

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**ORIGINAL**

Certiorari to Oconee County

**RECEIVED**

Honorable J. Cordell Maddox, Circuit Court Judge

JAN 04 2019

JONATHAN A. FINNEY,

S.C. SUPREME COURT

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000842

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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**INDEX**

INDEX ..... i

ISSUE PRESENTED ..... 1

STATEMENT ..... 2

ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to call alibi witness, Tia Chapman Finney, where she would have testified that alleged accomplice Josh Burrell came to their house where she had spent the day with petitioner with the proceeds of the freshly committed burglary. Her alibi testimony was critical to the defense, and defense counsel’s reasoning that calling Tia as a witness alone would have “opened the door” to evidence petitioner allegedly participated in other burglaries was patently erroneous.....4

Relevant Facts.....4

Discussion.....7

CONCLUSION.....9

PETITION TO BE RELIEVED AS COUNSEL .....10

### **ISSUE PRESENTED**

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to call alibi witness, Tia Chapman Finney, where she would have testified that alleged accomplice Josh Burrell came to their house where she had spent the day with petitioner with the proceeds of the freshly committed burglary since (1) her alibi testimony was critical to the defense, and, (2) defense counsel's reasoning that calling Tia as a witness alone would have "opened the door" to evidence petitioner allegedly participated in other burglaries was patently erroneous?

## STATEMENT

### **Procedural history**

Petitioner was indicted at the December 2, 2013 term of the Oconee County Grand Jury for the offenses of burglary in the first degree and petit larceny. App. 398 – 404. His case was called to trial on May 22, 2014, before the Honorable R. Lawton McIntosh, and a jury. R. Daniel Day, Jr., represented petitioner. David R. Wagner, Jr., was the assistant solicitor. App. 1.

The jury found petitioner guilty on both counts. App. 318, ll. 16-22. Judge McIntosh sentenced petitioner to twenty years imprisonment, suspended upon the service of sixteen years, and five-year's probation for burglary in the first degree. The judge also imposed a concurrent thirty-day sentence for petit larceny. App. 327, ll. 4-17.

Petitioner's convictions were affirmed on direct appeal pursuant to Anders v. California, 386 U.S. 738 (1976), in State v. Jonathan Alan Finney, 2015-UP-544 (November 25, 2015). The Anders issue on appeal was whether the trial court erroneously charged the jury on accomplice liability, "the hand of one is the hand of all," where there was no evidence of a second participant in the burglary.<sup>1</sup> State v. Jonathan Alan Finney, 2015-UP-544 (November 25, 2015).

Petitioner filed an application for post-conviction relief on November 23, 2016. App. 332 – 338. To this application, the state filed a return and partial motion to dismiss and motion for a more definite statement dated May 12, 2017. App. 339 – 345.

An evidentiary hearing was convened on February 21, 2018, before the Honorable J. Cordell Maddox. Susannah Ross represented petitioner. Kelly Oppenheimer was the assistant attorney general. App. 348.

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<sup>1</sup> Appellate Defender Lanelle Durant represented petitioner on direct appeal.

During the evidentiary hearing, the court heard the testimony of petitioner, Jonathan Finney, Tia Finney, and trial counsel, R. Daniel Day. App. 349-379. An order of dismissal was filed on April 27, 2018. App. 381-397. This order concluded petitioner was effectively represented, rejecting petitioner's argument that counsel was ineffective for failing to call his alibi witness, Tia Finney, and ineffective for reasoning her testimony would have per se "opened the door" to evidence petitioner allegedly participated in other burglaries. App. 394-395.

This petition for writ of certiorari follows.

## ARGUMENT

The PCR court erred by ruling defense counsel was not ineffective for failing to call alibi witness, Tia Chapman Finney, where she would have testified that alleged accomplice Josh Burrell came to their house where she had spent the day with petitioner with the proceeds of the freshly committed burglary. Her alibi testimony was critical to the defense, and defense counsel's reasoning that calling Tia as a witness alone would have "opened the door" to evidence petitioner allegedly participated in other burglaries was patently erroneous.

### **Relevant Facts**

Joseph Giordano testified he and his wife, Mary Jane, owned a house in Oconee County because of an estate settlement "when her father passed." The house was on McMahan Road in Oconee County. The couple used it as "[a] weekend place." "[A]nd when school is out my wife will go up there with the kids during the week, and then I will meet up with them on weekends later." App. 141, l. 19 – 142, l. 22.

