

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Lexington County  
Edgar W. Dickson, Circuit Court Judge  
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ALPHONSO SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-0001002  
\_\_\_\_\_

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

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ATTORNEY FOR PETITIONER

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Trial counsel erred by failing to hire a handwriting expert to examine  
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to Detective Russell that stated Petitioner wanted to confess to the  
crime, because Petitioner denied writing the letter, the letter was  
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## ISSUE PRESENTED

Whether trial counsel erred by failing to hire a handwriting expert to examine Petitioner's handwriting and compare it to the handwritten letter sent to Detective Russell that stated Petitioner wanted to confess to the crime, because Petitioner denied writing the letter, the letter was introduced at trial, and the solicitor argued the contents of the letter in her opening statement and closing argument, which prejudiced Petitioner?

## STATEMENT OF THE CASE

Petitioner Alphonso Simmons was convicted of armed robbery and burglary, first degree, during the April 2008 term of the Lexington County General Sessions Court before Judge Thomas A. Russo and a jury. App. 1 – 289. Judge Russo sentenced Petitioner to forty-five years imprisonment. App. 289. Petitioner was represented by Elizabeth Fullwood and Casey Cornwell. Richard Hubbard and Angela Garrick represented the State. App. 1.

Petitioner appealed, but his conviction and sentence were affirmed. See State v. Simmons, Op. No. 2011-UP-212 (S.C. Ct. App. filed May 11, 2011). He was represented by Kathrine H. Hudgins on appeal.

On March 8, 2012, Petitioner filed a PCR application with the Lexington County Clerk of Court. App. 292 – 298. Respondent filed a return, dated August 3, 2012, requesting that an evidentiary hearing be held. App. 299 – 303. A PCR hearing was held on August 13, 2013 in Lexington County before the Honorable Edgar W. Dickson. App. 304 – 366. Benjamin A. Stitely represented Petitioner at the hearing. Daniel Gourley represented the State. App. 304.

Judge Dickson issued an order of dismissal on April 9, 2014. App. 367 – 377. Petitioner appealed Judge Dickson's order of dismissal. This petitioner follows.

## ARGUMENT

Trial counsel erred by failing to hire a handwriting expert to examine Petitioner's handwriting and compare it to the handwritten letter sent to Detective Russell that stated Petitioner wanted to confess to the crime, because Petitioner denied writing the letter, the letter was introduced at trial, and the solicitor argued the contents of the letter in her opening statement and closing argument, which prejudiced Petitioner.

### **Relevant Facts at Trial**

Ann Walker was the State's first witness. Walker testified that she was the opening manager of the McDonald's on Saint Andrews Road in Lexington County in 2004. App. 158, lines 16 – 25. On April 16, 2004, she arrived at the restaurant at 4:30 in the morning to prepare for the breakfast crowd. App. 160, lines 23 – App. 161, line 3. She entered the side door near the drive-thru window and turned on all of the lights in the restaurant. App. 161, lines 15 – 20. She walked through the kitchen and turned on the fryers. App. 161, line 20 – App. 162, line 1. When she walked past the fryers, she noticed that the drive-thru window was open. App. 161, line 20 – App. 162, line 1. She immediately turned to leave the building. When she made it to the front door, she heard a noise and looked behind her. App. 162, lines 1 – 17. She saw a man on the freezer dressed in "a gray hooded sweatshirt and mirrored sunglasses." App. 162, lines 1 – 17. The man leaped over the front counter towards her and put a gun to her head. App. 162, lines 22 – 25.

Walker explained that the man ordered her to open the safe while holding a "silver gun" to her head. App. 164, lines 16 – 20. They walked into the office where the safe was located and she put all of the money that was inside the safe into a grey "petty cash box." App. 165, lines 15 – 24. Once Walker put all of the money into the box, the robber ordered her to lie on the floor for fifteen minutes. App. 166, lines 15 – 24. He then left the store. App. 166, line 24.

Detective Eric Russell, the lead investigator in the case, testified that he responded to the McDonald's on the night of the robbery. App. 206, lines 1 – 4. When he arrived, he met with Walker and obtained a general description of the suspect. App. 206, lines 5 – 12. He explained that during the course of his investigation, he developed Petitioner as a suspect in the robbery. App. 206, lines 21 – 2. After developing Petitioner as a suspect, the detective showed Walker two photo lineups, and she picked Petitioner out of the second one. App. 207, line 9 – App. 210, line 8. On May 26, 2004, Detective Russell and Detective Goss picked Petitioner up from the Richland County detention center and transported him to the Lexington County detention center to serve him with arrest warrants, interview him, and book him into the jail. App. 211, lines 1 – 16.

In October 2005, Detective Russell received a handwritten letter “with a return address of Alphonso Simmons at the detention center” requesting that the detective come to the jail to speak with him. App. 216, lines 2 – 13. The letter said that Petitioner wanted to “confess to the crime” and “that he wanted to give up his accomplice so he could get the best deal possible.” App. 216, lines 2 – 13. The detective went to the detention center to speak to Petitioner, but Petitioner did not want to talk inside the jail. App. 216, lines 14 – 16. Det. Russell informed Petitioner that he could not be taken out of the secure facility, so Petitioner declined to talk to the detective. App. 217, lines 2 – 6.

In her opening statement to the jury, assistant solicitor Garrick gave a timeline of events that began with Walker's account of the robbery and ended with Detective Russell's visit to the detention center in response to Petitioner's purported letter. App. 145, line 10 – App. 153, line 5. Later, in his closing argument, assistant solicitor Hubbard argued that mailing the letter to the detective asking to confess and get the best deal possible are not the actions of “an innocent man.”

