

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Sumter County

J. Cordell Maddox, Jr., Circuit Court Judge

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S.C. SUPREME COURT

WILLIAM GREGG,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000892

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO AUSTIN V. STATE  
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Lara M. Caudy  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate and interview two alleged eyewitnesses before trial, and where Petitioner was prejudiced because counsel's failure to interview these witnesses prevented him from conducting an effective cross-examination?

## STATEMENT OF THE CASE

Around 11:30 pm on November 1, 2003, Kevin Franklin and Darrell Herriott were leaving Herriott's girlfriend's house. Franklin was driving Herriott's 2000 Kia Sportage and Herriott was sitting in the front passenger seat. As they were backing out of the driveway, another car came "flying around the curve." App. 75, l. 22 – 76, l. 18. This vehicle slowed down and Franklin stopped and spoke to the driver. App. 76, ll. 19-22. The two vehicles were parked next to each other with their driver's side door windows aligned. App. 78, ll. 15-17. Herriott claimed that as he turned his head to "pluck [his] cigarette out the window," he heard a gunshot. When he turned back around, he saw the muzzle of a firearm "flash." The gunshots were coming from the other vehicle. Herriott immediately jumped out of the car and fled into the woods. App. 76, l. 23 – 77, l. 8.

After the gunshots stopped, Herriott heard Kendrick Miller, who was allegedly standing in the yard in front of Herriott's girlfriend's house, yell, "Oh. He done shot him." Herriott ran back to the car and looked inside the vehicle. After he saw that Franklin had been shot, Herriott ran to Franklin's mother's house, which was only about a block away, and told Franklin's mother what happened. He then fled the scene. He did not call 911 or wait for law enforcement to arrive. App. 95, ll. 3-23. Herriott allegedly called the police the next day and arranged a time to meet with law enforcement and provide a statement. App. 96, ll. 1-3.

Both Herriott and Kendrick Miller claimed Petitioner was the shooter. App. 79, ll. 2-12; App. 462, l. 19 – 465, l. 6. These "eyewitness" identifications were the only evidence against Petitioner. The state theorized at trial that Petitioner shot and killed Franklin because he suspected Franklin had been responsible for a recent burglary at Petitioner's house where clothing and other merchandise Petitioner had purchased in New York to sell at his booth at a

local flea market was stolen. However, law enforcement did little to investigate the case. Once Miller, and later Herriott, identified Petitioner as the shooter, law enforcement did absolutely nothing to investigate other suspects or leads.

Petitioner presented an alibi defense. Sherrill Williams, Petitioner's childhood friend and old girlfriend, testified that Petitioner would often visit her in Garner, North Carolina on his way to and from New York where the two were raised. Petitioner had family in New York and would often drive from Sumter to New York. On several occasions, Sherrill rode with Petitioner to New York to visit her own family. After a week or two week visit, Petitioner would drive Sherrill home to North Carolina on his way back to Sumter. App. 294, 1. 5 – 296, 1. 25.

Sherrill testified that Petitioner came to visit her on October 31, 2003, the day before the murder, on his way to New York. She remembered the date because it was Halloween as well as her mother's birthday. App. 297, 1. 8 – 298, 1. 2. Petitioner stayed at her house until Wednesday, November 5, 2003. App. 300, ll. 14-24. Again, the murder occurred on November 1, 2003.

The police interviewed Sherrill on December 2, 2003. Sherrill likewise told the police in a written statement that Petitioner came to visit her on October 31, 2003 and left on Wednesday, November 5, 2003. App. 299, 1. 9 – 300, 1. 13.

A Sumter County Grand Jury ultimately indicted Petitioner on October 25, 2007 for murder, possession of a firearm during a crime of violence, and possession with intent to distribute heroin. App. 614-615. His case was called to trial on July 28, 2008 before the Honorable R. Ferrell Cothran, Jr., and a jury.<sup>1</sup> App. 1. Assistant Solicitor Harry Conner represented the state, and

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<sup>1</sup> For whatever reason, the transcript of Petitioner's trial does not include the voir dire or jury selection proceedings. Court Administration informed undersigned counsel that the tapes containing these proceedings no longer exist since more than five years have passed since Petitioner's trial. See Rule 607(i), SCACR. Consequently, these proceedings cannot be transcribed.

Christopher Hart represented Petitioner. App. 1. Judge Cothran granted Petitioner's motion to sever the charge of possession with intent to distribute heroin after finding the offense was not sufficiently connected or closely related in kind, place, and character to the murder and weapons offense.<sup>2</sup> App. 51, ll. 4-18.

