

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Richland County  
Tanya A. Gee, Circuit Court Judge

---

**ORIGINAL  
RECEIVED**

JUL 19 2016

**SC SUPREME COURT**

RICHARD KOUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002311

---

JOHNSON PETITION  
FOR WRIT OF CERTIORARI

---

Susan B. Hackett  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

**I N D E X**

INDEX.....i

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to investigate and present testimony from a person who was unidentified by the police, but who allegedly gave the police consent to search the residence, where the entirety of the state’s case hinged on whether the search was legal as it resulted in Petitioner’s arrest, the identifications of Petitioner by witnesses, and the seizure of evidence .....8

CONCLUSION.....17

PETITION TO BE RELIEVED AS COUNSEL .....18

## **ISSUE PRESENTED**

Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to investigate and present testimony from a person who was unidentified by the police, but who allegedly gave the police consent to search the residence, where the entirety of the state's case hinged on whether the search was legal as it resulted in Petitioner's arrest, the identifications of Petitioner by witnesses, and the seizure of critical evidence?

## STATEMENT

On Wednesday, July 16, 2008, Petitioner arrived in Columbia, South Carolina, to celebrate his wife's graduation from basic training at Fort Jackson on July 18, 2008. App. 552, ll. 14-24; App. 553, ll. 8-21. The day after graduation, on Saturday morning, Petitioner checked out of his motel and went to the Greyhound Bus Station to return home to Pennsylvania. App. 554, l. 19 – App. 555, l. 12. When Petitioner went to the ticket counter to purchase a ticket to leave, he learned the earliest bus left at 6:00 the next morning. App. 556, ll. 12-16. He asked a panhandler at the bus station, named Tony, if he knew anywhere that Petitioner could rent a room nearby for one night. App. 557, ll. 2-15. Tony introduced him to Sylvester, who agreed to rent him a room for \$20 in a local boarding house. App. 557, ll. 17-24; App. 558, ll. 4-11.

Around 7:30 p.m., Petitioner got directions to a local grocery store, where he could buy food for supper. App. 558, ll. 5-19. After purchasing some pierogies from a Food Lion on Harden Street, he returned to the boarding house around 10 p.m. App. 560, ll. 14-20. While taking a shower, Petitioner heard some banging on the bathroom door. App. 561, ll. 4-18. Petitioner got out of the shower and opened the door when the person doing the banging indicated he was a police officer. App. 561, l. 14 – App. 562, l. 15. According to Petitioner and the chief investigating officer's report, after searching his person, the police searched his suitcase and found a yellow shirt. App. 563, l. 14 – App. 564, l. 6; App. 507, ll. 2-16.

Thereafter, the police handcuffed Petitioner and placed him in "an armored truck, kind of van thing." App. 564, ll. 7-11. Approximately forty-five minutes later, the police pulled him from the armored vehicle and shined a spotlight on him while police officers flanked him. App. 564, ll. 12-17. He was outside in the spotlight for approximately five minutes before he was returned to the armored vehicle. App. 564, ll. 17-19; App. 376, l. 21 – App. 377, l. 24. At that

time, Petitioner was wearing a red Ohio State shirt and blue North Carolina Tarheels shorts. App. 382, ll. 22-24; App. 560, ll. 4-10. Then, ten minutes later, he was removed yet again so that the police could take a photograph of him. App. 564, ll. 19-21. Petitioner was then taken to jail. App. 565, ll. 16-20.

Unbeknownst to Petitioner, a gas station not far from the boarding house where he was staying was robbed on July 19, 2008, around 8:30 p.m. App. 248, l. 17 – App. 249, l. 23. According to the cashier, a man entered the store wearing a bright yellow jersey and approached the counter. App. 248, l. 20 – App. 249, l. 3; App. 289, ll. 5-21. He requested a pack of cigarettes. App. 249, ll. 4-6. The man presented \$20 to pay for his purchase. App. 249, l. 6. While she was getting change for the \$20, she “looked up and he had a knife.” App. 249, ll. 7-8. The man told her “this [was] a robbery” and instructed her to give him all the cash, which she did. App. 249, ll. 8-21. She described the knife as an “original black handle, black plastic handle, serrated-edge steak knife, ordinary, every day kind of knife that you could find in any kitchen, any steakhouse.” App. 250, ll. 1-4. Immediately after the robber left the store, the cashier called 911. App. 251, ll. 8-16. She described the robber as “medium built” and having “sandy blonde hair.” App. 276, l. 3 – App. 277, l. 24. Additionally, she told the police that the robber was wearing a yellow jersey. App. 289, ll. 5-21. The police arrived within two to three minutes of the robbery. App. 261, ll. 19-22. The cashier met with the responding officers and provided information concerning the robber as well as the video. App. 262, ll. 2-25.<sup>1</sup> The robber

