

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

ORIGINAL

\_\_\_\_\_  
Certiorari to Anderson County

Honorable Jocelyn J. Newman, Circuit Court Judge

RECEIVED

SEP 17 2018

S.C. SUPREME COURT

JOSE L. CABARRUVIAS,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-002516

\_\_\_\_\_  
JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

David Alexander  
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

**INDEX**

INDEX ..... i

ISSUE PRESENTED .....1

STATEMENT.....2

STANDARD OF REVIEW .....3

ARGUMENT

In this DUI case, trial counsel provided ineffective assistance  
inconsistent with the requirements of the Sixth Amendment  
because of their failure to investigate witnesses who would have  
proved that petitioner was a passenger in the vehicle and not the  
driver .....4

CONCLUSION.....7

PETITION TO BE RELIEVED AS COUNSEL .....8

**ISSUE PRESENTED**

In this DUI case, whether trial counsel provided ineffective assistance inconsistent with the requirements of the Sixth Amendment because of their failure to investigate witnesses who would have proved that petitioner was a passenger in the vehicle and not the driver?

## STATEMENT

On August 25, 2009, an Anderson County grand jury indicted petitioner for two counts of felony DUI resulting in great bodily injury and one count of felony DUI resulting in death. App. 464-72. On September 3, 2010, petitioner pled guilty without recommendation to all three charges. App. 2, ll. 2 – 7. The Honorable R. Lawton McIntosh took the plea. App. 1. Jennifer Byford represented the State. App. 1. Jennifer Johnson and David Stoddard represented petitioner. App. 1. Judge McIntosh sentenced petitioner to a total of twenty years' imprisonment. App. 35, ll. 4 – 9.

Petitioner filed an application for PCR and hearings were held on June 8, 2011, before the Honorable Alexander S. Macaulay, and on June 28, 2017, before the Honorable Jocelyn Newman. App. 112. App. 299. Daniel L. Draisen represented petitioner. App. 112. App. 298. Kaelon E. May and Megan Harrigan Jameson represented the State. App. 112. App. 299. On December 11, 2017, Judge Newman denied petitioner's application and this petition follows. App. 446.

## **STANDARD OF REVIEW**

The standard of review in PCR cases depends on the specific issue before the Court. A PCR court's findings of fact will be upheld if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Questions of law are reviewed de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). See also Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

## ARGUMENT

In this DUI case, trial counsel provided ineffective assistance inconsistent with the requirements of the Sixth Amendment because of their failure to investigate witnesses who would have proved that petitioner was a passenger in the vehicle and not the driver.

Trial counsel performed deficiently by accepting the State's version of the events of the car accident which resulted in a fatality without fully investigating. The State charged petitioner with felony DUI resulting in death after a crash on Highway 29 in Anderson County. App. 23, l. 13 – 24, l. 22. The State alleged that petitioner was driving a van too fast for the rainy conditions and lost control. App. 23, l. 13 – 24, l. 22. The van “hydroplaned,” crossing the center line and crashing head-on into another car carrying three people. App. 23, l. 13 – 24, l. 22. Two of these people were injured and another died. App. 23, l. 13 – 24, l. 22.

The State had three witnesses from the car behind petitioner. App. 23, l. 13 – 24, l. 22. According to the solicitor, “All three of those individuals got out immediately. When they got to the car, they found this defendant unconscious behind the wheel. There was no one else in the car.” App. 23, ll. 14 – 23. EMS took petitioner to the hospital. App. 23, l. 13 – 24, l. 22. His blood alcohol level was .271. App. 23, l. 13 – 24, l. 22.

Trial counsel's investigation was substantially limited to reviewing the State's discovery and interviewing the three witnesses. App. 161, l. 1 – 162, l. 24. App. 191, l. 2 – 192, l. 19. On examination at the PCR hearing, trial counsel admitted she did not have specific information from the witnesses on their exact actions after the accident. App. 196, l. 16 - 198, l. 21. She admitted it was possible that the witnesses drove past the accident scene and returned, leaving a window when someone fled unseen from petitioner's van. App. 196, l. 16 - 198, l. 21.

Petitioner could not recall the accident. App. 119, ll. 19 – 24. At the PCR hearing, petitioner testified, “I don’t recall anything. I came back to my senses at the hospital.” App. 119, l. 22 – 120, l. 4. He explained the last thing he remembered from that day was sitting on the passenger side of the van waiting with his friend Ricardo waiting on someone to drive him home. App. 130, l. 21 – 131, l. 7. Petitioner said he assumed he fell asleep and thought he saw Ricardo sitting behind the wheel. App. 130, l. 21 – 131, l. 7. Petitioner told trial counsel about Ricardo and said they “ignored” him. App. 131, l. 14 – 132, l. 4. Trial counsel testified they asked the family to locate Ricardo, but he was never found. App. 179, l. 18 – 180, l. 19. Petitioner presented a witness at the PCR hearing, Jose Trejos, who corroborated that petitioner got into the passenger side of the van at a party before the accident. App. 333, l. 19 – 335, l. 21.