On July 30, 2008, the jury found Petitioner guilty. App. 383, l. 15 – 384, l. 6. Judge Cothran sentenced him to thirty five years' imprisonment for murder and five years concurrent for the weapons offense. App. 390, l. 20 – 391, l. 3. Petitioner did not appeal his conviction or sentence.<sup>3</sup>

On October 27, 2008, Petitioner filed an application for post-conviction relief (PCR). App. 492-497. The state filed a return to this application dated May 7, 2009. App. 498-502. Petitioner filed a *pro se* amended application on March 22, 2013. App. 503-507. An evidentiary hearing was convened on December 14, 2014, more than *six years* after Petitioner filed his original application, before the Honorable J. Cordell Maddox, Jr. App. 508. Assistant Attorney General Daniel Gourley represented the state, and John S. Keffer represented Petitioner. App. 508. By order filed May 18, 2015, Judge Maddox denied Petitioner relief. App. 568-575.

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<sup>2</sup> Law enforcement allegedly found heroin during a consent search of Petitioner's home the day after the shooting. App. 13, ll. 6-21.

<sup>3</sup> In his first application for post-conviction relief, Petitioner stated, "My notice of appeal was inadvertently filed past 10 days." App. 493. In his second application, Petitioner stated, "Trial counsel failed to file a direct appeal as requested. Christopher Hart [trial counsel] [gave] a written statement showing that the direct appeal was filed out of time." App. 578. Petitioner also specifically alleged that trial counsel was ineffective for failing to timely file a notice of appeal as requested. App. 584. For whatever reason, neither of Petitioner's PCR attorneys requested a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and the PCR court has never ruled on whether Petitioner is entitled to a belated appeal. Consequently, Petitioner has never had a direct appeal from his murder conviction or his thirty five year sentence.

During the evidentiary hearing, Petitioner asserted that “the whole case [revolved] around the witnesses alleging that I committed this crime,” but his attorney did little to investigate these eyewitnesses, particularly Kendrick Miller. App. 513, l. 7 – 514, l. 8. Petitioner explained that while Miller claimed he knew Petitioner, Petitioner did not know who Miller was and had never met him before. App. 515, l. 20 – 516, l. 12; App. 518, ll. 5-19. He asserted, “This is a witness that’s alleging he actually [saw] me at this crime, and I haven’t, haven’t see him until the day of the . . . trial.” App. 518, ll. 11-14. Petitioner contended that Darrell Herriott and Miller “conversed back and forth” and “concocted a story that said I committed the crime.” App. 519, ll. 13-18. Moreover, Petitioner said he did not know what Miller was going to testify to on the stand because Miller never gave the police a written statement and trial counsel failed to interview or investigate Miller before trial. App. 515, l. 20 – 516, l. 12; App. 518, ll. 5-16.

Christopher Hart, who was Petitioner’s trial counsel, said he hired a private investigator to locate and interview potential witnesses. App. 552, ll. 1-6. He was particularly interested in locating and interviewing Darrell Herriott, who claimed he was a passenger in the vehicle when Franklin was shot and killed and identified Petitioner as the shooter. Hart said he asked Petitioner who Herriott was and all Petitioner told him “for two years” was that he knew Herriott “as a guy named Black” and that he thought Herriott was a truck driver who lived in North Carolina. Despite efforts to do so, the investigator Hart hired could not find Darrell Herriott before trial. Hart said he was surprised when Herriott later testified at trial that Petitioner and Herriott had “a baby by the same momma.” Based on Herriott’s testimony, Hart said it appeared Petitioner and Herriott had a closer relationship than Petitioner led him to believe. Lastly, Hart testified that his investigator interviewed Kendrick Miller before trial and Miller said “he heard some shots, but he didn’t see any

of the shooting. He didn't see anything take place.”<sup>4</sup> App. 550, l. 24 – 553, l. 16; See App. 469, ll. 14-20.

The PCR court ultimately found Petitioner failed to prove trial counsel was ineffective for failing to properly investigate. App. 573. Noting that trial counsel hired a private investigator who interviewed Kendrick Miller, the court found counsel's “actions were reasonable [under] the circumstances and did not fall below professional norms of reasonableness.” App. 573. Moreover, the court found Petitioner “can show no prejudice as he failed to present any evidence or witnesses in support of his argument that [t]rial [c]ounsel failed to investigate his case.” App. 573. Consequently, the court denied Petitioner relief.

For whatever reason, Petitioner's PCR attorney failed to file a notice of appeal from the order of dismissal. However, Petitioner filed a *pro se* notice of appeal. In order to determine the timeliness of the service of Petitioner's *pro se* notice of appeal, this Court requested Counsel Keffer provide the date on which he received written notice of entry of the order of dismissal. App. 576. This Court ultimately dismissed Petitioner's appeal after Counsel Keffer failed to provide this information to the Court. App. 576.

