

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 ORIGINAL

Certiorari to Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

RECEIVED

JAN 17 2018

CHRISTOPHER T. WILSON,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001403

JOHNSON PETITION FOR WRIT OF CERTIORARI

LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Did the PCR court err in not finding trial counsel ineffective for not objecting to the testimony of the confidential informant (CI) concerning the controlled drug buys he made at Petitioner Wilson's home although trial counsel objected to the videos of the same drug buys pursuant to Rule 404(b), SCRE?

## STATEMENT

Justin Flake had several charges pending in Lexington County and decided to serve as a confidential informant (CI) for law enforcement to catch a person with more serious charges. App. 155, l. 22 – App. 156, ll. 24. Justin told the investigator that he believed that he could purchase drugs from Petitioner Wilson because Justin had known Wilson about two years before this incident. App. 147, ll. 7 – 24; App. 157, ll. 1 – 18.

Each time Justin went to purchase drugs, allegedly from Wilson, he was searched and wired with a camera. Two videos were presented at trial that Justin said were two of the videos taken with the camera he wore during the incidents with Wilson. Justin claimed that the drugs he purchased were crack cocaine. App. 183, ll. 18 – App. 185, ll. 25.

Based on the videos, action of the CI, Justin, and the investigation by the Sheriff's Department, Investigator Thomas Hodges with the Lexington County Sheriff's Department obtained a search warrant for the home of Petitioner Wilson. Investigator Hodges executed the search warrant on June 14, 2013. Living at the home were Petitioner Wilson, his brother Samuel Sims, and Wilson's girlfriend Brittany Jay. App. 90, ll. 4 – 25. Found in the home were 29.74 grams of crack cocaine; 18.09 grams of cocaine; 88.92 grams of marijuana; a pistol and an assault rifle. App. 74, ll. 7 – 17.

In January 2014, the Lexington County Grand Jury indicted Petitioner Wilson on the charges of trafficking in crack cocaine between 28 and 100 grams; trafficking in cocaine between 10 and 28 grams; possession with intent to distribute (PWID) marijuana; and possession of a weapon during the commission of a violent crime. App. 559; App. 567 – App. 581.

On March 16 – 19, 2015, Petitioner Wilson proceeded to trial before the Honorable Donald B. Hocker and a jury. Wilson was represented by Robert Theodore Williams, Sr., and the state was represented by Scott Spivey and Micah Caskey. App. 1.

In a pretrial hearing, defense counsel moved for the videos to be suppressed, but made no motion to suppress the testimony of the CI. Instead defense counsel asked the judge if he could question the CI, when he was on the stand during the trial, about the CI being charged with lying to law enforcement. The judge ruled that defense counsel could question the CI about any pending charges but not specific charges. App. 35, ll. 1- App.37, ll. 24.

Following arguments, the judge ruled that the videos would be admitted pursuant to State v. Lyle.<sup>1</sup> They were more probative than prejudicial, and were relevant. App. 158, ll. 1 – App. 172, ll. 9. During the argument, the judge asked defense counsel if he were also objecting to the witness, who was the CI, testifying to any of the drug buys. Defense counsel responded that he thought that was “different.” Counsel explained that if the CI’s testimony only included what the videos depicted, and the court gave an instruction that the testimony was only to prove intent or motive, he did not object. App. 169, ll. 1 – 21.

During the trial, defense counsel made no objection to the CI’s testimony but did object when the videos were admitted into evidence. App. 184, ll. 1 – App. 185, ll. 7; App. 144, ll. 17 – 25; App. 183, ll. 11 – 25.

The jury found Wilson guilty of the lesser included offense of trafficking in crack cocaine 10 to 28 grams second offense; as indicted for trafficking in cocaine 10-28 grams; the lesser included offense of possession of more than one ounce of marijuana; and not guilty of the possession of a firearm during the commission of a violent crime. App. 491, ll. 14 – App. 492, ll.

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<sup>1</sup> State v. Lyle, 125 S.C. 406, 417, 118 S.E.2d 803 (1923).

16. The judge sentenced Wilson to eight years on each of the trafficking charges and one year on the possession of marijuana charge with all to run concurrent. App. 504, ll. 24 – App. 505, ll. 5.

Wilson did not appeal his convictions nor sentences. Trial counsel believed that he advised Wilson of his right to appeal but that Wilson never asked counsel to file an appeal. App. 560; App. 561- App. 562.

On June 8, 2015, Petitioner Wilson filed an application for post-conviction relief (PCR). He filed an amended PCR application on January 26, 2017. The state filed a return on December 15, 2016. App. 559. An evidentiary hearing was held on January 30, 2017 before the Honorable Eugene C. Griffith. Petitioner Wilson was represented by Arthur Aiken, and the state was represented by Johanna Valenzuela. App. 528.

At the PCR hearing, Wilson testified that his trial attorney did not advise him of his right to an appeal. If he had known he could appeal, he would have told his trial attorney to file an appeal. App. 531, ll. 10 – App. 534, ll. 8.

PCR counsel then presented the remaining ground for relief based “exclusively on the transcript.” PCR counsel said there was no need for Wilson to testify about the other claims. App. 536, ll. 15 – 21. PCR counsel then used some of the grounds listed in the amended PCR application. App. 536, ll. 21 – 25.

