

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas  
Post Conviction Relief

John C. Hayes, Circuit Court Judge

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Appellate Case No.: 2017-00828

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John Jabbar Greene #219696,..... Petitioner,

vs.

State of South Carolina, .....Respondent.

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PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE

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Cannon 3E (1), Rule 501 SCACR

State v. Cheatham 349 S.C. 101, 561 S.E. 2d 618 (2002).

State v. Lounds App. Case No.: 2011-196208 (2013)

## QUESTION PRESENTED

**Did the Lower Court err in not granting Post-Conviction Relief for Trial Counsel's failure to request that the Judge recuses himself?**

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to Orders of Commitment of the Georgetown County Clerk of Court's. The Georgetown County Grand Jury indicted Petitioner at the May 2008 term for two counts of kidnapping (2008-GS-22-0456; -0457), two counts of armed robbery (2008-GS-22-0458; - 0459) and second-degree burglary (2008-GS-22-0460). Petitioner was represented by J. Eric Fox.

Petitioner proceeded to a jury trial and was convicted as indicted. On May 1, 2009, the Honorable W. Jeffery Young sentence Applicant to thirty (30) years' imprisonment for kidnapping, thirty (30) years' imprisonment for armed robbery, and fifteen (15) years' imprisonment for second-degree burglary, to be served concurrently.

A notice of appeal was filed with the South Carolina Court of Appeals. Kathryn Hudgins, Esq., with the Office of Appellate Defense perfected the Appeal. The Court of Appeals affirmed the Petitioner's conviction and sentence by Order dated November 15, 2011. State v. John Jabbar Greene, Unpublished Opinion No. 2011-UP-507 (S.C. Ct. App., filed November 15, 2011).

## 2012-CP-22-0164

Petitioner filed his first application for PCR on February 21, 2012. He alleged the following grounds for relief:

1. Ineffective assistance of trial counsel.

- a. Trial counsel failed to file an appeal.
2. Ineffective assistance of Appellate Counsel.
  - a. Appellate counsel never tried to appeal the trial courts denial of directed verdict.
3. Conflict of Interest/Judicial Bias
  - a. Trial counsel refused to recuse trial judge because trial Judge stated that he knew one of the victims for years.
4. Defective Chain of Custody.
  - a. The gun never made it to SLED as the source of the samples.
5. Fourth and fifth Amendment Violation
  - a. The intrusions into my body without probable cause; Miranda violation, officer testified that he continued to question me when I invoked Fifth Amendment right to remain quiet.

An evidentiary hearing was convened on October 27, 2014 before the Honorable John C. Hayes. Applicant was represented by Robert Mason, Esq. Relief was denied and the matter was dismissed by an order dated November 16, 2014 and filed December 5, 2014. An Appeal was not filed.

**2015-CP-22-0949**

Applicant filed a second Post Conviction Relief Application alleging that he was being held in custody unlawfully for the following reason:

1. Ineffective assistance of PCR Counsel.
  - a. Prior post-conviction relief counsel failed to file an Appeal from Judge Hayes Order.

On March 24, 2017, the Honorable Benjamin H. Culbertson signed a Consent Order Granting an Appeal Pursuant to Austin v. State. A timely Notice of Appeal was filed.

## STATEMENT OF FACTS

The Petitioner contended that the PCR Court erred in not granting Post Conviction Relief on Trial Counsel's failure to request that the Trial Judge recuses himself for the reason that he knew the victim for a long time. The Court brought this matter to the attention of the Solicitor and Trial Counsel before bringing the Jury in. The Judge stated as follows:

"All right, when I was reviewing I saw one of the victims earlier, Mr. Harby Moses. He's originally from Sumter. I just wanted to disclose it to you. I thought he might have just been a witness in this case. When I was reading the indictment I see that he was a victim. Now, Mr. Moses and I we go back a long way, but we – I mean, he was a number of years younger than I was. We went to the same high school. Mr. Moses has lived down here for probably 30 years, not in Sumter, but when I saw he was one of the victims I just wanted to disclose that to both of you all. Again, we have no professional connections other than the fact that I've known him for a long time. That would be the only thing, but I wanted to bring that up before we bring the jury out. Do you have any objection, Mr. Fox?

Mr. Fox: None, Your Honor.

The Court: Anything from the State?

Mr. Andrew: No, sir, do you think you could be a fair and impartial?

The Court: I really do. Well, I'm glad you asked so I could put it on the record that I do. All Right.

Mr. Andrew: No objection, Your Honor.