---

<sup>1</sup> The store was equipped with video surveillance, but the identity of the robber was not clear from the video. Additionally, whether the robber was displaying a knife was unclear in the video. App. 256, l. 22 – App. 257, l. 18; App. 483, l. 14 – App. 485, l. 9 (Thomas testifying that when he watched the video at the store, the images were much clearer than those produced in court and that he could see “an object” in the robber’s hand).

took \$360 in cash, plus the \$20 bill he had given to the cashier to purchase the cigarettes, and a pack of Newport cigarettes. App. 314, l. 22 – App. 315, l. 12.

Other officers were searching the surrounding area for the robber. Officer Bowman, who did not testify at the trial, “had received information that the suspect that committed the robbery had went [sic] to that address” of the boarding house. App. 367, ll. 17-21; App. 387, ll. 10-16. In response to that information, the police surrounded the boarding house. App. 367, ll. 2-7, App. 368, ll. 1-3; App. 369, ll. 22-24. When the police knocked on the door, no one answered. App. 367, ll. 11-12. The police were “trying to local [sic] a keyholder.” App. 369, ll. 12-13; App. 493, ll. 6-9. “There was a lady next door that knew the tenants and also the owner” and she “was attempting to find a key” for the police. App. 369, ll. 13-15; App. 493, ll. 6-9. “The female that ... lived next door was able to eventually get one of the tenants that lived in the house.” App. 370, ll. 13-16. The tenant provided the police with a key. App. 370, ll. 17-19; App. 493, ll. 10-12. The tenant was asked for permission to search, and in response, he let the police in. App. 370, ll. 20-24; App. 493, ll. 13-14. Thereafter, the police entered the home. App. 371, ll. 2-6.

Taurus Sanders, a police officer, described the tenant as a “black male, mid-thirties to early forties.” App. 371, l. 1; App. 392, ll. 7-9; see also, App. 493, ll. 20-21 (Thomas describing the tenant as “an African-American male in his thirties, mid to late thirties, slimly built”). No one had the alleged tenant’s name. No one inspected the alleged tenant’s identification. No one took a statement from the alleged tenant. App. 392, ll. 7-20; App. 495, ll. 1-10. Sanders saw suitcases in sunroom. App. 372, ll. 1-6; App. 393, ll. 17-23. The tenant did say “there was a Caucasian male who asked could he place his bags in the house for security measures earlier that

day or something of that nature” prior to the police entering the boarding house. App. 493, ll. 14-17.

According to Sanders and the chief investigating officer, Arthur Thomas, when the police arrived at the bathroom, the door was locked. App. 373, ll. 3-6. One of the officers used a card or a hanger to unlock the door. App. 373, ll. 12-15; App. 496, ll. 6-9. Inside the bathroom, the officers found Petitioner. App. 373, ll. 16-17. The police “detained” Petitioner. App. 374, l. 2. Sanders claimed that in the bathroom, he saw “a yellow shirt on the floor along with some one-dollar bills on the floor as well.” App. 374, ll. 3-7.

Sometime later that night, the police took the cashier to a nearby residence because the police had caught a suspect – Petitioner – and the police wanted her identify the robber. App. 263, l. 13 – App. 264, l. 24; App. 279, ll. 10-17. The cashier described seeing an individual brought out into an open area where the police shined lights on the individual. App. 266, ll. 14-22. The cashier told the police she was 80 – 90% sure the man she was looking at under the police lights was the robber. App. 267, ll. 10-12.

