

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge  
\_\_\_\_\_

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S.C. Supreme Court

JAMES BABB,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000719  
\_\_\_\_\_

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

LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ISSUE PRESENTED

Did the PCR court err in failing to find trial counsel ineffective for not conducting a thorough investigation into petitioner's case in order to call the two witnesses, Few and Ensley, to testify whose testimony would have rebutted the testimony of the co-defendant, Troy Fallin, that petitioner Babb was a drug dealer?

## STATEMENT

In September 2007, the Greenville County Grand Jury indicted James M. Babb on the charge of trafficking methamphetamine. In November 2007, the Greenville County Grand Jury indicted Babb on the charge of possession with intent to distribute (PWID) a controlled substance. On February 1-2, 2010, Babb and his co-defendant, Troy Fallin, proceeded to trial before the Honorable Edward W. Miller and a jury. Babb was represented by Richard H. Warder, and Fallin was represented by C. Timothy Sullivan. App. 1. The state was represented by William I. Bouton and Samantha S. Adair. Midway through the trial, co-defendant Fallin entered a guilty plea to the charges but was not sentenced. App. 163, ll. 1 – App. 171, ll. 9. Co-defendant Fallin then testified for the state and implicated petitioner Babb as the drug dealer. App. 192, ll. 16 – App. 199, ll. 14. The jury returned a verdict finding Babb guilty on both charges as indicted. App. 269, ll. 19 – App. 270, ll. 1. Judge Miller sentenced Babb to fifteen years on the trafficking methamphetamine and five years on the pWID controlled substance. App. 273, ll. 6-10.

On May 17, 2012, Babb filed an application for post conviction relief (PCR). The state filed a return on August 31, 2012. An evidentiary hearing was held on December 19, 2013 before the honorable G. Edward Welmaker. Babb was represented by Susannah Ross, and the state was represented by Karen Ratigan. App. 299. On February 17, 2014, Judge Welmaker filed an order denying Babb's PCR application and dismissing it with prejudice. App. 340- App. 347. On February 24, 2014, Babb's PCR attorney filed Motion to Alter or Amend the Judgment. App. 348. The state filed return to the motion on March 6, 2014. App. 350. Judge Welmaker issued an order denying the motion on March 11, 2014. App. 352. Babb's PCR counsel filed a notice of appeal. This petition follows.

## ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not conducting a thorough investigation into petitioner's case in order to call the two witnesses, Few and Ensley, to testify whose testimony would have rebutted the testimony of the co-defendant, Troy Fallin, that petitioner Babb was a drug dealer.

Petitioner James Babb and his co-defendant, Troy Fallin, were arrested and charged with trafficking methamphetamine and possession with intent to distribute (PWID) a controlled substance after the police received an anonymous call that a group of people were bringing in a shipment of methamphetamine from Atlanta. The caller also sent photos of the three people and provided the license plate number and description of the car. The car was registered to Troy Fallin. App. 42, ll. 13 – App. 43, ll.23.

The police observed the car at the Econo Lodge motel and saw two men putting items in the trunk of the car. The police followed the car and stopped the car for a seatbelt violation. After Fallin gave consent to search, the police found three bags of methamphetamine, two glass pipes, and gamma-hydroxybutyric (GHB) in bottles. App. 44, ll. 1 – App. 52, ll. 15.

Babb and Co-defendant Fallin were tried together initially. App. 1; App. 6, ll. 1 – 6. Midway through the trial, Fallin decided to plead guilty to the charges. He was not sentenced until after the trial. App. 163, ll. 1 – App. 171, ll. 9.

Co-defendant Fallin then testified for the state during the trial. In his trial testimony, Fallin testified that Babb was the drug dealer as Babb sold drugs to Fallin, and they used drugs together. Fallin denied knowing about the drugs in the bag in the trunk until he and Babb started partying together. App. 167, ll. 21 – App. 169, ll. 23; App. 192, ll. 18 – App. App. 197, ll. 8.

Fallin denied that he was promised anything for testifying but pled guilty because he thought he was going to be convicted anyway. App. 199, ll. 7 – 14.

Petitioner Babb testified in his own behalf at his trial. He denied any involvement with the drugs, but claimed that Fallin had the drugs. Babb knew that Fallin dealt drugs sometimes. App. 213, ll. 10 – App. 223, ll. 25.

Babb was convicted and sentenced to fifteen years. App. 273, ll. 6 – 11. Co-defendant Fallin received seven years. App. 306, ll. 6 – 18; App. 338.

At his PCR hearing, Babb testified that his trial attorney received a letter from Troy Fallin shortly after the trial, in which Fallin stated that he was promised a sentence of seven years for his testimony, and that he was coached as to what his testimony would be. App. 306, ll. 6 – 25.

Babb 's story was that he went to the hotel that night to use drugs that he got from Troy Fallin. Fallin always had drugs and would share them with Babb. The drugs in the trunk belonged to Fallin. They were not Babb's. App. 303, ll. 15 – App. 308, ll. 14.

