAYES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001593

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Did the PCR judge err in refusing to find prejudicial deficient performance by trial counsel for failing to move to sequester the identification witness prior to the identification hearing and allowing the witness to hear the detective's testimony about the photo line-up procedure used and the identification of Petitioner?

## STATEMENT

In October of 2011, the Greenville County Grand Jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime, indictment #2011-GS-23-7681. On October 15, 2012, Petitioner proceeded to jury trial before the Honorable G. Edward Welmaker. Caroline Horlbeck and Teal Johnson represented Petitioner at trial. Judy Munson and Wanda Adams prosecuted the case. The jury returned verdicts of guilty as charged. Judge Welmaker sentenced Petitioner to life in prison for murder and five years for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. In November of 2014, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Hayes, Op. No. 2014-UP-385 (S.C. Ct.App. filed November 5, 2014). The South Carolina Supreme Court denied the petition for writ of certiorari on March 20, 2015.

On May 28, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on November 30, 2015. On June 14, 2016, an evidentiary hearing was held before the Honorable George C. James, Jr. Brian Johnson represented Petitioner at the PCR hearing. Patrick Schmeckpeper represented the State. In a written order signed July 22, 2016, Judge James denied relief and dismissed the application. A timely notice of intent to appeal was served on July 21, 2017. This petition for writ of certiorari follows.

## ARGUMENT

**The PCR judge erred in refusing to find prejudicial deficient performance by trial counsel for failing to move to sequester the identification witness prior to the identification hearing and allowing the witness to hear the detective's testimony about the photo line-up procedure used and the identification of Petitioner.**

Prior to trial the judge conducted an *in camera* identification hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972). (App. pp. 43-81). Detective Christopher Miller with the Greenville County Sheriff's Office testified about the procedure used in showing witness Larry White a photo-lineup which included a photo of Petitioner. (App. p. 44, line 21 – p. 49, lines 1-23). Witness White identified Petitioner from the photo line-up. (App. p. 48, lines 4-23). After Detective Miller testified, counsel for Petitioner moved to sequester witness White stating, "Judge, just as a preliminary matter, I would just ask that Mr. White leave. He's going to be testifying after Detective Miller. If we could sequester him and if we could sequester the witnesses throughout this trial. I failed to do that earlier, Judge." (App. p. 50, lines 4-9). The judge granted the sequestration motion. (App. p. 50, lines 10-11).

During the PCR hearing Petitioner testified that trial counsel was ineffective in failing to move to sequester witness White prior to Detective Miller's testimony during the identification hearing. (App. p. 478, line 17 – p. 479, 480, lines 1-8). In the order of dismissal the PCR judge wrote:

Applicant also alleged counsel was ineffective for failing to move to sequester witness White during *in camera* testimony of Detective Miller regarding the lineup and the identification made by witness White. Perhaps this was deficient performance in a general sense, as the very reason for sequestration is to make sure witnesses do not base their own testimony on the testimony of others. However, there is nothing in the record to establish whether White was paying close attention during the proffer or that he heard something from Detective Miller that changed his own testimony. White was very thoroughly cross-examined during his *in camera* testimony and in front of the jury. Applicant has failed to meet his burden to show prejudice.

(App. p. 528). The PCR judge erred.

In State v. Tisdale, 338 S.C. 607, 615–16, 527 S.E.2d 389, 394 (Ct. App. 2000), the South Carolina Court of Appeals wrote:

The trial court may order the sequestration of witnesses upon its own motion or by motion of any party. Rule 615, SCRE. A party is not entitled to have witnesses sequestered as a matter of right. The decision to sequester witnesses is left to the sound discretion of the trial judge. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980); State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct.App.1998) (allowing the State to recall a reply witness who was present in the courtroom during a portion of the trial). “Whether a witness should be exempted from a sequestration order is within the trial court's discretion.” Gattison v. South Carolina State College, 318 S.C. 148, 456 S.E.2d 414, 415 (Ct.App.1995) (citing Constant v. Spartanburg Steel Prods. Inc., 316 S.C. 86, 447 S.E.2d 194 (1994)).

The issue presented in this case is not that the trial judge abused his discretion in refusing to order sequestration. The trial judge granted the motion for sequestration, once the motion was made. The issue presented by the present case is trial counsel's failure to move to sequester witness White prior to Detective Miller's testimony. This was particularly prejudicial given the importance of White's identification and testimony to the State's case against Petitioner.

In June 2009, Larry White was living on the streets in Greenville. He chose to be homeless because he “like[d] to explore and go from state-to-state, seeing how other states [are] and then compare it to [his] state.” (App. p. 127, lines 10 – 18). White claimed that he talked to Petitioner on a particularly hot day in June as he sat on a shaded bench behind Able Body, a labor hall. He recalled it was a Sunday because Able Body was closed. He could not remember the date, but agreed with the prosecutor who suggested it was June 9, 2009.<sup>1</sup> (App. p. 127, lines 22 – 24. App. 128, lines 2-22. App. 130, lines 7 – 12). He saw a man, whom he identified as

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<sup>1</sup> June 9, 2009 was a Tuesday. App. 169, lines 7 – 13.

