

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ALBERT J. CAVE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002383

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JOHNSON PETITION FOR WRIT OF CERTIORARI  
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ATTORNEY FOR PETITIONER

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JUN 27 2017

S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether trial counsel's failure to move to recuse the solicitor's office based on a prior order recusing the solicitor's office was deficient performance which prejudiced petitioner's Sixth Amendment right to the effective assistance of counsel?

## STATEMENT

On October 17, 2011, petitioner was indicted for first-degree burglary in Aiken County. App. 179. On September 10, 2012, petitioner pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), before the Honorable Doyet A. Early, III. App. 1. David W. Miller represented the State. App. 1. Brian A. Katonak represented petitioner. App. 1. Judge Alford accepted the negotiated plea and sentenced petitioner to twenty-five years' imprisonment. App. 14, ll. 13 – 24.

On January 2, 2014, petitioner filed a PCR application. App. 16. On September 23, 2016, a hearing was held before the Honorable Robert E. Hood. App. 36. Lance S. Boozer represented petitioner. App. 36. Julie A. Coleman represented the State. App. 36. Because petitioner's case had overlapping evidentiary issues with another of his PCR cases, the parties consented to a consolidated evidentiary hearing, but separate orders were issued and this petition only concerns one of these orders. App. 39, l. 3 – 41, l. 19. Aimee J. Zmroczek represented petitioner on the consolidated PCR action. App. 36. On November 16, 2016, Judge Hood denied petitioner's PCR application. App. 162. This petition follows.

## ARGUMENT

Trial counsel's failure to move to recuse the solicitor's office based on a prior order recusing the solicitor's office was deficient performance which prejudiced petitioner's Sixth Amendment right to the effective assistance of counsel.

It was undisputed that on October 29, 2008, the Honorable James C. Williams, Jr. recused the Second Circuit Solicitor's Office from prosecuting petitioner. App. 154-55. Petitioner was accused of crimes against a former deputy solicitor and a relative of the mayor of Aiken. App. 154-55. Petitioner filed a motion to recuse the solicitor's office and a hearing was held before Judge Williams on September 10, 2008. App. 154-55. The State opposed recusal and threatened to serve notice of life without parole on petitioner at the hearing on the motion to recuse. App. 154-55.

Judge Williams granted petitioner's motion to recuse. App. 154-55. Judge Williams entered a written order that, in relevant part, read:

The Second Circuit Solicitor's Office shall be recused from prosecuting the above-captioned offenses, or any charges or indictments stemming from the same incidents **or alleged to be related or part of a pattern of criminal activity**, including the above captioned charges, **including but not specifically limited to**, the possible indictments mentioned by Solicitor Morgan at the hearing.

App. 154 (emphasis added). The Attorney General prosecuted these charges and petitioner was acquitted and other charges were nolle prossed. App. 48, l. 1 – 51, l. 11.

In 2011, petitioner was indicted for first-degree burglary. App. 179. The alleged victim was an Aiken County police officer. App. 67, ll. 6 – 15. Even though Judge Williams had entered the 2008 Order recusing the Second Circuit Solicitor's Officer, it still prosecuted the case against petitioner. App. 105, l. 16 – 106, l. 12. The assistant solicitor who handled the case testified at the PCR hearing that he "had no idea that the order existed." App. 106, ll. 7 – 12. He

further claimed that Judge Williams' Order did not apply to his prosecution where the alleged victim was an Aiken County police officer. App. 105, l. 17 – 107, l. 4. He said, “You have to have such a tortured reading of that order it is ridiculous.” App. 106, ll. 7 – 8.

Petitioner was first represented on these charges by David Hayes, who testified, “This was absolutely the worst relationship I’ve ever had with any client.” App. 123, ll. 10 – 13. Hayes’ relationship with petitioner deteriorated to the point where he asked Judge Early to appoint substitute counsel. App. 124, ll. 11 – 21. The court appointed Brian Katonak. App. 124, ll. 22 – 24.

Hayes testified he never saw Judge Williams’ recusal order until he “received the PCR packet.” App. 129, ll. 24 – 25. However, he admitted that he knew that the Attorney General prosecuted petitioner’s 2008 charges because he “watched the prior two trials.” App. 129, ll. 15 – 23.

The first time Katonak heard about Judge Williams’ recusal Order was the day of the PCR hearing. App. 144, l. 4 – 145, l. 23. Katonak testified, “Sitting here today, I was thinking I can’t recall that ever coming up and when I heard the discussion about this order, today was the first I knew about any order.” App. 144, ll. 8 – 11. Because Katonak had “never seen it,” PCR counsel gave him the Order to review on the witness stand. App. 144, ll. 12 – 23. After reviewing the Order, Katonak said he tended “to agree with [the solicitor’s] assessment” of the Order and that he would not have used it to try to recuse the solicitor’s office. App. 146, l. 13 – 147, l. 14. However, on further cross-examination, Katonak admitted that he did not know whether it would have been advantageous for petitioner to have the solicitor’s office recused. App. 147, ll. 2 – 14.