On August 10, 2013, the family went to the weekend house. Joseph remembered: "I walked in the room and . . . saw the closet door was open. I thought that was somewhat odd." He also noticed that a shotgun was gone. App. 143, l. 3 – 144, l. 6.

It continues, "the lock on the screened-in porch was open." App. 144, ll. 7-13. Joseph also noticed that the screen was cut, and when he walked into the kitchen he noticed "all the cabinets were open." Things were missing and "the house was in total disarray." Other items stolen during the burglary were later identified. App. 144, l. 16 – 145, l. 16.

Petitioner was apparently developed as a suspect in the burglary. App. 234, l. 7 – 235, l. 3. Petitioner gave the police a statement on August 28, 2013, at the Oconee County Law Enforcement Center. Petitioner told them that he was at the house with Josh Burrell, and Josh

left to allegedly go to the store. A couple of hours later, Josh “walked in with a blue bag, a 12-gauge shotgun, airsoft machine gun, and a BB gun.” Petitioner added that Josh “had to get rid of the gun so he could make a little money. The only thing he ever talked about was hitting licks and making money.” Petitioner told the police that Josh had the gun they were looking for in this burglary case. App. 236, l. 7 – 237, l. 2.

On August 30, 2013, petitioner spoke with the police again. The police alleged that Petitioner admitted during this second meeting that he “did it.” Petitioner was alleged to state “that he was a look-out man, and Josh Burrell committed the burglary. App. 204, l. 5 – 205, l. 10.

On September 4, 2013, petitioner allegedly showed the police the location of the McMahan Road house burglary. “That’s the house, and he pointed to the house. At that point I snapped a photo of him pointing to the house.” App. 205, l. 15 – 209, l. 10. As seen below, Petitioner would strongly dispute this claim at the PCR hearing. Further, a key investigating officer, David McMahan, was related to the burglary victims. App. 209, ll. 5-22.

Petitioner would later allege that defense counsel was ineffective for failing to call his wife, Tia Chapman Finney, as an alibi witness. Tia would have testified that petitioner was with her that day that Josh Burrell arrived back at the house with the bookbag and other stolen goods taken from the freshly burglarized house. App. 353, l. 8 – 355, l. 4

Petitioner testified at the PCR hearing. He denied that he showed the police how to find the house that had been burglarized. Instead, Petitioner related how the police stopped their vehicle in front of the burglarized house, and they asked him if he’d “seen this house before?” Petitioner merely acknowledged the house was 200 to 300 yards away from his wife’s daughter’s house, so he was aware of its existence. App. 355, l. 18 – 357, l. 6. Petitioner also denied that

he ever admitted to being a lookout for Josh Burrell while Burrell burglarized the house. App. 358, l. 5 – 359, l. 3.

Tia Chapman Finney described how petitioner was with her all day. At some point, Josh Burrell “came in and he had all kinds of snacks and change and bags, you know, book bags and stuff like that, blankets and stuff, and he went to the back room. That’s -- you know, that’s pretty much all -- Josh said he wanted Jonathan back there with him.” App. 360, l. 21 – 362, l. 18. Tia said while she was questioned by police investigators about her knowledge of the case -- her alibi -- that Petitioner’s trial attorney never attempted to talk with her. She was available to give this testimony before the jury if counsel had only called her as a witness. App. 362, l. 12 – 363, l. 6.

Trial counsel, R. Daniel Day, admitted: “I don’t think I spoke to Tia, and I don’t think I spoke to Tia unless it was at the courthouse when it came up on -- before the trial as we were trying to determine trial strategy as to what we would go on. And I explained to him about **last argument**, if we didn’t put up witnesses or testimony. *I think I spoke to her at the courthouse. I don’t remember going out to see her anywhere though.*” App. 368, l. 20 – 370, l. 21. (emphasis added).

Day also claimed that he feared “opening the door” to other burglaries petitioner allegedly may have been involved in, and for that reason, and because he wanted the last argument, he did not call Tia as an alibi witness. App. 371, l. 4 – 373, l. 25. Day disagreed with petitioner’s post-conviction relief counsel that he did not have to “open the door” to references to other burglaries merely by calling Tia as an alibi witness. Day broadly asserted, “**I’m afraid in order for them to testify, they would have to open the door.**” App. 373, ll. 15-20. (emphasis added).