App. 237, lines 5 – 23. The State took advantage of the letter to argue Petitioner was not an innocent man. App. 240, lines 11 – 15.

### **PCR Hearing**

At the PCR hearing, Petitioner denied writing the letter to Det. Russell. App. 351, line 24 – App. 352, line 4. He also denied giving any confessions to the police. Petitioner stated that he told his defense attorney that he did not write the letter and that the letter was not in his handwriting.

Defense counsel Fuller testified as well. She admitted to not seeking a handwriting expert to examine the letter and compare it to Petitioner’s handwriting. App. 314, lines 4 – 16. She conceded that the State relied on the letter as part of their case. App. 313, lines 8 – 21. She acknowledged that if an expert’s opinion would have been to Petitioner’s benefit, it would have helped him in trial. App. 314, lines 4 – 16. However, she did not hire an expert because “there was nothing that would show [her] that they were going to be able to show it was his handwriting.” App. 336, lines 9 – 17.

### **Order of Dismissal**

Judge Dickson dismissed Petitioner’s claim of ineffective assistance of counsel. He reasoned that Petitioner’s “mere speculation as to what a witnesses’ testimony would have been cannot, by itself, satisfy his burden of showing prejudice.” App. 374. Because Petitioner did not “produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing, he failed to establish prejudice.” App. 374.

### **Discussion**

Trial counsel erred by failing to hire a handwriting expert to examine Petitioner’s handwriting and compare it to the handwritten letter sent to Detective Russell that stated Petitioner wanted to confess to the crime. Petitioner denied writing the letter. However, the letter was

introduced at trial and the solicitor argued the contents of the letter in her opening statement and closing argument, which prejudiced Petitioner.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, “whether 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,” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Pursuant to Strickland v. Washington, a court will conduct a two-prong test when determining whether trial counsel’s assistance was ineffective. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688).

First, an applicant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. In analyzing this prong, a court will use an objective standard of reasonableness. *Id.* Under this prong, “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must show that counsel’s “deficient performance prejudiced the defendant to the extent that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

A criminal defense attorney has a duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and evidence that can refute any aggravating evidence presented by the State. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 359 (2008) (citing

Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 2537 (2003)); Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 634 (Ct. App. 2014). This duty requires, at a minimum, interviewing potential witnesses and making an independent investigation of the facts and circumstances of the defendant's case. Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008).

In Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2008), this Court reversed the defendant's murder conviction because trial counsel was ineffective. In that case, defense counsel failed to hire an independent expert witness on gunshot residue analysis to evaluate the State's gunshot residue reports. Id. at 330, 642 S.E.2d at 596. The State relied on the gunshot residue evidence, specifically, the fact that no residue was found on the victim. Id. at 334, 642 S.E.2d at 598. Because the defendant argued that the gun accidentally fired when he grabbed it out of the victim's hand, the lack of gunshot residue on the victim was critical to the State's case. Id. Defense counsel failed to "adequately evaluate and challenge" the State's gunshot residue evidence and, therefore, was unable to refute it. Id. According to this Court, "the State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlight[ed] both the deficiency of counsel and the resulting prejudice." Id. at 334-35, 642 S.E.2d at 598.

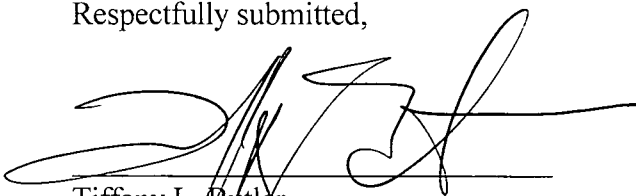
Here, the State alleged Petitioner mailed a handwritten letter to Det. Russell requesting that the detective visit him in jail so he could confess to the armed robbery and give the name of his accomplice. Although Petitioner denied writing the letter, trial counsel failed to hire a handwriting expert to examine and compare Petitioner's handwriting to the handwritten letter. Because counsel did not seek out and hire an expert to examine the handwriting, she was unable to rebut the State's contention that Petitioner wrote the letter. The State argued the contents of the letter in its opening statement and closing argument as evidence of Petitioner's guilt. If trial counsel had hired an expert and the expert determined that Petitioner **did not** write the letter, there is a reasonable probability

that counsel could have gotten it excluded. Because counsel did not attempt to gather **any** evidence to refute the State's claim that Petitioner wrote the letter asking to confess and was, therefore, guilty, Petitioner was denied a fair trial.

CONCLUSION

For the reasons argued, Petitioner Alphonso Simmons respectfully requests this Court to grant his petition with the ultimate relief of a new trial on his convictions of armed robbery and burglary, first degree.

Respectfully submitted,



Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of December, 2014.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO LEXINGTON COUNTY  
EDGAR W. DICKSON, CIRCUIT COURT JUDGE

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ALPHONSO SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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PETITION TO BE RELIEVED AS COUNSEL

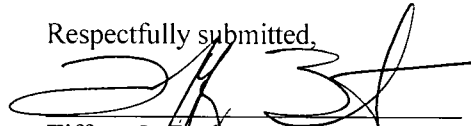
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Counsel for Alphonso Simmons states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on August 13, 2013. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Alphonso Simmons.

Respectfully submitted,



Tiffany L. Butler  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 12th day of December, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Lexington County

Edgar W. Dickson, Circuit Court Judge  
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ALPHONSO SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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CERTIFICATE OF SERVICE  
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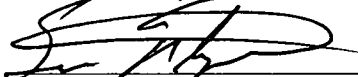
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Mr. Alphonso Simmons #279349, at Lee Correctional Institution, 990 Wisacky Highwaym, Bishopville, SC 29010, this 12th day of December, 2014.



\_\_\_\_\_  
Tiffany L. Butler  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day  
of December, 2014.



\_\_\_\_\_  
(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.