PCR counsel then argued Item 10(b) from the amended application which referred to trial counsel’s failure to object to the evidence “introduced by the government under Rule 404 (b).” Counsel told the court that the real issue at trial was whether Wilson had knowledge of the drugs found in his trailer. Trial counsel did not object to the CI’s testimony about the controlled buys that occurred at Wilson’s “trailer” but trial counsel then objected under Rule 404 (b), SCRE to

the videos taken by the camera worn by the CI. PCR counsel said that trial counsel “sort of halfway objected” to the 404 (b) evidence. App. 536, ll. 22 – App. 538, ll. 12.

PCR counsel argued that trial counsel should have objected to “all of the prior sales evidence, the CI’s evidence, and the videotape evidence.” Counsel argued that if an objection had been made, the evidence should have been excluded. App. 539, ll. 4 – 18.

Trial counsel testified that he always filed an appeal and it was unusual for him not to do that. He believed that he talked with Wilson in between the trial and sentencing. Wilson did not ask him to file an appeal. Trial counsel said that “the eight year sentence could have been a whole lot worse.” He did not find anything at trial that he thought needed to be taken up on direct appeal. App. 543, ll. 11 – App. 545, ll. 25.

Trial counsel testified that Wilson did not want to go to trial but wanted to plead to something where he could get probation. However, due to his prior record, there was no deal. App. 548, ll. 10 – 25. Trial counsel said that the videos were “damning.” The CI was “totally unbelievable.” Counsel believed that it was very clear that the CI was trying to work off charges. Counsel stated: “To a certain extent it kind of helped us because it looked like law enforcement was destined to go after him (Wilson).” App. 549, ll. 9 – App. 552, ll. 3.

The PCR judge issued an order on May 3, 2017 denying Wilson’s PCR application and dismissing it with prejudice. App. 559 – App. 566. The judge found that Petitioner Wilson failed to “present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the applicant.” App. 565. The judge found that trial counsel had a valid reason for employing a certain strategy and such “conduct should not be deemed ineffective assistance of counsel.” The judge wrote that trial counsel testified that he wanted to

highlight the CI and use the video to challenge the credibility of the state's case. He said that Wilson had not established any prejudice from trial counsel's reasonable strategy. App. 566.

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

## ARGUMENT

The PCR court erred in not finding trial counsel ineffective for not objecting to the testimony of the confidential informant (CI) concerning the controlled drug buys he made at Petitioner Wilson's home although trial counsel objected to the videos of the same drug buys pursuant to Rule 404(b), SCRE.

In State v. Ford, 334 S.C. 444, 451, 513 S.E.2d 385, 388 (Ct. App. 1999), the Court of Appeals held:

Although evidence of other criminal acts by a defendant is generally not admissible to prove the defendant's propensity to commit the crime with which he has been charged, such evidence may be admitted to prove motive, intent, identity of the perpetrator, lack of accident or mistake, or common scheme or plan.

State v. Ford, *id.* (citing Rule 404 (b), SCRE, and State v. Lyle, 125 S.C. 406, 417, 118 S.E.2d 803, 807, (1923).

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).

The PCR court erred in not finding trial counsel ineffective for not objecting to the testimony of the CI as well as the videos taken by the CI. The CI's testimony and the videos were of the prior controlled drug buys at Wilson's residence. Even if the evidence of the drug buys met one of the Lyle exceptions (motive, intent, identity, lack of accident, or common scheme or plan), the drug buys were still more prejudicial than probative which was one of the factors the judge had to determine. If counsel had objected to both the CI's testimony and the videos, it was likely that the drugs would have been suppressed. Counsel's lack of objection was prejudicial to Wilson because the outcome would have been different without the drugs.

**CONCLUSION**

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

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 17th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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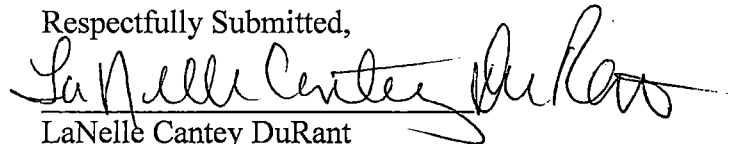
PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Christopher T. Wilson states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. She has reviewed the record of petitioner's trial before Judge Eugene C. Griffith, which was held on January 30, 2017, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
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 Christopher T. Wilson.

Respectfully Submitted,



LaNelle Cantey DuRant

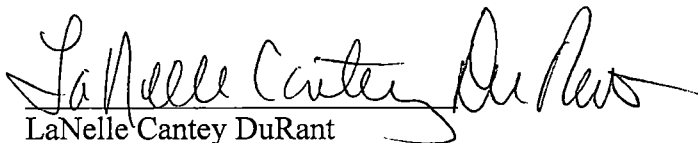
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of January, 2018.

**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."



LaNelle Cantey DuRant  
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This 17th day of January, 2018.

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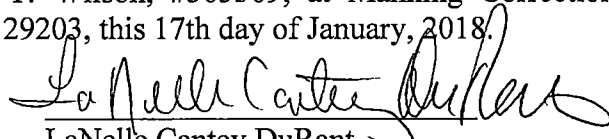
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STATE OF SOUTH CAROLINA,


RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

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 Megan Harrigan Jameson, 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 Christopher T. Wilson, #363369, at Manning Correctional Institution, 502 Beckman Drive, Columbia, SC 29203, this 17th day of January, 2018.

  
LaNelle Cantey DuRant  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 17th day of January, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 5, 2027.