On November 2, 2015, Petitioner filed a second application for post-conviction relief seeking the right to a belated appeal of the denial of his original application, among other relief. App. 577-586. The state filed a return to this application and motion to dismiss dated December 30, 2015. App. 587-590. An evidentiary hearing was convened on March 18, 2016 before the Honorable Brooks P. Goldsmith. App. 591. Assistant Attorney General Daniel Gourley represented the state, and Timothy L. Griffith represented Petitioner. App. 591. During the hearing,

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<sup>4</sup> Miller actually identified Petitioner as the shooter. While he claimed he did not see the shooting because his back was to the driveway when the shooting occurred, Miller said he saw Petitioner “creep” around the car Franklin was driving after the shooting and drive away. He claimed he saw Petitioner's face. App. 462, ll. 7-24.

the assistant attorney general indicated the state would consent to a belated appeal based on his review of the “various documents” filed by Petitioner and his conversation with Petitioner’s first PCR attorney. App. 612. By order filed April 7, 2016, Judge Goldsmith granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 610-613.

This petition for writ of certiorari follows.

## ARGUMENT

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate and interview two alleged eyewitnesses before trial. Petitioner was prejudiced because counsel's failure to interview these witnesses prevented him from conducting an effective cross-examination.

Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to properly investigate and interview Kendrick Miller and Darrell Herriott, the two alleged eyewitnesses who identified Petitioner as the shooter during trial. Counsel's failure to properly investigate these witnesses prevented him from effectively cross-examining Herriott and Miller during trial. If counsel would have conducted a reasonable investigation of these witnesses, there is a reasonable probability that the outcome of Petitioner's trial would have been different since this "eyewitness" testimony was the only evidence against Petitioner.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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, 686 (1984); see 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.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Petitioner must prove 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 of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d

624, 625 (1989). 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).

The United States Supreme Court has held that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691; see Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (holding “[w]ithout a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation”) (internal quotation and citation omitted). The United States Supreme Court has also held that “[i]n assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” Wiggins v. Smith, 539 U.S. 510, 527 (2003).

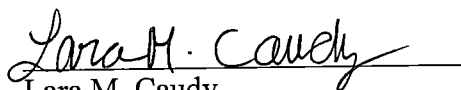
In this case, trial counsel’s performance was deficient as it fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 687-688. A reasonable attorney would have conducted a proper investigation into Kendrick Miller and Darrell Herriott since these men claimed to have witnessed the murder and identified Petitioner as the shooter. Counsel’s failure to conduct a reasonable investigation or interview Herriott and Miller before trial prevented him from discovering evidence that could have been used to impeach these alleged eyewitnesses and conduct an effective cross examination. If counsel would have engaged in a thorough investigation, there is a reasonable probability that the outcome of Petitioner’s trial would have been different, particularly because the eyewitness identifications by Herriott and Miller were the only evidence against Petitioner.

Respectfully, this Court should reverse the ruling of the PCR court, hold trial counsel was ineffective, and grant Petitioner a new trial.

**CONCLUSION**

Petitioner respectfully requests this Court grant the petition for writ of certiorari and permit full briefing on the issue presented.

Respectfully submitted,



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of February, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County  
J. Cordell Maddox, Jr., Circuit Court Judge

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WILLIAM GREGG,

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PETITION TO BE RELIEVED AS COUNSEL

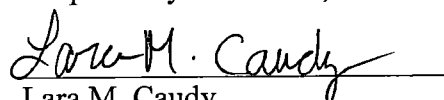
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Counsel for William Gregg states:

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 that was held on December 17, 2014. 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 an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for William Gregg.

Respectfully Submitted,

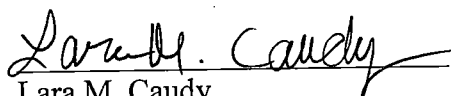
  
Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of February, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of her 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."



Lara M. Caudy  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
P.O. Box 11589  
Columbia, SC 29211-1589  
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ATTORNEY FOR PETITIONER

This 8th day of February, 2017.

STATE OF SOUTH CAROLINA

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WILLIAM GREGG,

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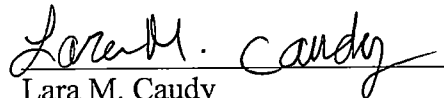
RESPONDENT

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CERTIFICATE OF SERVICE

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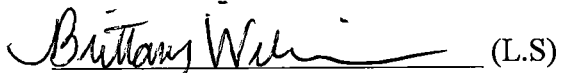
The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix in the above referenced case have been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari Pursuant to Austin v. State and a copy of the Appendix have been served upon William Gregg, #274507, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of February, 2017.



Lara M. Caudy  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8th day of February, 2017.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: November 3, 2026.