On June 17, 2009, a Richland County grand jury indicted Petitioner for armed robbery (2009-GS-40-6661). App. 847-848. The state, represented by Dolly Justice Garfield and Andrew Rogers, called the case for trial before the Honorable J. Michelle Childs and a jury on December 7-10, 2009. App. 1. Charlie J. Johnson, Jr., represented Petitioner. App. 1. The state’s main witness was the cashier from the store. At the trial, the cashier described the robber as “[f]ive-two to five-five, 150 to 180 pounds, bright yellow shirt, husky voice, stocky build.” App. 250, ll. 18-20. She also claimed the robbery had “sandy brown hair,” and a beard. App. 250, l. 22 – App. 251, l. 1. This description differed from the one she provided to law enforcement prior to Petitioner’s apprehension. App. 276, ll. 3-20. Although the state presented

video of the robbery, the robber's identity was not immediately apparent. App. 256, l. 22 – App. 257, l. 18; App. 483, l. 14 – App. 485, l. 9. In addition to the cashier's identification of Petitioner at trial, the state presented a taxicab driver who claimed he heard a man say he intended to rob the store across from the Greyhound bus station. App. 316, l. 25 – App. 317, l. 8. The man was wearing a yellow t-shirt. App. 318, ll. 3-4. His hair color was “more in the blonde, not gray, not brown, but ... between red and brown.” App. 318, ll. 4-7. The man wore a white hat. App. 327, l. 4 – App. 328, l. 25. At the boarding house and during the trial, the taxicab driver identified Petitioner as that man. App. 322, l. 5 – App. App. 325, l. 3. The only other evidence presented against Petitioner was the yellow shirt and one-dollar bills found in the boarding house. App. 418, l. 8 – App. 420, l. 15. The state presented no other physical evidence linking Petitioner to the crime – no fingerprints, no DNA, no footwear impressions, no knife, and none of the stolen money. Nevertheless, after requesting to re-hear several witnesses' testimony, to review the video at least twice, to retire for one evening, and to re-hear the instructions concerning strong arm robbery and armed robbery, the jury found Petitioner guilty as charged. App. 668, ll. 9-10; App. 674, ll. 22-24; App. 677, ll. 15-16; App. 678, ll. 9-14; App. 680, ll. 19-24; App. 682, ll. 10-14; App. 684, ll. 6-14. Judge Childs sentenced Petitioner to sixteen years' imprisonment. App. 695, ll. 6-11; App. 849.

Petitioner filed a notice of appeal that was perfected by LaNelle Cantey Durant. App. 697-717. Petitioner raised two issues on appeal. The first concerned the trial court's erroneous admission of out-of-court identifications. The second concerned the trial court's erroneous admission of evidence seized during an illegal search. App. 697-717. On November 9, 2011, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion.

State v. Kough, 2011-UP-501 (S.C. Ct. App. filed Nov. 9, 2011); App. 757. Remittitur was sent on November 28, 2011. App. 758.

On December 27, 2011, Petitioner filed an application for post-conviction relief (PCR). App. 759-777. On May 14, 2015, through counsel, Petitioner filed an amendment to his PCR application. App. 784. On August 27, 2015, the matter proceeded to an evidentiary hearing before the Honorable Tanya A. Gee. App. 785. Charles T. Brooks, III, represented Petitioner. App. 785. J. Clayton Mitchell represented the state. App. 785. Dr. Tora Brawley, Petitioner, and Johnson testified at the hearing. By an order dated November 3, 2015, Judge Gee denied Petitioner relief from his conviction and sentence. App. 838-846.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to investigate and present testimony from a person who was unidentified by the police, but who allegedly gave the police consent to search the residence, where the entirety of the state's case hinged on whether the search was legal as it resulted in Petitioner's arrest, the identifications of Petitioner by witnesses, and the seizure of evidence.

### **Relevant facts**

#### *Trial facts*

Prior to trial, there was a hearing to determine the admissibility of certain evidence seized by the police from the boarding house where Petitioner had rented a room. Taurus Sanders, a City of Columbia police officer, responded to the armed robbery call by patrolling the immediate area around the store to look for a suspect. App. 54, ll. 1-25; App. 55, ll. 15-16. Officer Bowman “received information from a female that the suspect had went [*sic*] to the house at the corner of Pine and Gervais.” App. 55, ll. 1-5. Police officers surrounded the house. App. 56, ll. 13-19. Sanders then knocked on the door, but no one answered. App. 57, ll. 11-21. According to Sanders, one of the officers claimed he could see a white male changing clothes in a bedroom. App. 57, l. 22 – App. 58, l. 2.

