

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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SC SUPREME COURT

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Certiorari to York County

John C. Hayes, III, Circuit Court Judge  
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RANDY MITCHELL

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002374

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ISSUE PRESENTED

Did the PCR court err in not finding trial counsel ineffective for not insuring that Petitioner Mitchell understood clearly that he was facing a mandatory life without parole (LWOP) sentence if found guilty at trial which was prejudicial to Petitioner because he would have taken the ten year plea offer if he had understood the LWOP required sentence?

## STATEMENT

On October 3, 2010, brothers Everett and Kenny Williams were at their home watching Sunday Night football with their friends. Around ten o'clock someone banged on the front door. Before Everett could answer the door, a man burst through the door with a gun in his hand. He kept yelling to Everett to "Give it up! Give it up!" A short while later, another man came through the door holding a sawed off shotgun. He was screaming to "Give it up! Give it up!" App. 62, ll. 7 – 25.

Another brother, James, was in the back of the house. The man with the shotgun found him and took his money from the dresser. This man returned to the living room where the other man was collecting money and other items from the people there. The man with the shotgun left through the back door. The man with the pistol shot the gun up into the air and told them not to come outside. App. 63, ll. 1 – 12.

Unknown to the two robbers, the house was under surveillance by the police at the time. App. 405, ll. 4 – 13; App. 77, ll. 6 – App. 78, ll. 8. Four police officers were standing outside almost in the yard when the two men came from the house. The man with the shotgun shot into the air when they got outside. The four policemen then gave chase and caught both men. Both of the men had items belonging to the victims on their person. App. 405, ll. 14 – 21; App. 63, ll. 13 – App. 64, ll. 15; App. 87, ll. 4 – App. 93, ll. 23. Randy Mitchell was identified as the man with the pistol. App. 205, ll. 8 – App. 207, ll. 14.

On February 17, 2011, the York County Grand Jury indicted Petitioner Mitchell on the charges of burglary first degree and armed robbery. App. 421; App. 429 – App. 433. On February 27-29, 2012, Petitioner Mitchell proceeded to trial before the Honorable Robin Stilwell and a jury. Petitioner was represented by Philip Jamieson, and the state was represented by Betty Miller. App. 1. The jury returned a verdict of guilty on both charges. App. 324, ll. 16 – 24.

Before sentencing, the solicitor told the court that she had noticed Petitioner Mitchell and his attorney more than ten days before trial of the state's intention to go forward with the life without parole (LWOP) sentence based on Mitchell's prior conviction of a most serious offense of attempted armed robbery. The solicitor said she gave written notice to Mitchell in court, and gave a separate written notice to Mitchell's attorney. App. 326, ll. 5 – 18.

Petitioner Mitchell told the court that he did not have an attempted armed robbery on his record "for this to be a third offense." He said he did not have a third strike. He claimed that he went to prison for strong arm robbery which was not a violent offense. Mitchell said this was his only violent offense even if it was his third offense. He said: "This is all summed up in one case so you can't make this my third offense like that." App. 327, ll. 4 – 19.

The solicitor responded that she "personally prosecuted him for it." App. 327, ll. 23 – 24. The judge then asked Mitchell's trial counsel if he took exception to the fact that this would constitute a second most serious strike. Trial counsel replied: "She provided me a certified copy of a conviction at the beginning of the trial, Your Honor." The judge then asked if that conviction was a most serious offense. Trial counsel responded that it was. App. 328, ll.2 – 9.

The judge then imposed the life without parole sentence on Petitioner Mitchell. The judge emphasized that he had no discretion and "was held by the law" to impose the LWOP sentence. App. 329, ll. 2 – 16.

Petitioner Mitchell filed a notice of appeal. The South Carolina Court of Appeals affirmed Mitchell's conviction and sentence. State v. Mitchell, 2014-UP-104 (Ct. App. filed March 12, 2014). App. 422; App. 451- App. 452.

On April 3, 2014, Petitioner Mitchell filed an application for post-conviction relief (PCR). The state filed a return on App. 421; App. 333 – App. 344. An evidentiary hearing was held on

April 14, 2015 before the Honorable J. Ernest Kinard. Petitioner Mitchell was represented by Leah Moody, and the state was represented by J. Rutledge Johnson. App. 346.

At his PCR hearing, Petitioner Mitchell testified that his trial counsel was ineffective for “not investigating or keeping the defendant informed of important developments in the course of the case.” He explained that he had a previous trial that ended in a hung jury. After that his new trial counsel came and brought a plea offer from the state. Trial counsel told him that the state was going to serve him with notice of LWOP. Mitchell told his attorney that he was “not on his third strike.” The only explanation counsel gave him was that the solicitor said “he was on his third strike and they were serving him with papers.” App. 357, ll. 12 – App. 358, ll. 15.