Babb's trial attorney told him that the state had a check they were going to use to say that someone used that check to buy drugs from Babb. The check was from his friend, Gwen Insley for forty dollars. It was not given to him to buy drugs. App. 305, ll. 1 – 25. Insley would have been a witness for Babb at his trial if they had contacted him. App. 306, ll. 1 – 5.

Babb trusted his trial attorney and thought he would do what he needed to do. Babb discovered with counsel's approach to the check issue that his attorney did not do what he needed to do. His attorney did not argue against the check which was five months old. His attorney did not try to contact Gwen Insley who wrote the check. Babb did not ask his attorney to contact Gwen Insley who wrote the check because they were already in trial. His attorney did not keep him informed about what was happening. App. 311, ll. 1 – App. 313, ll. 24.

PCR counsel presented two witnesses who testified at Babb's PCR hearing: Michael Few and Roger Edwin Insley. App. 300. Michael Few testified that he had known Babb thirty years as he was a long-time friend. Few would have testified at Babb's trial if Babb's attorney had contacted him. Few' trial testimony would have been that Troy Fallin was the drug dealer. Babb was not a drug dealer. Few did not contact Babb's attorney because he did not know who he was. App. 314, ll. 11 – App. 316, ll. 7.

Roger Insley (Gwen) testified that he wrote the forty dollar check to Babb because Babb let him stay at Babb's house when Insley was in the process of finding a house in Greenville to relocate there. He just wanted to show his gratitude to his friend. Insley had no idea the check "would have anything to do with this whole sordid mess." If he had been contacted, Insley would have testified at trial. App. 316, ll. 21 – App. 318, ll. 16.

Babb's trial counsel testified at the PCR hearing that the only defense they had was that Babb was not involved in any drug transaction. Counsel did not remember the forty dollar check. Babb did not tell him to contact the person who wrote the check. Babb never gave him any witnesses to contact. Counsel did remember receiving the letter from Fallin which he received on March 17 or about two months after the trial. Counsel thought he questioned Fallin on cross examination at trial if he had been promised anything. No one contacted him about testifying for Babb. App. 320, ll. 21 – App. 325, ll. 10.

Babb's PCR attorney argued at the PCR hearing that Babb was denied due process because there were witnesses who were available who could have rebutted the testimony of the co-defendant Troy Fallin that Babb was the drug dealer. App. 332, ll. 5 – App. 334, ll. 3.

The PCR judge ruled that he found trial counsel's testimony to be credible but found Babb's testimony to not be credible. App. 344. The judge found trial counsel to be thoroughly competent in

his representation. App. 344. The judge also held that Babb did not meet his burden of proof that trial counsel should have subpoenaed witnesses Few and Insley to testify at trial. The judge wrote that “the law requires that defense attorneys conduct a reasonable investigation, the law does not require attorneys interview every potential witness when they can articulate reasonable grounds not to do so.” In this case, the judge found that trial counsel had no knowledge of any favorable witnesses because none contacted him wanting to testify, and Babb did not tell him witnesses to contact. App. 345 - App. 346.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel’s performance was deficient and 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. 117-118, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Ard v. Catoe, the Supreme Court held that a criminal defense attorney has a duty to perform a reasonable investigation. “While the scope of a reasonable investigation depends upon a

number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. Id.

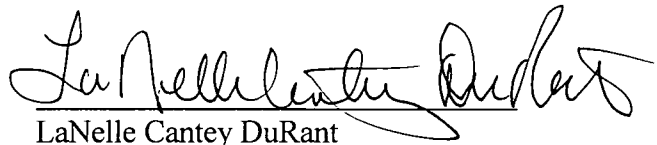
In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), the Supreme Court held that Lounds' counsel was ineffective for failing to adequately prepare for trial so as to be able to call key witnesses. The Court reversed the denial of Lounds PCR and remanded for a new trial.

Babb was prejudiced by the lack of independent investigation by his trial counsel because the two witnesses, Few and Insley, could have rebutted the testimony of co-defendant Fallin that Babb was the drug dealer. The PCR judge erred in ruling that trial counsel had a reasonable ground not to call these two favorable witnesses simply because counsel did not know about them. It was trial counsel's duty to conduct an investigation to learn of witnesses. There was no evidence that counsel asked for witnesses from Babb. Counsel knew about the check as this was brought out at trial. Counsel could have subpoenaed Insley at that point before the trial ended.

CONCLUSION

Based on the above, certiorari should be granted, and the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a large, sweeping flourish at the end.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of November, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Greenville County  
G. Edward Welmaker, Circuit Court Judge

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JAMES BABB,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE

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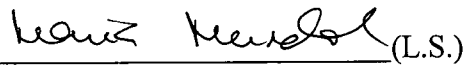
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. James Babb #339152, at Tyger River Correctional Institution, 200 Prison Road, Enoree, SC 29335-9308, this 25th day of November, 2014.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 25th day  
of November, 2014.

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