ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Williamsburg County

Honorable D. Craig Brown, Circuit Court Judge

MARTY BAGGETT,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002413

JOHNSON PETITION FOR WRIT OF CERTIORARI

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## ISSUE PRESENTED

Whether the court erred in finding trial counsel provided effective representation where counsel did not move to suppress petitioner's statements to law enforcement that he was too drunk to drive, since petitioner's state of intoxication precluded him from having the mental capacity necessary for a voluntary statement?

## STATEMENT

On Wednesday, March 8, 2007, Carolina Jones was driving down Clare Road in Williamsburg county to take her cousin some barbeque sauce when she saw petitioner's white pickup truck blocking the road. App. 127, ll. 20-25; App. 129, ll. 14-18. "I couldn't get by and at the time, I pulled up, I blowed my horn and I asked him could I get by and he said no, he found a dead body there." App. 129, ll. 18-20. Jones said petitioner was "staggering around and he was just really repeating the same thing over again about the dead body and don't leave." App. 130, l. 24 – 131, l. 1. She saw the body "laying in the road." App. 132, l. 10. Jones said she asked petitioner if he called 911, he said he had not, and that he had to call someone else first. App. 136, ll. 12-13. Jones told petitioner "that [she] was going home to call 911," and she did so. App. 136, ll. 23-25.

Law enforcement responded, and Petitioner was arrested for DUI at the scene. App. 205, ll. 4-6. However, police never offered petitioner a breath test, and did not attempt to take him to the hospital for a blood draw or urine sample. App. 205, ll. 1-14; App. 220, l. 25 – 221, l. 1. "[T]he BA machine, I think it was down at that time." App. 225, l. 4. Nor was a video recording done. App. 321, ll. 7-8. The DUI turned into a murder investigation—the DUI was dismissed and petitioner was charged with murder and kidnapping. App. 219, ll. 1-23; App. 183, ll. 183, ll. 6-10. The murder and kidnapping charges were later nolle prossed. App. 592, ll. 5-9. The state indicted petitioner for felony DUI and reckless homicide. App. 681 – 684.

Petitioner proceeded to trial before the Honorable George C. James, Jr., and a jury. App. 1. Petitioner was represented by Sam Floyd. App. 1. Then-Assistant Attorneys General Dale Scott and David Stumbo represented the state. App. 1.

The pathologist who performed the autopsy determined that Jean Turner died from head trauma, likely due to being run over by a vehicle. App. 266, ll. 16-18. Turner chronically abused alcohol and had been drinking on the day of her death. App. 265, ll. 11-13; App. 27, ll. 1-5. The autopsy revealed that at the time of her death, Turner had a blood alcohol concentration of .387. App. 263, ll. 22-23. Trial counsel described how Turner came to be run over as an "unsolved mystery," and police admitted they did not know how she wound up outside of the vehicle that ran over her. App. 629, ll. 11-12. App. 213, ll. 21-24; The pathologist did not classify Turner's death as accident or homicide, and instead listed it as undetermined. App. 258, ll. 3-10.

Corporal Vincent Staggers responded to the scene. App. 152, ll. 4-8. He said petitioner "seemed to be unsteady on his feet," and "had an odor of alcoholic beverages on his person." App. 153, ll. 13-14. Staggers said he read petitioner *Miranda*[1] warnings, and petitioner told him: "Ms. Turner was driving the vehicle and that she suddenly fell out of the truck." App. 153, l. 24 – 154, l. 1; App. 155, ll. 15-16. Corporal Staggers said he did not perform any field sobriety tests on petitioner because: "He was unsteady on his feet and it was not safe to conduct that at the time." App. 160, ll. 12-20.