A female who lived next door claimed she knew how to contact the owner of the boarding house. App. 58, l. 22 – App. 59, l. 1. However, she was unable to find the owner. App. 59, ll. 2-3; App. 81, ll. 11-15. Then, the neighbor stated she knew there was “a guy that lives in the area that has a room.” App. 59, ll. 3-5. She found him. App. 59, ll. 5-6. The “guy” arrived, and gave a key to the police. App. 59, ll. 6-8; App. 81, ll. 15-18; App. 88, ll. 20-24.

Sanders and Thomas claimed the man gave verbal consent to search. App. 59, ll. 9-12; App. 81, ll. 18-19; App. 88, l. 24. Sanders understanding was the man “was a resident” of the boarding house and “had control” and “a key.” App. 59, ll. 19-21. The man told Sanders there were other tenants and Sanders learned it was a boarding house. App. 59, ll. 22-25. This man was “just a black male in his maybe mid to late thirties.” App. 60, ll. 7-10. No one took a statement from him. App. 60, ll. 11-12. The man told Thomas “that there was a Caucasian male that visited that area and asked could he put some bags in the house. But he did not stay there. He wasn’t a resident there. So there would be possibly some clothing that belonged to this gentleman.” App. 81, ll. 20-25; see also, App. 89, ll. 2-3. Thomas believed the man was named Roberson, but he was uncertain. App. 89, ll. 19-22. No one from the police department got any type of contact information for the man. App. 89, l. 23 – App. 90, l. 3.

The police entered the boarding house. App. 60, ll. 13-17. When the police arrived at a bathroom, where the police believed the suspect was located, an officer opened the bathroom door. App. 61, l. 25 – App. 62, l. 1. The individual, later determined to be Petitioner, was handcuffed and frisked. App. 62, ll. 5-9. Sanders claimed there “was some clothing on the bathroom floor with some money on the floor as well.” App. 62, ll. 18-21. Although Thomas claimed in court that he “remembered some clothing being on the floor and a few dollars,” his report stated “[t]he suspect had two bags in the house. A yellow shirt was found in one of the bags.” App. 82, ll. 17-20; App. 207, ll. 24-25. Thomas claimed his report was wrong, and that he was focusing on questioning the suspect, not the location of evidence. App. 208, ll. 8-18. However, Thomas was the officer who placed the shirt and dollar bills on a bed in a bedroom. App. 82, l. 21 – App. 83, l. 6; App. 212, ll. 5-8; App. 212, l. 19 – App. 213, l. 2. Thomas admitted he searched the bags because he “was looking for identification for the individual here”

because Petitioner exercised his constitutional right and refused to speak to police. App. 211, ll. 19-23; App. 214, ll. 11-12. He “believe[d he] found the wallet and maybe a cellphone or something out of the bag.” App. 211, ll. 20-24.

Margaret Thomas Land owned the boarding house. App. 72, ll. 1-3. She explained that she rents the property by the room. App. 72, ll. 9-11. Sylvester Roberson rented “the third bedroom,” and Alvin Johnson rented “the front room.” App. 72, ll. 12-15. Sylvester was a black male, approximately thirty-five years old, of medium build, and standing approximately five feet, eight inches. App. 72, ll. 16-23. Land had never rented a room at the boarding house to a white male. App. 73, ll. 14-18. She had never seen Petitioner. App. 73, l. 25 – App. 74, l. 1. Although the tenants were not allowed to have roommates, the tenants were allowed to have guests. App. 74, ll. 5-20.

Trial counsel argued for suppression of the evidence seized during law enforcement’s search of the boarding house. He explained the police “entered the house without a search warrant supposedly based on the belief or the fact that they had someone there that lived in the house, which was an important element. But they could not produce a person. They could not produce a name. They did no identification check even to see who the person was.” App. 177, ll. 11-16. According to trial counsel, the owner did not provide the police with consent to search. App. 177, ll. 18-21. He noted the police made no effort to identify the person who provided consent. App. 177, l. 21 – App. 178, l. 1. As a result, the police had no basis for the search. App. 178, ll. 2-6. He noted Petitioner was not attempting to destroy evidence and could not have run from the house because the police were surrounding it. App. 178, ll. 2-14. Thus, he argued for suppression of “any evidence taken from that property as a result of that illegal search.” App. 178, ll. 14-15.