Petitioner, drinking a beer and crying. When White asked what was wrong, the man allegedly responded “I done fucked up bad, real bad.” (App. p. 128, line 24 – App. 129, line 3). White claimed Petitioner said, “It’s going to fuck my sister up when I tell her what I done.” (App. p. 129, lines 15 – 17). In response to White’s questioning, Petitioner explained “I went in the house and found my girl dead, man. The dope boys cut my girl all up, pulled her panties down to her ankles and put her in the bathtub.” (App. p. 129, lines 18 – 20; p 132, lines 12 – 14). Upon seeing the deceased, Petitioner ran out of the house. When White asked why he did not call the police, Petitioner responded that the police would think he had committed the crime because it was his girlfriend. (App. p. 129, lines 21 – 24; Tr. 131, lines 15 – 24).

Even on direct examination, White admitted that Petitioner did not state that he had hurt the deceased or committed the crime. White related only that Petitioner continued to cry during their conversation. (App. p. 130, lines 1 – 12). The prosecutor continued to press White regarding what Petitioner could have done that was so bad. (App. p. 130, lines 13 – 14). White responded that Petitioner “hesitated for a while,” then looked at White, “did like this on the table,” and said “but you ain’t never killed nobody.” (App. p. 130, lines 15 – 18; p. 143, lines 12 – 16).

White further claimed that Petitioner said he was going to Kentucky and had purchased a bus ticket for the trip. Although White was unable to see the location or the time on the ticket, he did observe a Greyhound bus ticket in Petitioner’s possession. (App. p. 131, lines 2 – 5; p. 177, lines 10 – 12; App. 177, lines 16 – 22).<sup>2</sup>

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<sup>2</sup> An officer testified that in September 2010, he picked up Petitioner from New York and returned him to Greenville, South Carolina. App. 108, line 5 – App. 109, line 16.

A couple of days later, White overheard other people discussing the murder of a young lady while at the labor hall. The people explained that she had been “cut up and stabbed real, real bad.” (App. p. 135, lines 17 – 22). Upon hearing that a woman had been stabbed, White thought of his alleged conversation with Petitioner. (App. p. 135, line 24 – p. 136, line 4). White was forced to admit that in addition to overhearing the conversation among other homeless individuals regarding the murder, he also saw police officers showing a photograph of an individual and asking for help to solve a crime. (App. p. 143, line 17 – p. 144, line 10). White, however, denied ever seeing the photograph. (App. p. 149, lines 1 – 4; p. 152, lines 1 – 7). Despite this assertion at trial, White was forced to admit that he told police he “did not really look at the picture at first” when the officers were displaying it. (App. p. . 153, lines 11 – 18; p. 159, lines 10 – 16). Additionally, White informed police that he told the employee of the labor hall that the man in the photograph shown by the police was the same man he had talked to a week earlier. (App. p. 155, lines 10 – 15; p. 159, lines 17 – 24).

Sometime later in the month of June, White asked an employee of the labor hall to call the police. Although White was unable to recall when he actually spoke to the police or even when he decided to speak to the police, he agreed with the prosecutor that it was probably around June 18, 2009. White gave a formal statement at the conclusion of his two to four hour interview. (App. p. 136, lines 4 – 9; lines 12 – 23; p. 137, lines 18 – 20). White testified his formal statement provided a true and accurate account of his conversation with Petitioner. (App. p. 138, lines 9 – 22; p. 143, lines 5 – 10). White selected Petitioner’s photograph from a photographic lineup. (App. p. 139, lines 5 – 8; p. 140, lines 10 – 21). Additionally, White identified Petitioner in court. (App. p. 141, lines 18 – 23). White claimed that he got involved in the case because he was “brought up in a church” and “brought up to do the right thing.” (App. p.

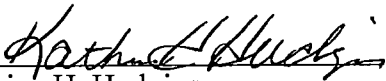
144, lines 21 – 22). No physical evidence connected Petitioner to the murder, making White's identification and testimony critical.

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, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

Trial counsel was deficient for failing to move to sequester witness White prior to Detective Miller's testimony during the identification hearing. Petitioner was prejudiced by the deficient performance. White's identification of Petitioner and testimony was critical to the State's case. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

**CONCLUSION**

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

  
Kathrine H. Hudgins  
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of February, 2018.

STATE OF SOUTH CAROLINA

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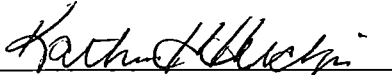
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Ralph Beverly Hayes states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge George C. James, which was held on June 14, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve her as counsel for Ralph Beverly Hayes.

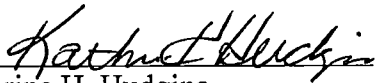
Respectfully Submitted,

  
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Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 26th day of February, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
Kathrine H. Hudgins  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 26th day of February, 2018.

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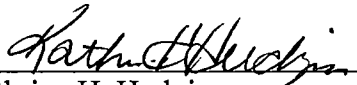
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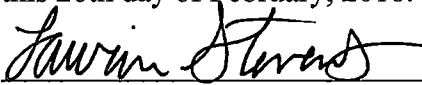
RESPONDENT

—————  
CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Ralph Beverly Hayes, #320369, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of February, 2018.

  
Kathrine H. Hudgins  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 26th day of February, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.