Investigator Steve Boston also spoke to petitioner at the scene. App. 176, ll. 7-8. Boston said he read petitioner *Miranda* warnings, and: "**He said he was too drunk to drive**, so he let Ms. Turner drive and stated that once they went down Clare Road . . . she just fell out of the truck . . ." App. 177, ll. 9-12 (emphasis added). Boston said he could "smell alcohol on" petitioner, and he appeared "very intoxicated." App. 178, ll. 14-19. Petitioner was taken to the Hemingway police department and gave a similar statement to Investigator Boston after being read *Miranda* warnings again. App. 180, l. 25 – 181, l. 13. Petitioner then asked for an attorney

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[1] *Miranda v. Arizona*, 384 U.S. 346 (1966).

and was charged with DUI. App. 181, l. 12-24. Investigator Boston said: "The **basis of the DUI charge, is he was, from my investigation, that he was drinking from his own admittance** at the time." App. 182, ll. 2-5 (emphasis added). **He admitted he was "too drunk to drive."** App. 182, ll. 6-17 (emphasis added).

Investigator Boston said they sought to question petitioner again the next day "since he sobered up he would be able to remember what happened." App. 183, ll. 20-24. He was again read *Miranda*, and again provided a similar statement—that Turner was driving and fell out of the truck. App. 184, l. 1 – 185, l. 5. During that interview, petitioner said that "he tried to pick her up two or three times, but he don't actually remember what happened because he was too drunk." App. 186, ll. 17-19. Petitioner's last statement, given to Investigator Boston, was transcribed and submitted into evidence. App. 185, ll. 13-22. Trial counsel did not object to the introduction of petitioner's March 9, 2007, statement. App. 164, l. 21 – 166, l. 13; App. 72, l. 22 – 73, ll. 16.

The day of the incident, Turner and her long-time romantic partner Rod Garris went to the Kangaroo convenience store at 3:00 pm and bought beer. App. 25, l. 5 – 26, l. 2. They drank behind a beauty shop before going to the home of the Evans brothers where they "walked around the yard," and caught a ride "to Westside to get another beer." App. 28, ll. 4-13. App. 27, ll. 12-14. Garris went into the Westside grocery and got more beer while Turner stayed outside. App. 60, ll. 24-25; App. 61, ll. 11-16.

Petitioner drove up and started pumping gas. App. 61, ll. 18-23. Petitioner began talking with Turner—he was shaking his hand in her face and she was smiling. App. 61, l. 23 – 62, l. 1; App. 62, ll. 20-24. Petitioner knew Garris because Garris used to drive petitioner's school bus. App. 30, ll. 7-10. Petitioner offered Turner and Garris a ride home. App. 47, ll. 24-25; App. 30,

ll. 15-21; App. 630, ll. 4-6. However, the three wound up "driving around all over Williamsburg county." App. 37, ll. 3-5.

Garris, Turner, and petitioner got in petitioner's truck and went to the liquor store across the street. App. 31, ll. 20-22. Garris said petitioner purchased a bottle of Smirnoff, but the store owner said he purchased a bottle of Lord Calvert. App. 33, ll. 8-13; App. 68, ll. 16-21. At trial, Garris claimed petitioner stopped at one point, and said: "[Y]'all not getting out of this truck til you drink the rest of the liquor," so they "finished the liquor." App. 35, ll. 15-20.

Garris claimed for the first time at trial that while he was urinating in a field, petitioner "backed up real quick and I had to jump into a ditch" to "get out of his way." App. 37, ll. 14-20; App. 49, l. 21 – 50, l. 4. Nevertheless, Garris said he got back in the truck. According to Garris, petitioner stopped the truck by Turner's driveway, Garris got out, and had Turner by the hand when petitioner got her "by the bra" and "pulled her trying to keep her in the truck." App. 38, ll. 14-23. According to Garris, petitioner left with Turner, and backed the truck into him, knocking him down and running over his arm and face. App. 38, l. 25 – 39, ll. 8; App. 53, ll. 10-22. Police officers saw no evidence of this, and Garris never alleged to law enforcement that petitioner ran over him. App. 188, l. 11 – 189, l. 6.

Garris did not call 911, and instead got a ride home from Turner's mother. App. 41, ll. 4-10. Garris said he did not call the police because "knowing her," he thought Turner "would jump out of the truck." App. 45, l. 24 – 46, l. 10.