In the order of dismissal, the judge found that defense counsel did not speak with Tia Finney prior to trial. However, the judge found credible defense counsel's assertion that he feared "opening the door" to evidence implicating petitioner in other burglaries. App. 393 – 395.

### **Discussion**

In this case, Petitioner produced the testimony of the favorable witness, Tia Finney, at the PCR hearing to show she could have been his credible alibi witness at trial. Tia would have testified at trial that she was with petitioner when Josh Burrell returned from freshly committing the burglary with the goods stolen during the burglary. Thus, Petitioner carried his burden of producing the favorable witness. Cf. Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998).

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court reversed the Court of Appeals, finding that court read Glover, supra, too broadly. This Court explained that the Court of Appeals found Reed's testimony in that case did not qualify as an alibi because it did not make it physically impossible for Walker to could have committed the crime. Therefore, the Court of Appeals concluded under Glover, Walker could not establish the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984).

This Court further noted that the PCR court in Walker had found Reed credible. Moreover, Reed's testimony supported the PCR court's conclusion that Reed offered alibi testimony that reasonably could have resulted in a different outcome at trial. Therefore, this Court reversed the Court of Appeals finding in Walker of no prejudice under the second prong of Strickland v. Washington, 466 U.S. 668 (1984).

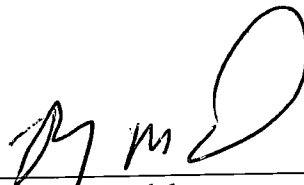
In this case, the alibi testimony of Tia Finney could have produced a verdict of acquittal, since the jury could have concluded that Josh Burrell acted alone in committing the burglary, given Tia's alibi testimony for petitioner.

Most critically in this case, defense counsel's reasoning that calling Tia Finney as a witness alone would have "opened the door" to evidence of other burglaries Petitioner was allegedly involved in was simply erroneous. To admit evidence of other burglaries, the state would have had to prove the other burglaries were part of a "common scheme or plan" pursuant to State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), and Rule 404(b), SCRE. In addition, such other bad acts would have had to have been proved by clear and convincing evidence. See State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct.App. 2003). Finally, the other bad act burglaries would have had to survive a Rule 403, SCRE balancing test that its probative value was not substantially outweighed by its danger of unfair prejudice, confusion of the issues, or misleading the jury.

Defense counsel's testimony that calling Tia Chapman Finney as a witness alone would have allowed the evidence of other burglaries to be admitted therefore was patently erroneous. Tia Finney's alibi testimony was critical to petitioner's defense, and trial counsel erred by reasoning it alone would have "opened the door" to evidence petitioner allegedly participated in other burglaries. While counsel may have genuinely believed his reasoning was sound on "opening the door" to the other bad act evidence, the PCR court's acceptance of trial counsel's facile reasoning was respectfully, erroneous on its face, and this Court should reverse.

**CONCLUSION**

By reason of the foregoing argument, a petition for writ of certiorari should be issued to allow full briefing on this issue.



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Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January, 2019.

STATE OF SOUTH CAROLINA  
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Honorable J. Cordell Maddox, Circuit Court Judge

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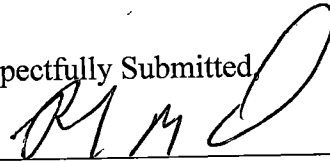
RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL  
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Counsel for Jonathan Allen Finney states:

1. He is Chief 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 J. Cordell Maddox, which was held on February 21, 2018, 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 Jonathan Allen Finney.

Respectfully Submitted,

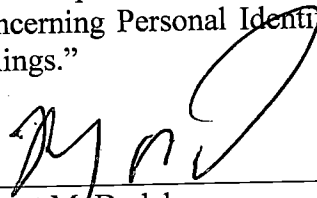


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Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

This 4th day of January, 2019.

**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."



Robert M. Dudek  
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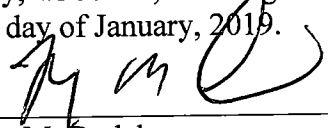
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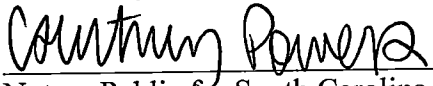
CERTIFICATE OF SERVICE

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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 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 Jonathan Allen Finney, #360193, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 4th day of January, 2019.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 4th day of January, 2019.

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