Petitioner only entered an Alford plea because the solicitor's office threatened him with LWOP if he did not accept a plea. App. 78, l. 8 – 79, l. 21. Petitioner testified that he “had no other choice” but to accept the plea because he was “going to get life in prison.” App. 79, ll. 10 – 21. Petitioner said the solicitor “made this clear to me.” App. 79, ll. 14 – 21.

Petitioner's memory of the plea hearing was corroborated by the solicitor's testimony at the PCR hearing. App. 107, ll. 16 – 24. The solicitor testified that he told Katonak “my intention was to either plead to burglary first for a concurrent time, or in the alternative I retry the case as an LWOP case.” App. 107, ll. 17 – 24. The solicitor left his offer open until after the court ruled on a suppression motion, but after the ruling “if [petitioner] doesn't take it then I'm going to pull the offer and we're going to go to trial.” App. 108, ll. 3 – 8.

The PCR court erred in holding that plea counsel was not ineffective in moving to recuse the solicitor based on Judge Williams' Order. App. 173. “Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). “Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.” Padilla v. Kentucky, 130 S.Ct. 1473, 1480-81 (2010) (internal quotations omitted).

Counsel must perform a reasonable investigation. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Counsel cannot be credited with making a strategic decision unless the decision was made after fully investigating an issue. Id. Neither Hayes nor Katonak even knew of the existence of Judge Williams' recusal Order until the PCR hearing. Katonak had never seen the Order until after he took the witness stand. The failure to even discover the existence of the Order constitutes deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

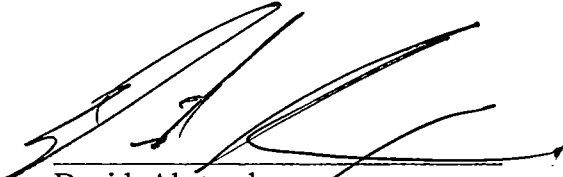
Petitioner can also prove prejudice. To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different.

See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). A “reasonable probability” is simply a probability sufficient to undermine confidence in the outcome of the trial. See Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). The PCR court erred in its conclusion that the recusal order could not have applied to petitioner’s 2011 charges. The Order covered any matters that were related to a pattern of criminal activity. It can certainly be argued that allegedly burglarizing a solicitor’s house and a policeman’s house are not analytically different because the State, including the police and the solicitor, are all considered as the same agent and are all part of the executive branch. Had plea counsel made a recusal motion, it is highly likely it would have been granted.

It is clear from the testimony at the PCR hearing that the solicitor intended to seek LWOP and use the threat of LWOP to coerce a plea. Had the solicitor’s office been recused, it is probable that another prosecuting agency would have dealt more justly with petitioner. Petitioner testified that the only reason he pled guilty was because of the threat of LWOP. Trial counsel’s ineffectiveness in failing to have the solicitor recused caused petitioner’s involuntary guilty plea. This Court should grant certiorari and reverse.

**CONCLUSION**

For the foregoing reasons, this Court should grant the petition for certiorari and reverse petitioner's conviction.



David Alexander  
Appellate Defender

ATTORNEY FOR PETITIONER

This 27th day of June, 2017.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

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PETITION TO BE RELIEVED AS COUNSEL

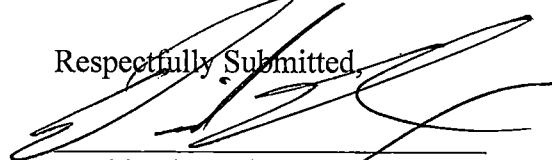
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Counsel for Albert James Cave states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Robert E. Hood, which was held on September 23, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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 him as counsel for Albert James Cave.

Respectfully Submitted,



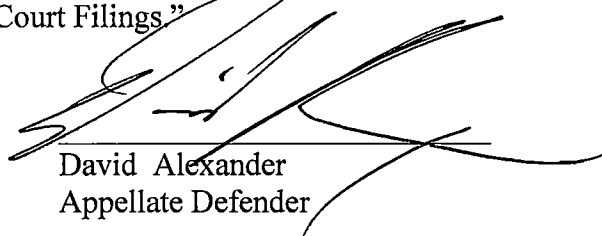
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David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 27th day of June, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his 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."



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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 and a copy of the Appendix in the above referenced case has 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 and a copy of the Appendix have been served on Albert James Cave, #189002, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of June, 2017.



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David Alexander  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 27th day of June, 2017.

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