Further, he argued Petitioner was an invited guest as indicated by the testimony of the officer regarding what the alleged tenant said – that Petitioner, or a white male, had asked permission to leave his bags inside the boarding house that day. App. 189, ll. 5-10. Trial counsel noted that given the nature of a boarding house, the tenant would have the authority to grant consent to search only the area to which he could lay a claim, and not to the entirety of the house. App. 188, l. 11 – App. 189, l. 4. Trial counsel also argued Petitioner had an expectation of privacy in the bags in the room, which the testimony indicated had been placed in the boarding house for safekeeping. App. 215, l. 12 – App. 216, l. 8. In light of Thomas’ testimony that the yellow shirt was found in the bag, then the shirt was not in “plain view” as claimed by the state. App. 219, l. 14 – App. 220, l. 3.

The state argued the police were permitted to enter and search the house without a warrant based on exigent circumstances. App. 182, l. 23 – App. 183, l. 2. The prosecutor argued (1) the possibility of destruction of evidence and (2) hot pursuit of a fleeing felon were the exigent circumstances at the time of entry. App. 183, ll. 3-11. In the alternative, the state argued the police relied on the alleged tenant who appeared on the scene with a key who had “apparent authority” to consent to a search. App. 186, ll. 6-22. Finally, the state argued Petitioner had no standing to challenge the search because there was no evidence that he was a guest. App. 187, ll. 17-23.

The trial judge ruled “that the police had a reasonable belief that the tenant had a common and apparent authority to enter into the house by virtue of the key.” App. 222, ll. 12-15. Thus, the only remaining issue before the judge was whether Petitioner had a possessory interest in the suitcase that would prohibit introduction of the evidence. App. 222, ll. 15-18. The judge recognized Thomas’ report indicated the shirt was found in the suitcase, but she used

Sanders' testimony regarding the location of the shirt "to meet the preponderance of the evidence." App. 222, ll. 19-25. She summarized her ruling as follows:

But I believe at this threshold hearing, the preponderance of the evidence does indicate that the tenant had an interest into the home, allowed the officers to enter the home by the key. So the officer had to have a reasonable belief that he had a common and apparent authority to enter into that house, meaning the tenant. And that's what the officers' belief was at the time.

Once they're in, then the arguments about plain view and hot pursuit I think would follow. And then we also have testimony about the clothing and money actually being found on the bathroom floor. As I indicated, there's some discrepancy there, but it's been cleaned up, and also there is testimony on the record at this point in time. So the Court would allow it in and respectfully deny the motion to suppress.

App. 223, ll. 4-20.

*Direct appeal*

On appeal, Petitioner argued the trial judge erred in admitting evidence seized during an illegal search of the house where he had rented a room because the police did not have a search warrant and relied on a person who had a key to provide consent. App. 710-714. Petitioner noted the police were unable to identify the person or confirm the person had authority over the premises. App. 710-714. The state argued the police had authority to enter because "the officers had consent to search the home from a person with apparent authority over the residence." App. 742.

The Court of Appeals affirmed the trial judge's rulings regarding the illegal search citing State v. Laux, 344 S.C. 374, 376, 544 S.E.2d 276, 277 (2001) for the propositions: (1) "the test of whether a third party may grant valid consent to search is 'whether the third party possesses common authority over or has some other sufficient relationship to the premises or effects searched'" and (2) that "consent to search may be valid based on apparent authority and a police officer's reasonable belief that the person authorizing the search has the authority to do so."

App. 757. Additionally, the Court of Appeals cited Warden v. Hayden, 387 U.S. 294, 296-299 (1967) to explain that the exigent circumstances exception to the warrant requirement applied in a similar case “where [the] armed robber was seen by witnesses entering a house, police arrived within minutes, police were admitted into the house by a person with apparent authority over the premises, and incriminating items were found during a search.” App. 757.

*PCR hearing facts*

Petitioner explained to the PCR judge that trial counsel failed to investigate the circumstances surrounding the police officers’ illegal entry and search of the boarding house. App. 805, ll. 14-20. Petitioner noted he had paid rent to stay there for a night. App. 805, ll. 19-20. He further noted the police officers testified “they were given access into the house” “by a mysterious black man with no name that just let them in.” App. 805, ll. 21-25. Petitioner explained “this mysterious black man just wasn’t available for trial.” App. 806, ll. 2-3. This issue was particularly important because the police entered the boarding house without a warrant and seized evidence from the room Petitioner had rented. App. 806, ll. 5-10. On this same point, Petitioner explained that trial counsel failed to object to hearsay when the officers testified repeatedly to what the unidentified “keyholder” said to them. App. 809, ll. 3-12.