The Court: Thank you. Thank you. (App. p. 40, lines 12-25, p. 41, lines 1-13)

Eric Fox was asked on direct examination at the Post Conviction Relief hearing about the Judge's statement and friendship. He was asked, what was your reasoning for not objecting. Didn't he think that he should at least get it on the record. Counsel replies that he thought that the Judge had made his mind up and that he was going to try the case. PCR Counsel pointed out that it didn't appear from the transcript. That Judge Young didn't present it that way, that he didn't suggest that he would not entertain a Motion to Recuse himself. (App. p. 390, lines 21-25, p.391, lines 1-12) Trial Counsel stated that it could be interpreted that the relationship the Judge had with the victim was that they had once been neighbors; that he knew him; that they were both from Sumter and that like many people in the same town, he knew who he was. Trial

Counsel goes further to say, however, looking back, I think it would have been wise and make a Motion to preserve on the record (and that Judge Young may well have recused himself.) (App. p. 391, lines 13-19)

The Petitioner testifies at Post Conviction that he believed that the Judge had an interest in the outcome of the case. The victim in the case, Mr. Herby Moses was from Sumter. Mr. Greene testified that he believed that the Judge and Mr. Moses went back a long way and had known each other for a number of years. That they had possibly gone to the same school. The Petitioner further testified that Trial Counsel did not object, nor ask that the Judge recuse himself. (App. 382 – 383)

### **ARGUMENT**

That pursuant to Cannon 3E (1) of the Judicial Code of Conduct, a Judge shall disqualify himself or herself in a proceeding in which the Judge's impartiality might reasonably be questioned. (Cannon 3E (1), Rule 501 SCACR) The Judicial Cannons provide direction as to when disqualification may be necessary, including, but not limited to, to instances where (1) the Judge holds personal bias or prejudice to the litigant or counsel or has personal knowledge of evidentiary facts in dispute in the proceeding. (2) The Judge either worked on the case as a lawyer, a lawyer with whom the Judge previous practiced law, worked on the case, while the Judge was associated with the lawyer's firm or the Judge has been a material witness concerning the case. (3) The Judge knows that he or a member of his family (spouse, parent or child) has more than a *de minimus* economic interest in the litigation and the litigation will substantially affect that interest. (4) The Judge or his spouse or a person within the third degree of relationship to them, or the spouse of such a person is either a party or the officer, director or trustee of a party as a lawyer in the case, known to have more than a *de minimus* interest that

could be substantially affected by the litigation or to the Judge's knowledge is likely to be a material witness in the proceeding.

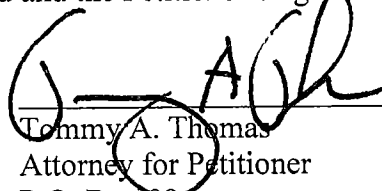
The Appellant in this case, would allege that through the trial judge's disclosure that it was indicative of him having a person bias or prejudice toward the litigant. This is especially present in the sentencing phase of this case. Based upon this information volunteered by the Court, Trial Counsel should have moved for the Judge to recuse himself.

A Judge shall hear and decide matters assigned to the Judge, except those in which disqualification is required. State v. Lounds App. Case No.: 2011-196208 (2013) In addition, the comment to Rule 501 states that a Judge shall disqualify himself or herself under this rule where impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.

Generally, a Judge must exercise sound judicial discretion in determining whether or not his impartiality might reasonably be questioned. State v. Cheatham 349 S.C. 101, 561 S.E. 2d 618 (2002). Trial Counsel was ineffective in not moving to ask the trial Judge to recuse himself from the Petitioner's trial.

### CONCLUSION

That the Lower Court's decision be reversed and the Petitioner be granted a new trial.



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November 3, 2017

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas  
Post Conviction Relief

John C. Hayes, Circuit Court Judge

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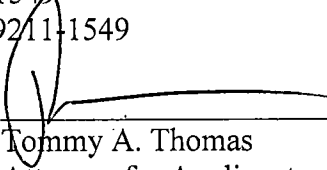
vs.

State of South Carolina, .....Respondent.

CERTIFICATE OF SERVICE

I, Tommy A. Thomas, Attorney for the Appellant hereby hand delivered, a copy of the  
Appendix to Johnny James, Jr., Esq. of the Attorney General's Office, at:

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September 21, 2017

THE STATE OF SOUTH CAROLINA  
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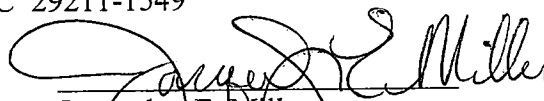
vs.

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Petition for Writ of Certiorari, with postage prepaid and the return address clearly shown on said envelope to Johnny James, Jr., Esq. of the Attorney General's Office, at:

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November 3, 2017