

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

GREG K. ISAAC;

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000510

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Adam Sinclair Ruffin  
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

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S.C. SUPREME COURT

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### **ISSUE PRESENTED**

Did the post-conviction relief court err by failing to make findings of fact and conclusions of law regarding whether trial counsel was ineffective in failing to object to an improper jury charge on accomplice liability which contained a hypothetical example which was an improper comment on the facts?

## STATEMENT

On October 27, 2005 at 9:33 p.m., Antonio Corbitt was found dead on the ground in front of his home. App. 325, l. 6 – 329, l. 16. A photograph of a fingerprint on a lamp inside Corbitt's home was taken. App. 387, ll. 4 – 14. In 2012, according to the fingerprint analyst with Richland County Sheriff's Department, Trisha Odom, the photograph of that fingerprint was matched to Petitioner's left middle finger. App. 396, l. 20 – 397, l. 10.

Based on the fingerprint match, Investigator David Wilson interviewed Petitioner on April 11, 2012. App. 636, l. 22 – 637, l. 15. In Petitioner's written statement he allegedly told Wilson that he and two other individuals, World and Dixon, went to Corbitt's home to collect money that Corbitt owed to World. While Dixon stayed in the car, Petitioner and World went to Corbitt's door and confronted him about the money. World and Corbitt got into a physical altercation and Petitioner attempted to break them up and pull World out of the house. Petitioner saw Corbitt reaching behind his waist and, because he thought Corbitt was reaching for a gun, Petitioner pulled out a gun and shot Corbitt. App. 655, l. 10 – 656, l. 17. Petitioner was then arrested and charged with murder, burglary first degree and attempted armed robbery. App. 663, ll. 8 – 11.

Prior to Petitioner's jury trial, his trial counsel moved for immunity pursuant to the Protection of Persons and Property Act.<sup>1</sup> App. 4, ll. 23 – 25. The Honorable Clifton Newman held a hearing at the end of which he denied Petitioner's request for immunity. App. 6, l. 1 – 41, l. 5. Petitioner's trial counsel then immediately filed an appeal in the Supreme Court based on State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). App. 117 – 157. This Court dismissed the appeal. State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013); App. 234 – 243.

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<sup>1</sup> S.C. Code Ann. §§ 16-11-410 – 450 (1976).

Petitioner then proceeded to a jury trial before the Honorable Clifton Newman. App. 244 – 866. Petitioner testified in his own defense at trial. App. 705, l. 14 – 768, l. 11. Petitioner testified that he only accompanied World to Corbitt’s house because he was under duress by World. App. 710, l. 11 – 711, l. 23. He further testified that he only shot at Corbitt in self-defense after he believed that Corbitt was reaching for a gun behind his waist. App. 717, l. 4 – 719, l. 9. The theory presented by defense counsel was that Petitioner should be acquitted for the burglary and attempted armed robbery by way of duress and that he should be acquitted for the murder by way of self-defense.

Judge Newman granted Petitioner’s request to instruct the jury on self-defense and the defense of duress. App. 769, l. 1 – 772, l. 16; app. 840, l. 20 – 843, l. 20. Included in the judge’s instruction on duress was a charge that “[d]uress is not a defense to the crime of murder.” App. 843, ll. 15 – 16. The jury convicted Petitioner as charged and he was sentenced to life imprisonment.

On direct appeal, Petitioner was represented by David Alexander of Appellate Defense who raised the following issue: “Whether the exclusion of a co-defendant’s plea deal was error under the rules of evidence and the Confrontation Clause?” App. 867 – 884. The Court of Appeals affirmed. State v. Isaac, Op. No. 2015-UP-337 (Filed July 8, 2015); App. 906 – 907.

Petitioner then filed an application for post-conviction relief on February 20, 2016. App. 908 – 914. Petitioner alleged in his application that his trial counsel was ineffective for not responding to his letters and not preparing him for trial. App. 910. Petitioner also alleged that there was a conflict of interest between his trial counsel and the trial judge. App. 910. The state made its Return on October 28, 2016. App. 915 – 920. An evidentiary hearing was held in Richland County on August 31, 2017 before the Honorable Paul M. Burch. App. 921 – 962.

Petitioner was represented by Jonathan Waller and the state was represented by Jessica Kinard. App. 921.

Petitioner and his trial counsel, Mark Schnee,<sup>2</sup> were the only witnesses called at the hearing. App. 922. Schnee was asked why he did not object to the trial court's jury charge on "hand of one/hand of all." App. 944, ll. 4 – 12. Specifically, the trial court instructed the jury regarding accomplice liability:

If a crime is committed by two or more people who are acting together in committing the crime, the act of one is the act of all. A person who joins with another or others to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable and natural consequence of the acts done in carrying out the common plan and purpose. *For example, two people can be guilty of killing another person when only one of the two had a gun, there is only [one] bullet and only one of the two fired the shot that caused the death.* If two or more people are together acting together, assisting each other in committing the offense, the act of one is the act of all or as it is sometimes said, the hand of one is the hand of all.