Trial counsel did not hire an investigator in this case because “[t]here was no need.” App. 823, ll. 5-6. Trial counsel “actually investigated it ... personally.” App. 823, ll. 6-7. He “went to the scene” and “interviewed every witness ... personally,” including the officers. App. 823, ll. 7-13. Trial counsel told the PCR judge that at the trial he “argued basically that they didn’t have, that the person that gave them the key, they could not prove who that person was. And that without that person having authority to give them the key, that they shouldn’t have the right to do a search without a search warrant.” App. 830, l. 21 – App. 831, l. 3.

### *Order of dismissal*

In the order of dismissal, Judge Gee found Petitioner's allegation that trial counsel was ineffective for failing to investigate the identity of the man who allowed law enforcement into the house where Petitioner was found rested "entirely on speculation because the tenant was not produced at the [PCR] hearing to allow the Court to judge the relevance of his testimony." App. 843. To support this conclusion, Judge Gee cited to *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998) for the proposition that "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." App. 843. According to Judge Gee, Petitioner "failed to present any evidence to th[e] Court as to how any evidence regarding the tenant could have changed the result of the trial." App. 843.

### **Discussion**

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner 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. 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). 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 also *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.

An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. As this Court explained, "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011).

Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003)(holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004)(holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from "major depressive episodes with severe symptoms of anxiety and possible prepsychotic features").

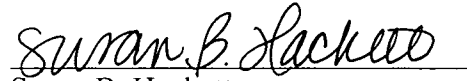
Trial counsel provided ineffective assistance by failing to investigate and present testimony from the unidentified person who allegedly provided the police with permission to enter the boarding house. There was no question that the individual was not the owner of the

boarding house as she testified at the trial. Learning the identities of the two boarders would have been relatively easy considering trial counsel was aware of the address and had conducted the entirety of the investigation in this case himself. Trial counsel testified he had gone to the boarding house as part of that investigation. If the alleged tenant who provided the police with permission to search were not one of the tenants, then trial counsel could have presented the actual tenants as witnesses to show the police lacked the authority to enter the residence. Instead, trial counsel permitted the state to permeate the record with hearsay. Officers testified as to what Bowman said but Bowman did not testify. Officers testified as to what Bowman said an unidentified female said when neither Bowman nor the female testified. Officers testified regarding what the unidentified tenant said when the tenant never testified. Having the illegal entry into the boarding house declared legal was crucial for the state's case because Petitioner's arrest, the two witnesses' identifications, and the only physical evidence in the trial were derived from the police entering the boarding house. Trial counsel's failure to secure the alleged tenant's testimony greatly prejudiced Petitioner because it allowed the state to move forward with its case. Had the tenant testified during the suppression hearing, the state's case would have been stopped in its tracks.

**CONCLUSION**

Petitioner respectfully requests this Court reverse the decision of the PCR court, reverse his conviction, and remand for a new trial.

Respectfully submitted,

  
Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of July, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Richland County  
Tanya A. Gee, Circuit Court Judge

---

RICHARD KOUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

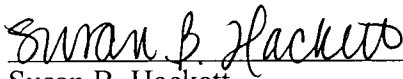
---

Counsel for Richard M. Kough 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 November 13, 2015. In her opinion seeking certiorari from the order of dismissal is without merit.
3. Pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201(1988), she has 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 Richard M. Kough.

Respectfully submitted,

  
\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 19th day of July, 2016

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Richland County  
Tanya A. Gee, Circuit Court Judge

---

RICHARD KOUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

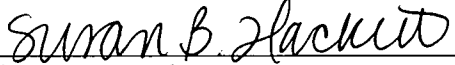
RESPONDENT

---

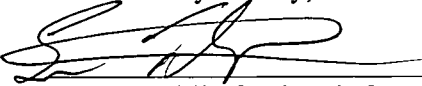
CERTIFICATE OF SERVICE

---

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 Clay Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Richard M. Kough, #338426 at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC, 29936, this 19th day of July, 2016.

  
\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 19th day of July, 2016.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 30, 2022