The defense theory of the case was that Turner "was so intoxicated that she fell out of the truck and got run over." App. 644, ll. 9-11. There were no "bumper abrasions" on Turner's legs that would indicate she had been knocked down, and the police did not attempt to lift fingerprints from the vehicle's steering wheel to determine whether Turner had been driving the truck before

she was run over. App. 641, l. 5-12; App. 191, l. 8 – 192, l. 2. "[T]here were no bumper bruises, nobody knew what happened, everybody's intoxicated." App. 641, ll. 22-24. The state's evidence "wasn't overwhelming." App. 644, ll. 13-15. Trial counsel later testified: "I don't think anybody truly knows what happened that night to be honest with you."[2] App. 644, ll. 15-17.

Trial counsel did not object to the state admitting petitioner's verbal statements through the testimony of police officers, or otherwise argue any of petitioner's statements were involuntary due to his level of intoxication. App. 637, ll. 9-12.

After the case had been submitted to the jury, it came back with a question: "is a test, you find that breath/blood done in order to prove felony DUI?" App. 422, ll. 17-20. The court recharged the elements of felony DUI and DUI. App. 423, l. 6 – 427, l. 4. The jury found petitioner guilty of felony DUI and reckless homicide and he was sentenced to imprisonment for concurrent terms of twenty years and ten years, respectively. App. 685 – 686.

Petitioner appealed his convictions and the Court of Appeals initially reversed his felony DUI conviction, finding the trial court should have directed a verdict in his favor because the state failed to present video of his conduct at the incident site. App. 485 – 487. However, after rehearing, the Court of Appeals affirmed petitioner's felony DUI conviction, finding that videotaping never became practicable, as officers were responding to reports of a dead body in the roadway rather than performing a traffic stop. App. 499 – 501. Petitioner's appellate counsel, Susan Hackett, petitioned for rehearing, but rehearing was denied. App. 516. Appellate counsel

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[2] The state introduced the testimony of a jailhouse informant. App. 243, ll. 10-20. The informant claimed that while sharing a cell, petitioner volunteered that Turner "got out of the car and started walking and he cranked the truck up and the truck, he started backing up and run over her." App. 244, ll. 12-16; App. 243, ll. 18-20.

filed a petition for writ of certiorari to the Court of Appeals, but this Court denied the petition. App. 561.

On December 5, 2016, petitioner filed an application for post-conviction relief (PCR). App. 563 – 573. On June 15, 2017, the state filed a return. App. 574 – 580. A hearing was held on the matter before the Honorable D. Craig Brown on July 25, 2017. App. 581. Lance Boozer represented petitioner and Julie Coleman represented the state. App. 581.

At the PCR hearing, petitioner testified he believed trial counsel should have attempted to suppress his statements as involuntary due to his level of intoxication. App. 602, ll. 1-20. Trial counsel testified that he did not move to suppress petitioner's statements,[3] and said he did not think he would have been successful. App. 637, ll. 8-15. Trial counsel said: "'Cause in a DUI, which is all he was charged with that night, he's supposed to be videotaped so the jury could see his statement. I mean, you know, in a DUI case which at that time that's all he's charged with, that's it, several days. And so, you know, I'm of the opinion that that statement would come in." App. 637, ll. 17-23. Trial counsel also noted police officers testified they read petitioner his *Miranda* rights. App. 637, l. 24 – 638, l. 4.

The PCR court denied petitioner relief. App. 661 – 680. In its order of dismissal, the court found trial counsel "was not deficient by not challenging the admissibility of the statements, as it appears they were voluntarily given based on the totality of the circumstances." App. 674. "This court further finds no prejudice resulting from the lack of challenge to the statements, as a motion to suppress likely would have been denied." App. 674.

This petition for writ of certiorari follows.

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3 PCR counsel erroneously stated that petitioner had a hearing pursuant to *Jackson v. Denno*. App. 601, ll. 22-24. However, trial counsel admitted he did not attempt to suppress petitioner's statements.

## ARGUMENT

The court erred in finding trial counsel provided effective representation where counsel did not move to suppress petitioner's statements to law enforcement that he was too drunk to drive, since petitioner's state of intoxication precluded him from having the mental capacity necessary for a voluntary statement.