App. 839, ll. 7 – 20 (emphasis added). Schnee explained his failure to object to the charge: "That is clearly an improper charge . . . on the facts. . . . I should have objected and clearly didn't. There's no strategy in that." App. 944, ll. 18 – 20.

The PCR court's order denying Petitioner's application for relief did not include any findings of fact or conclusions of law on this issue which was raised through trial counsel's testimony at the PCR hearing. App. 964 – 971.

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<sup>2</sup> Mark Schnee was placed on interim suspension by this Court on September 10, 2018. In the Matter of Mark E. Schnee, S.C. Sup. Ct. Order dated September 10, 2018.

## ARGUMENT

The PCR court erred by failing to make findings of fact and conclusions of law regarding whether trial counsel was ineffective in failing to object to an improper jury charge on accomplice liability which contained a hypothetical example which was an improper comment on the facts.

In order to prove ineffective assistance of counsel, Petitioner must show that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

Court’s use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient,” meaning that it fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) citing Strickland, 466 U.S. at 688. “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) citing Strickland, 466 U.S. at 668.

Section 17-27-80 of the South Carolina Code (2014) requires the PCR court to “make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” The South Carolina Rules of Civil Procedure, which apply to PCR hearings, also mandate that lower courts “find the facts specially and state separately its conclusions of law thereon.” Rule 52 (a), SCRPC. “The PCR court’s general denial of all claims not specifically

addressed in the PCR court's order does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law." Simmons v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (internal quotations omitted).

This Court recently held in Fishburne v. State, Op. No. 27911 (S.C. Sup. Ct. filed July 31, 2019) (Shearouse Adv. Sh. No. 31), that the PCR court's failure to make specific findings of fact and conclusions of law in its order regarding one of the issues raised by Fishburne required a remand for the PCR court to issue an amended order. The Court stated, "we again stress that PCR orders must be prepared in compliance with section 17-27-80 of the South Carolina Code (2014) and Rule 52(a) of the South Carolina Rules of Civil Procedure." Id. at 21. The Court reached this conclusion even though Fishburne's PCR counsel failed to file a motion pursuant to Rule 59(e), SCRPC requesting the PCR court to make a specific ruling on the unaddressed issue. Id. at 28.

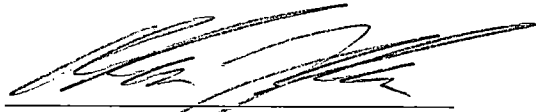
In this case, the PCR court ignored one of the issues raised by Petitioner at his PCR hearing. Petitioner's trial counsel plainly conceded at the PCR hearing that it was error not to object to the trial court's accomplice liability jury instruction and that there was no strategic reason for his failure to do so. App. 944, ll. 18 – 20.

The failure to file a Rule 59(e), SCRPC motion by Petitioner's PCR counsel does not preclude this Court from remanding to the PCR court to make specific findings of fact and conclusions of law as to this issue. Fishburne v. State, Op. No. 27911 (S.C. Sup. Ct. filed July 31, 2019) (Shearouse Adv. Sh. No. 31). The Fishburne Court stated: "[W]e cannot continue to permit a party's procedural shortcoming – such as the failure to file a Rule 59(e) motion – to prevent this Court from remanding claims of ineffective assistance of counsel when the PCR court's order does not comply with section 17-27-80." Id. at 28.

The PCR court erred by failing to make findings of fact and conclusions of law in violation of section 17-27-80 of the South Carolina Code (2014) regarding whether trial counsel was ineffective in failing to object to the accomplice liability jury charge. Fishburne v. State, Op. No. 27911 (S.C. Sup. Ct. filed July 31, 2019) (Shearouse Adv. Sh. No. 31).

**CONCLUSION**

Based on the foregoing argument, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and order further briefing on the issue presented.



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Adam Sinclair Ruffin  
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of September, 2019.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Richland County

Honorable Paul M. Burch, Circuit Court Judge

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GREG K. ISAAC,

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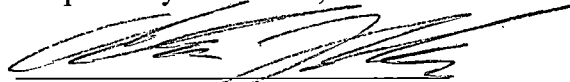
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Greg K. Isaac states:

1. He is 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 Paul M. Burch, which was held on August 31, 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 Greg K. Isaac.

Respectfully Submitted,

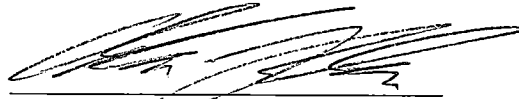


Adam Sinclair Ruffin  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 16th day of September, 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."



Adam Sinclair Ruffin  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

This 16th day of September, 2019.

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CERTIFICATE OF SERVICE

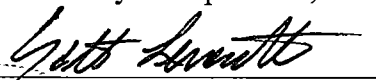
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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly 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 Greg K. Isaac, #331813, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of September, 2019.



Adam Sinclair Ruffin  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 16th day of September, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.