Mitchell testified that they had a hearing before the judge and he tried to explain this to the judge who just told him to talk to his attorney. When Mitchell talked to his attorney after the hearing, his attorney told him that “she said she was going to give the sentence on one.” Counsel told him he would show him the notice that he was on his third strike. App. 358, ll. 8 – 25.

Mitchell said that if he had known he was facing a life sentence if found guilty, he would not have gone to trial. He said he did not know about the two strikes. He told the judge he did not have three strikes. Mitchell testified:

This is the evidence I’m trying to present to show that I was not properly informed of the guidelines of the 17-25-45 being a two-strike law.

App. 361, ll. 3 – 18.

Betty Miller, the solicitor who prosecuted Petitioner Mitchell’s case, testified at the PCR hearing in response to the allegation of prosecutorial misconduct that the LWOP notice was not proper. She stated: “I am always very careful about how I serve LWOP notices.” She said that her practice was to do it on the record with the defendant and defense attorney present. App. 397, ll. 1 – 15.

Mitchell's trial counsel testified at the PCR hearing that he was appointed to represent Petitioner Mitchell on his second trial. The first time counsel met with Mitchell, counsel said that he discussed the plea offer of ten years. Counsel said he told Mitchell that he should take the plea offer because he was facing LWOP if guilty. Counsel said that Mitchell understood before going into the second trial that he could receive the LWOP sentence. App. 398, ll. 23 – App. 399, ll. 25; App. 408, ll. 1 – 14.

Trial counsel testified that he “informed” Mitchell of the two most-serious offense law concerning the LWOP sentence. Counsel thought Mitchell understood. They had a hearing before a judge where the notice of LWOP was served. Counsel again encouraged Mitchell to take the plea offer but Mitchell rejected the offer. App. 403, ll. 21 – App. 404, ll. 11.

Counsel said he “encouraged Mitchell vehemently not to go to trial.” Counsel said the state's case was “particularly” strong as Mitchell was accused of robbing a crack house that was under surveillance by the police at the time. Mitchell “ran out into the arms of the police.” App. 405, ll. 1 – 21.

On October 13, 2015, Judge John Hayes III <sup>1</sup> issued an order denying Petitioner Mitchell's PCR application, and dismissing it with prejudice. App. 421 – App. 428. The PCR judge ruled that Petitioner Mitchell was aware of the state's position that Mitchell was subject to a LWOP sentence. The judge found that Petitioner Mitchell had not met his burden of proof that trial counsel was ineffective and had not proven any prosecutorial misconduct. App. 428.

Mitchell's PCR attorney filed a notice of appeal. This petition follows.

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<sup>1</sup> Due to the untimely death of the PCR judge, the Honorable L. Ernest Kinard, the Honorable John C. Hayes III assigned this case to himself pursuant to Rule 63, SCRPC.

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for not insuring that Petitioner Mitchell understood clearly that he was facing a mandatory life without parole (LWOP) sentence if found guilty at trial which was prejudicial to Petitioner because he would have taken the ten year plea offer if he had understood the LWOP required sentence.

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, *supra*; Butler v. State, *supra*.

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. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

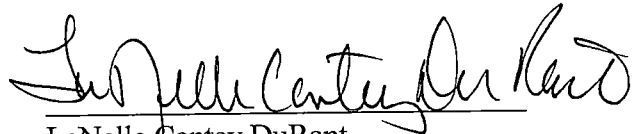
In Jones v. Barnes, 463 U.S. 745 (1983), the United States Supreme Court held that trial counsel has the duty to keep his client informed of important developments at trial and to consult with him on important issues.

The PCR judge erred in not finding trial counsel ineffective for making the sentence clear to Mitchell. It was obvious that Mitchell did not understand the two strike law as he kept saying that he did not have three strikes. This was prejudicial to Mitchell because he rejected a ten year plea offer because he thought he had a chance to be found not guilty since his first trial ended with a hung jury. Counsel needed to explain the chances of another hung jury in light of the eyewitness evidence against Mitchell.

CONCLUSION

Based on the above, certiorari should be granted, and Petitioner's convictions and sentences vacated, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", written over a horizontal line.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO YORK COUNTY  
JOHN C. HAYES, III, CIRCUIT COURT JUDGE

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RANDY MITCHELL

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002374

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Randy Lamont Mitchell 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 April 14, 2015. 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 Randy Lamont Mitchell.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name.

LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to York County

John C. Hayes, III, Circuit Court Judge

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RANDY MITCHELL

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

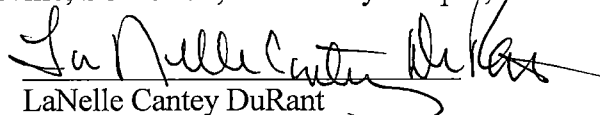
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CERTIFICATE OF SERVICE

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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 Justin Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Randy Lamont Mitchell, #247782, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 6th day of April, 2016.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day  
of April, 2016.

Christian Ford (L.S.)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026.