Given the absence of blood, breath, or urine testing, the absence of video recording, and the absence of field sobriety testing, counsel was deficient when he did not move to suppress petitioner's statements to police that he was too drunk to drive.

The Sixth Amendment to the United States Constitution guarantees an accused 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 established a two-pronged test to evaluate allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced Petitioner. *Id.* at 687.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." *Jackson v. Denno*, 378 U.S. 368, 376 (1964) (internal

citation omitted). "Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." *Id.* at 376-77.

The use of a defendant's confession offends due process if his will has been overborne and his capacity for self-determination critically impaired. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973). "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226.

Proof that an accused was intoxicated at the time he made a confession renders the statement inadmissible as a matter of law, where the accused's intoxication is such that he did not realize what he was saying. *State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). In *Saxon*, this Court found a defendant's statement properly admitted by the trial judge because while there was "testimony that appellant had been drinking rather heavily and was not acting normally, there [was] other testimony from which the conclusion may be reasonably drawn that he was not drunk and fully comprehended what he was doing and saying." *Id.* at 529-30, 201 S.E.2d at 117.

Here, unlike in *Saxon*, there was no other testimony to support a conclusion petitioner was not drunk and fully comprehended what he was saying, when he spoke with officers the night of his arrest. The officers stated petitioner appeared intoxicated, even saying they wanted to re-interview him the next day when he would be "sobered up" and "able to remember what happened," despite basing his arrest in part on his statement that he was intoxicated.

The PCR court erred in finding counsel provided effective representation because the totality of the circumstances showed petitioner's statements were not voluntarily given. *Schneckloth* makes clear that in determining voluntariness, a totality of the circumstances enquiry assesses all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. The PCR court here did not consider that the "characteristics" of petitioner included his intoxication. Petitioner's intoxication rendered his confession that he was "too drunk to drive" involuntary.

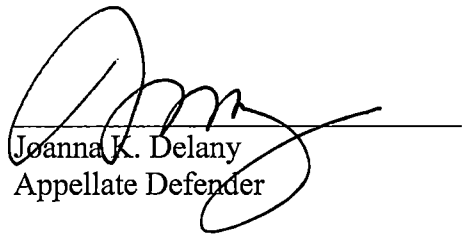
Petitioner submits counsel should have required the court to examine the voluntariness of his statements before the statements were admitted into evidence. Because trial counsel failed to raise this issue, the statements were heard by the jury. Trial counsel's failure to raise the issue also rendered it unpreserved for direct appeal, and that is why appellate counsel did not raise it at the Court of Appeals.

The prejudice to petitioner is evidenced by the jury focusing its critical attention on the lack of objective proof of petitioner's intoxication, as demonstrated by its question: "is a test, you find that breath/blood done in order to prove felony DUI?" *Rutland v. State*, 415 S.C. 570, 579, 785 S.E.2d 350, 354 (2016); *State v. Blassingame*, 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978) (when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked). There were no objective tests taken to measure petitioner's intoxication—no blood, breath, or urine. His conduct at the scene was not videotaped. The state relied on petitioner's admission that he was too drunk to drive and observations that he was unsteady on his feet and smelled like alcohol to prove intoxication.

Counsel was deficient for not moving to suppress petitioner's statements to law enforcement given the absence of blood, breath, or urine testing, the absence of video recording, and the absence of field sobriety testing. Petitioner's statements to police that he was too drunk to drive were critical evidence of his intoxication, an element of felony DUI. This deficiency prejudiced petitioner. *Strickland*, 466 U.S. at 687.

## CONCLUSION

By reason of the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT



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Certiorari to Williamsburg County

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MARTY BAGGETT,

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RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Marty Baggett 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 post-conviction relief hearing before Judge D. Craig Brown, which was held on July 25, 2017, 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 Marty Baggett.

Respectfully Submitted,

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

This 6th day of August, 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."

Joanna K. Delany
Appellate Defender

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ATTORNEY FOR PETITIONER

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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 Julie Coleman, 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 Marty Baggett, #216091, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 6th day of August, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of August, 2018.

Maria Mendez (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023