Petitioner’s right clavicle was fractured in the accident. App. 380, l. 22 – 381, l. 23. App. 184, ll. 10 – 25. Petitioner told trial counsel it was caused by a seatbelt, which could only be from the passenger side because of its location, but trial counsel said she saw nothing in the medical records “to indicate it was a seatbelt injury.” App. 184, ll. 11 – 25. But at the PCR hearing, she admitted she did not interview several witnesses who saw petitioner’s injuries at the jail. App. 392, l. 19 – 394, l. 14.

These witnesses testified at the PCR hearing. Timothy Owens saw petitioner at the Anderson County jail immediately after the accident. App. 318, l. 4 – 320, l. 15. Owens was an auto mechanic and familiar with wrecks. App. 318, l. 4 – 320, l. 15. He saw a lump on the right side of petitioner’s head. App. 318, l. 4 – 320, l. 15. Critically, Owens also saw a “black mark” that went from petitioner’s right shoulder diagonally downward and across petitioner’s chest, which would be consistent with a passenger’s seatbelt. App. 318, l. 4 – 320, l. 15. Another witness from the jail, David Eskew, described the same injury. App. 343, l. 6 – 344, l. 3.

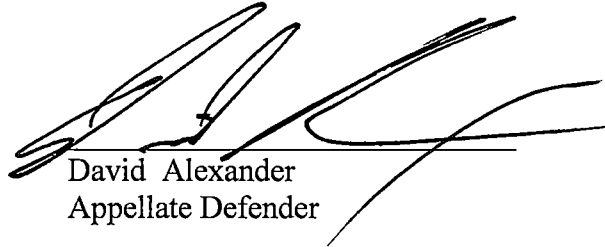
A nurse from the jail also testified for petitioner. App. 349, l. 18 – 350, l. 22. Karen Langston remembered seeing petitioner’s injuries. App. 349, l. 18 – 350, l. 22. She remembered “thinking it was odd that his injuries were on the right hand side of his body and not the left hand side of his body.” App. 349, l. 18 – 350, l. 22.

Petitioner was prejudiced by his attorneys’ failure to discover these witnesses who could have proved that petitioner was not the driver of the van. Strickland v. Washington, 466 U.S. 668 (1984). “Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” Lafler v. Cooper, 566 U.S. 156, 162 (2012). “Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (internal quotations omitted). Plea counsel’s advice to petitioner to plead guilty was based solely on their assessment of the witnesses from the scene and not on an independent investigation, which is deficient performance. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

This Court has recognized the importance of trial counsel investigating and locating favorable fact witnesses. In Martinez v. State, 304 S.C. 39, 41, 403 S.E.2d 113, 113-14 (1991), this court held trial counsel ineffective for failing to subpoena a witness who could have testified favorably for the defense. In Pauling v. State, 331 S.C. 606, 610, 503 S.E.2d 468, 470-71 (1998), trial counsel was held ineffective for failing to call a triage nurse in a rape case. Petitioner’s case is no different. Had plea counsel found Trejos, Owens, Eskew, and Langston, petitioner could have proved he was not the driver and would not have pled guilty. This Court should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's convictions.

A handwritten signature in black ink, appearing to read 'DAVID ALEXANDER', is written over a horizontal line. The signature is stylized and somewhat cursive.

David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of September, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Anderson County

Honorable Jocelyn J. Newman, Circuit Court Judge

---

JOSE L. CABARRUVIAS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

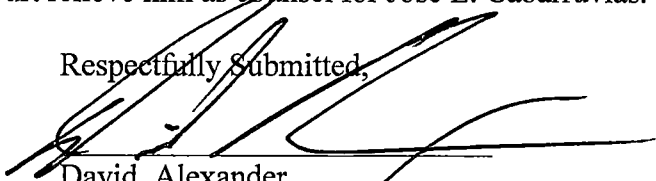
---

Counsel for Jose L. Cabarruvias 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 record of petitioner's post-conviction relief hearing before Judge Jocelyn J. Newman, which was held on June 28, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Jose L. Cabarruvias.

Respectfully Submitted,

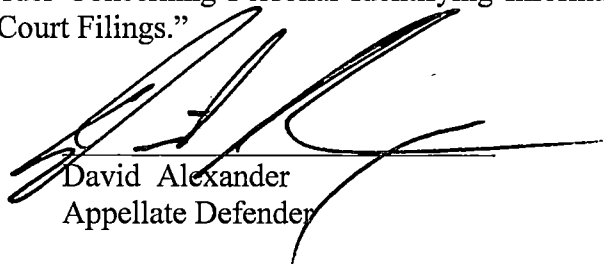


David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 17th day of September, 2018.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his 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."



David Alexander  
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

This 17th day of September, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Anderson County

Honorable Jocelyn J. Newman, Circuit Court Judge  
\_\_\_\_\_

JOSE L. CABARRUVIAS,

PETITIONER

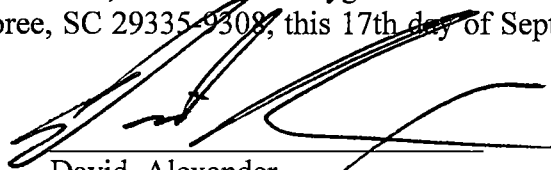
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 Kelly Oppenheimer, 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 Jose L. Cabarruvias, #342601, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 17th day of September, 2018.



David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of September, 2018.

Courtney Powers (L.S)  
Notary Public for South Carolina  
My Commission Expires: May 2, 2027.